

Government Procurement (Secure Local Jobs Complaints and Noncompliance Investigation) Guidelines 2018

Disallowable instrument DI2018–288

made under the

Government Procurement Act 2001, s22U (Guidelines for audits, complaints and requests for information)

1 Name of instrument

This instrument is the *Government Procurement (Secure Local Jobs Complaints and Noncompliance Investigation) Guidelines 2018*.

2 Commencement

- (1) This instrument commences on the day after its notification day.
- (2) The *Legislation Act 2001*, section 81 (6) applies to this instrument.

Note: The Legislation Act 2001, s 81 provides for the exercise of a power given by a law if the law, or amending law, has been notified but has not yet commenced.

3 Secure Local Jobs Complaints and Noncompliance Investigation Guidelines

I make the Secure Local Jobs Complaints and Noncompliance Investigation Guidelines as attached to this instrument.

Rachel Stephen-Smith

Minister for Government Services and Procurement

30 November 2018



SECURE LOCAL JOBS

Complaints and Noncompliance Investigation Guidelines

Chief Minister, Treasury and
Economic Development

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1. INTRODUCTION

- 1.1. The ACT Government has amended the *Government Procurement Act 2001* (**the Act**) to support businesses that do the right thing by their workers. The Secure Local Jobs Code (**the Code**) strengthens the ACT Government's procurement practices so its contracts are only awarded to businesses that meet the highest ethical and labour standards.
- 1.2. The Act establishes a registrar, an independent statutory appointment, whose functions include:
 - > maintaining a number of registers
 - > administering the Code and the legislative obligations conferred on Territory entities, Code Certified Entities and approved auditors
 - > making decisions regarding applications for Secure Local Jobs Code Certificates
 - > appointing approved auditors
 - > conducting investigations in response to complaints and apparent noncompliance with the Code
 - > acting on the outcomes of such investigations, including imposing sanctions
 - > granting exemptions.
- 1.3. The registrar is supported by a dedicated compliance unit (**the Compliance Unit**) which conducts education, compliance and investigation activities associated with the Code.
- 1.4. These Guidelines outline:
 - > the process for informing the Territory of alleged noncompliance of a Code Certified Entity with their Code obligations
 - > the process on receipt of an allegation of noncompliance
 - > referral to a regulatory authority
 - > audit process
 - > investigations into allegations or instances of noncompliance
 - > sanctions available to the Territory
 - > review pathways.
- 1.5. Some terms used in these Guidelines have a defined meaning set out in the Code. In addition, some terms are defined in these Guidelines by including the defined term in brackets and bolded following the definition.

2. MAKING A COMPLAINT ABOUT NONCOMPLIANCE

- 2.1. The Code places a number of obligations on Code Certified Entities, Territory entities and approved auditors.
- 2.2. The registrar is responsible for responding to allegations of noncompliance with the Code.
- 2.3. Allegations of noncompliance by a Code Certified Entity must be made in writing using the Territory's notification form.

- 2.4. Persons (**the Claimant**) wishing to notify the Territory of an allegation of noncompliance by a Code Certified Entity must complete the notification form and submit it with supporting documentation to the registrar.
- 2.5. The Claimant must ensure particulars in the notification form and supporting documentation are true and correct.

3. RECEIVING AN ALLEGATION OF NONCOMPLIANCE

- 3.1. Notification of a complaint should be made in writing to the registrar using the Territory's notification form. The form is available at procurement.act.gov.au (or another site determined by the Territory).
- 3.2. The Claimant should complete the notification form and provide a detailed description of the allegation of noncompliance with the Code along with supporting documentation relevant to the allegation.
- 3.3. After receiving a notification form detailing alleged noncompliance with the Code, the Compliance Unit will acknowledge receipt of the complaint on behalf of the registrar within five days.
- 3.4. If the registrar considers further information is required and/or that the form is incomplete, the registrar must give the Claimant an opportunity to provide that information and/or rectify that deficiency within a specified timeframe.
- 3.5. When the registrar has obtained all required forms and documentation, a determination will be made. The registrar may determine for example to do any one or a combination of:
 - > advise any Territory entity for which the Code Certified Entity is performing territory funded work that an allegation of noncompliance has been made and seek any information that the Territory entity may have that is relevant to the allegation
 - > refer the matter to an appropriate regulatory authority
 - > initiate an audit
 - > conduct its own investigation
 - > work with the Code Certified Entity to ensure they rectify alleged noncompliance and meet the obligations.
- 3.6. Where the decision is made to undertake an investigation, the Code Certified Entity subject to the allegation will be informed in writing and given the opportunity to make submissions in respect of the alleged noncompliance.

4. REFERRAL TO A REGULATORY AUTHORITY

- 4.1. If an allegation of noncompliance relates to a breach of a legislative requirement for which there is an existing regulatory authority, the complaint may be referred to that regulatory authority as outlined in Section 22Q (3) (b) of the Act.
- 4.2. This referral does not preclude a concurrent investigation or action being taken by the registrar or Compliance Unit.

5. AUDIT PROCESS

- 5.1. In response to allegations of noncompliance, the registrar may appoint an approved auditor to conduct an audit of:
 - > a Code Certified Entity's compliance with their Code obligations with specific reference to the alleged complaint; or
 - > compliance with the Code obligations of one or more Code Certified Entities contracted to deliver specified territory funded work.
- 5.2. If such a referral is made, the registrar will provide written notification of the audit to the Code Certified Entity. Written notification will include the details of the approved auditor appointed by the registrar to conduct the audit.
- 5.3. An approved auditor appointed by the registrar to undertake an audit, cannot have assessed any of the Code Certified Entity's previous three applications for a Secure Local Jobs Code Certificate.
- 5.4. Upon referral for an audit, the Code Certified Entity is required to provide all information requested by the registrar and any supporting documentation to the approved auditor within five days.
- 5.5. The Code requires that, subject to law, a Code Certified Entity comply with any reasonable request for information, access to records or directions given by the approved auditor for the purpose of investigation of alleged noncompliance. Failure to comply with the audit requirements may result in a finding of noncompliance and the imposition of sanctions.
- 5.6. In respect of an audit, the cost of the approved auditor will be met by the Territory. However, the Code Certified Entity will meet all of its own costs associated with complying with the audit requirements and will have no claim for recovery of those costs from the Territory.
- 5.7. Once an audit is complete, the auditor will provide the registrar with an audit report.
- 5.8. The registrar will evaluate the findings of the report to determine what further action is required, if any. Such action may include:
 - > resolution of the noncompliance allegation
 - > further investigation by the Compliance Unit
 - > imposition of sanctions.

6. INVESTIGATION BY THE REGISTRAR

- 6.1. The registrar may direct the Compliance Unit to investigate claims of noncompliance with the Code. The registrar may also initiate investigations where it believes, on reasonable grounds, that the Code Certified Entity may not be compliant with its obligations under the Code.
- 6.2. The purpose of an investigation is to establish whether there has been one or more instances of noncompliance. Where an allegation has been made under Section 2 of these Guidelines, the starting point of the investigation is the information provided by the Claimant. The investigator may also consider whether other instances of noncompliance have occurred based on information gathered during the course of the investigation.

- 6.3. Where there is a relevant regulatory authority in place, an investigation by that authority will take preference over an investigation by the Compliance Unit.
- 6.4. Where the decision is made to undertake an investigation, the Code Certified Entity subject to the allegation will be informed in writing and given the opportunity to make submissions in respect of the alleged noncompliance.
- 6.5. Submissions by the Code Certified Entity in respect of the alleged noncompliance must be provided to the registrar within seven days of the date of the registrar's written notice.
- 6.6. At the conclusion of the investigation a written report will be provided to the registrar. The report should detail matters considered in the investigation, including:
- > the noncompliance alleged by the Claimant or any other grounds for initiating the investigation
 - > any other potential noncompliance subsequently identified and investigated
 - > summary of information considered in the course of the investigation
 - > findings based on the evidence, including any findings of noncompliance with the Code
 - > actions taken, including to rectify noncompliance, referral to relevant regulatory authority or the imposition of sanctions.
- 6.7. If an investigation is inconclusive in any respect, the report should indicate so. If any part of the noncompliance alleged by the Claimant was not investigated, the report should explain the reasons for the decision not to investigate those matters.
- 6.8. The registrar will evaluate the findings of the report to determine what further action is required, if any. Such action may include:
- > resolution of the noncompliance allegation
 - > further investigation by the Compliance Unit
 - > imposition of infringement points and sanctions.
- 6.9. The registrar will provide the Claimant advice on the status of their complaint. Status advice will be in respect of process matters (i.e. if an investigation has commenced, estimated time to complete investigation, conclusion of investigation).

7. APPLICATION OF SANCTIONS IN RESPONSE TO AN ADVERSE RULING

- 7.1. The registrar may impose sanctions against a Code Certified Entity for noncompliance with the Code or in the event of an adverse ruling against a Code Certified Entity. In determining any sanction the registrar will consider proportionality to the breach.
- 7.2. In considering proportionality, the registrar will take into account:
- > the nature and extent of the conduct which led to the breach
 - > the circumstances in which that conduct took place
 - > the nature and extent of any loss or damage sustained as a result of the breach
 - > whether there had been similar previous conduct by the Code Certified Entity
 - > whether the breaches were properly distinct or arose out of the one course of conduct
 - > the size of the Code Certified Entity involved

- > whether or not the breach was deliberate
 - > whether senior management was involved in the breach
 - > whether the party committing the breach had exhibited contrition
 - > whether the party committing the breach had taken corrective action
 - > whether the party committing the breach had cooperated with the registrar or enforcement authorities
 - > the need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements
 - > the need for specific and general deterrence.
- 7.3. Table 1 provides classifications of noncompliance and highlights examples of infringement point allocation and possible sanctions. Examples are provided as a guide and are not limited or exhaustive. The application of infringement points and sanctions may be extended subject to the registrar's discretion.
- 7.4. Infringement points imposed upon a Code Certified Entity remain in place for a period of two years. If a Code Certified Entity accumulates or has a total of 100 points imposed within a two year period, the registrar may suspend or cancel the entity's Secure Local Jobs Code Certificate.
- 7.5. In addition to the imposition of infringement points or sanctions the registrar may also:
- > direct a Code Certified Entity to demonstrate their compliance with their Code obligations at intervals specified by the Territory
 - > take into consideration any findings of noncompliance or adverse ruling when assessing an application for a new or renewal of a Secure Local Jobs Code Certificate
 - > take the details of the noncompliance into account in assessing future responses to procurement for territory funded work
 - > refer the matter to an appropriate regulatory authority for investigation.
- 7.6. In determining their course of action, the registrar may take into account findings from an audit or an adverse ruling or decision of a relevant regulatory authority. The registrar may also consider any aggravating factors in determining infringement point allocation and sanctions for noncompliance which may include, but are not limited to involvement of:
- > vulnerable workers. For example, young workers (aged under 25), migrant workers (either visa workers or workers from a non-English speaking background), or workers with a disability
 - > a large section of the Code Certified Entity's workforce. For example, >25 percent of the Code Certified Entity's workforce
 - > a lengthy period of noncompliance.
- 7.7. The registrar may also take into consideration an entity's previous history of noncompliance with Code obligations and seek advice from other parties when determining infringement points or sanctions.
- 7.8. Contracts for territory funded work may contain specific penalties related to noncompliance with the Code. In enforcing any such contract terms, the registrar will work with the relevant Territory entities who manage the contract.

Table 1. Classification of noncompliance and possible sanctions

Classification and infringement points	Example of noncompliance	Possible sanctions
Extreme – serious noncompliance 100 points	<p>Providing false or misleading information on a statutory declaration.</p> <p>Falsification or concealment of documents requested by the registrar under Section 22S of the Code.</p> <p>Failure to provide documents requested by the registrar under Section 22S of the Code.</p> <p>Intentional disregard for the law.</p>	<p>Immediate cancellation of Secure Local Jobs Code Certificate</p>
Major – significant noncompliance with the Code 50 points	<p>Failure to notify the Territory within seven days of an adverse ruling against the Code Certified Entity by a relevant regulatory authority.</p> <p>Failure to meet the requirements of prescribed legislation and failure to inform the Territory within seven days of any actions being taken by a relevant regulatory authority.</p> <p>Failure to comply with orders, directions or decisions of any court, tribunal, board, commission or any other relevant authority.</p> <p>Repeated noncompliance with the Code obligations.</p> <p>Failure to disclose all associated entities.</p>	<p>Suspension of Secure Local Jobs Code Certificate.</p> <p>Reduction in period of current Secure Local Jobs Code Certificate.</p> <p>Increased audit regime during period of current Secure Local Jobs Code Certificate.</p> <p>Secure Local Jobs Code Certificate issued for a period less than the standard term on renewal (<18 months).</p>
Moderate – noncompliance with the Code 20 points	<p>Territory notified of action plan in place with relevant regulatory authority to address a failure to meet the requirements of prescribed legislation.</p> <p>Failure of Code Certified Entity to ensure that all subcontractors it engages on territory funded work are also a Code Certified Entity.</p> <p>Failure to meet obligations under the Code.</p> <p>Failure to meet commitments made in a Labour Relations, Training and Workplace Equity Plan.</p> <p>Increased or additional liability to Australian Taxation Office of Superannuation Guarantee.</p> <p>Failure to maintain registration with ACT Long Service Leave Authority.</p> <p>Failure to retain currency with workers compensation during the term of Secure Local Jobs Code Certificate or project.</p>	<p>Secure Local Jobs Code Certificate issued for a period less than the standard term on renewal (<18 months).</p> <p>Increased audit regime during period of current Secure Local Jobs Code Certificate.</p>

Minor –noncompliance with administrative requirements of the Code. 5 points	Isolated incident of failure to deal with matters relating to industrial relations and/or employment obligations. For example failure to provide payslips, pay appropriate overtime rates.	Increased audit regime during period of current Secure Local Jobs Code Certificate. Secure Local Jobs Code Certificate issued for a period less than the standard term on renewal (<18 months).
No sanction imposed - during the course of the audit or investigation process the registrar made a determination to impose no sanctions on a Code Certified Entity.	The complaint was found to lack substance or evidence. Exceptional circumstances beyond the Code Certified Entity's control.	

Table 1 - Classification of noncompliance and possible sanctions

8. REVIEW PROCESS

- 8.1. If the registrar proposes to apply sanctions, the Code Certified Entity and Claimant will first be given the opportunity to show reasons why the sanctions should/should not be applied. The registrar will issue a Show Reason Notice and the Code Certified Entity and Claimant will be given not more than 10 business days to respond.
- 8.2. Submissions received from the Code Certified Entity and claimant within the 10 business day response period will be considered by the registrar in the determination of any sanctions.
- 8.3. If by the time specified in a Show Reason Notice the Code Certified Entity or claimant fails to respond or to satisfy the registrar they should not apply the sanctions, the registrar may apply the sanctions.
- 8.4. The Code Certified Entity may then apply to the ACT Civil and Administrative Tribunal for a review of the decision.



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