

Government Procurement (Secure Local Jobs Code Model Contract Terms) Determination 2018

Disallowable instrument DI2018–282

made under the

Government Procurement Act 2001, 22G(4) (Requirements for procurement – secure local jobs code certificates etc)

EXPLANATORY STATEMENT

Overview

This explanatory statement relates to the *Government Procurement (Secure Local Jobs Code Model Contract Terms) Determination 2018* (Model Terms).

The Model Terms support the implementation of the Secure Local Jobs Package (the Package).

The Model Terms are introduced under the Package to support its implementation within contracts for territory-funded work. The Model Terms are to be incorporated into contracts for territory-funded work and relate to the requirements of the *Government Procurement Act 2001* (GPA) and the Code. Initially, territory-funded work is defined as being services or works for a Territory Entity. Once schedule 1 of the Amendment Act commences, which is a delayed amendment, territory-funded work will also include services or works for a Territory Entity that are primarily for labour with an estimated value equal to or above an amount prescribed by regulation, excluding certain services or works (for example, professional services provided by architects, engineers and surveyors).

The Model Terms are made under section 22G of the GPA which provides:

(3) A territory entity must not enter into a contract for procurement for territory-funded work with another entity unless –

....

(b) the contract includes terms that incorporate, as far as applicable, the substance of any model terms determined under subsection (4).

(4) The Minister may determine model terms for incorporation into contracts for territory-funded work that relate to the requirements of this part or the code.

(5) A determination under subsection (4) is a disallowable instrument.

The Model Terms are to be included in each applicable contract for Territory-Funded Work under a clause referred to as 'M1'.

The Model Terms are one of several measures introduced by the Package to ensure compliance with the Code and make sure entities that the Government contracts with maintain the highest labour standards, and where they fall short, may be held to account. Where an entity that enters into a contract for Territory-Funded Work breaches the Model Terms, this may lead to the termination of the contract. This provides an additional option for legal recourse for the Territory, and represents an economic sanction to encourage compliance by entities who choose to engage in Territory-Funded Work.

Regulatory impact statement

A regulatory impact statement has been prepared for the Model Terms and is available on the ACT Legislation Register. The regulatory impact statement also addresses two related legislative instruments - the Code and Amendment Regulation.

Human rights implications

This disallowable instrument does not engage the *Human Rights Act 2004* (HRA).

CLAUSE NOTES

Clause 1 Name of instrument

This clause provides the name of the instrument, the *Government Procurement (Secure Local Jobs Model Contract Terms) Determination 2018*.

Clause 2 Commencement

This clause provides that the instrument commences on 15 January 2019.

Clause 3 Determination of model contract terms

This clause states that the Minister determines the model contract terms included in the Schedule of the instrument.

Schedule

Subclause 1

This subclause ensures that the Model Terms apply to the extent that the contract relates to the performance of territory-funded work. The Model Terms are to be referred to as a clause within the contract for territory-funded work, referred to as M1.

Subclause 2

This subclause defines key terms used in the model contract terms. Many of the terms have the same meaning as in the GPA. Other terms defined are *Adverse Ruling*, *Associated Entity*, *Full Details* (which relates to an *Adverse Ruling*) and *Industrial Law*.

Subclause 3

This subclause requires the entity (the Party) contracting with the Territory Entity to comply with its obligations under the Code. This reflects the intent of the Government to ensure compliance with the Code at multiple levels.

Subclause 4

This subclause requires the Party to maintain a valid Secure Local Jobs Code Certificate (Certificate) for the duration of the contract, further reinforcing compliance with the Code.

Subclause 5

This subclause states that maintaining a valid Certificate is an essential term of the contract. Where a Party fails to maintain a valid Certificate, a Territory Entity is entitled to terminate the contract by written notice. This provides legal recourse under contract law for Territory Entities where an entity does not comply with its obligations under the contract and Code.

Subclause 6

Where an Adverse Ruling (ruling), as defined in subclause 2, is made against the Party, this subclause requires the Party to provide a statutory declaration by an authorised representative setting out the full details of the ruling within 7 working days, as well as details of any existing or planned remedial measures taken or to be taken to prevent the issue that led to the ruling (or similar issue) from recurring. This gives the Party the chance to explain what has taken place to lead to the Ruling, and also explain what steps the Party will take to ensure that it won't happen again, which is beneficial to the Party in terms of maintaining its Certificate and ensuring compliance with the Code.

Subclause 7

This subclause requires the Party to, in all agreements where the Party engages a subcontractor in relation to territory-funded work, that the subcontractor be required to comply with the Code and insert these Model Terms into the contract with the subcontractor.

Subclause 8

This subclause requires the Party to ensure that all subcontractors the Party engages to perform territory-funded work hold and maintain a Certificate for the duration of the term of their agreement. The obligations to hold and maintain a Certificate are also to be included in the relevant agreement with the subcontractor.

Subclause 9

This subclause requires the Party to provide a statutory declaration to the Territory regarding the Party's compliance with the Code within 5 working days of a request in writing by the Territory. In addition, the Territory may also request in writing that the Party provide a statutory declaration regarding its compliance with the Code when they submit an invoice for payment (a payment claim) under the contract. This will provide the Territory with an early indication of compliance or non-compliance by a Party.

Subclause 10

This subclause states that it will be a breach of contract if the Party fails to provide a statutory declaration as requested by the Territory in accordance with subclause 9, or makes a false declaration in the statutory declaration it provides to the Territory. This emphasises the importance of compliance and clarifies the consequence of the Party not meeting its obligations under the contract and Code.

Subclause 11

This subclause enables the Territory to withhold payment in respect of the relevant payment claim until the Party submits a statutory declaration in accordance with subclause 9(b), where it was required to but failed to do so. This ensures that the Party will meet its contractual obligations by providing a clear financial disincentive for non-compliance.

Subclause 12

This subclause states that the Territory may request in writing that the Party obtains a statutory declaration from a subcontractor regarding the subcontractor's compliance with the Code. The Party needs to provide the subcontractor's statutory declaration to the Territory within 15 working days of the written notice. The Party is required to do all it reasonably can to ensure that the subcontractor provides the statutory declaration in accordance with the subclause.

Subclause 13

This subclause relates to employee inductions, and provides that the Territory may require that the Party conduct in-person induction sessions when territory-funded work, or employment in relation to territory-funded work, begins.

Subclause 14

This subclause relates to employee representation, and provides that the Territory may require a union workplace delegate or employee representative to attend the staff induction session held by the Party. This requirement does not apply where it would create conflict with a Commonwealth law.

Subclause 15

This subclause requires the Party to allow the Territory, Secure Local Jobs Code Registrar (Registrar) or a nominee to enter a workplace where territory-funded work is being performed to conduct Code education and Code awareness raising activities. A person may not be nominated to enter for the purposes of this subclause where doing so would conflict with a Commonwealth law.

Subclause 16

This subclause allows the Territory, its nominated representatives and Approved Auditors to access records kept by the Party or its subcontractors and conduct audits or other kinds of inspections in order to monitor the delivery of the Territory-Funded Work and compliance with the Code and the Party's contractual obligations. A nominated representative will not be able to access records and conduct audits or other kinds of inspections under this subclause where doing so would conflict with a Commonwealth law.

Subclause 17

This subclause applies where the Party was required to submit a Labour Relations, Training and Workplace Equity Plan (LRTWE plan) as part of its tender for the Territory-Funded Work the contract relates to. This subclause reinforces the obligations of the Party in relation to its commitments under the LRTWE plan.