

Australian Capital Territory

Government Procurement (Secure Local Jobs) Code 2020

Disallowable instrument DI2020–278

made under the

Government Procurement Act 2001, s 22M (1) (Secure local jobs code)

1 Name of instrument

This instrument is the *Government Procurement (Secure Local Jobs) Code 2020*.

2 Commencement

This instrument commences on the day after its notification day.

3 Secure local jobs code

I make the secure local jobs code as set out in the Schedule to this instrument.

4 Revocation

This instrument revokes the *Government Procurement (Secure Local Jobs) Code 2019*, DI2019-47.

Suzanne Orr
Minister for Government Services and Procurement

8 September 2020

Secure Local Jobs Code

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Part 1 Preliminary

1 Name of this instrument

This instrument is the Secure Local Jobs Code.

2 Definitions

Note 1 The Legislation Act contains definitions and other provisions relevant to this Code.

Note 2 In particular, the Legislation Act, dict, pt 1, defines the following terms:

- administrative unit
- the Territory
- working day

Note 3 The *Government Procurement Act 2001* contains definitions relevant to this Code. For example, the following terms used in this Code have the meaning given by the *Government Procurement Act 2001*:

- approved auditor
- commencement day
- existing arrangement
- labour relations, training and workplace equity plan
- new contract for procurement
- new procurement
- procurement
- registrar
- responsible chief executive officer
- secure local jobs code certificate
- secure local jobs code
- secure local jobs code advisory council
- secure local jobs code register
- tenderer
- territory entity
- territory-funded work

Note 4 In addition to the terms defined in this section, some terms are defined in this Code by including the defined term in brackets and bolded following the definition.

Administrative Arrangements means the administrative arrangements made under the *Australian Capital Territory (Self-Government) Act 1988* (Cth) and the *Public Sector Management Act 1994* and as amended from time to time.

Adverse Action has the same meaning as in the *Fair Work Act 2009* (Cth).

Adverse Ruling means a ruling by any court, tribunal, board, commission or other entity (including but not limited to the Fair Work Commission) with jurisdiction to determine the matter, that the Code Certified Entity has contravened an Industrial Law.

Code means this Secure Local Jobs Code.

Code Certified Entity means an entity subject to this Code pursuant to section 4.

Eligible Union, for a business or undertaking conducted by a person, means a Registered Employee Association that is eligible to represent the industrial interests of one (1) or more workers carrying out work—

- (a) for the business or undertaking; or
- (b) at a workplace under the management or control of the person conducting the business or undertaking.

Enterprise Agreement has the same meaning as in the *Fair Work Act 2009* (Cth).

GPA means the *Government Procurement Act 2001*.

Industrial Instrument means an award or agreement, however designated, that is made under or recognised by an Industrial Law.

Industrial Law means any Commonwealth, State or Territory legislation that deals with matters relating to industrial relations and includes employment and workplace safety obligations.

Local Industry Participation Policy means the Territory's *Canberra Region Local Industry Participation Policy* applying to procurements from 1 January 2017.

Minister means the Minister with responsibility for the GPA under the Administrative Arrangements.

Prescribed Legislation means all applicable Acts and subordinate instruments of the Commonwealth and the Territory, which deal with matters relating to industrial relations, employment and/or workplace safety obligations that apply to an entity, including (as amended or replaced from time to time) but not limited to:

- (a) *Fair Work Act 2009* (Cth)
- (b) *Building and Construction Industry (Improving Productivity) Act 2016* (Cth)
- (c) *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)
- (d) *Income Tax Assessment Act 1997* (Cth)
- (e) *Independent Contractors Act 2006* (Cth)
- (f) *Industry Research and Development Act 1986* (Cth)
- (g) *Long Service Leave Act 1976* (ACT)
- (h) *Long Service Leave (Portable Schemes) Act 2009* (ACT)
- (i) *Migration Act 1958* (Cth)
- (j) *Paid Parental Leave Act 2010* (Cth)
- (k) *Payroll Tax Act 2011* (ACT)
- (l) *Safety, Rehabilitation and Compensation Act 1988* (Cth)
- (m) *Superannuation Guarantee (Administration) Act 1992* (Cth)
- (n) *Superannuation Guarantee Charge Act 1992* (Cth)
- (o) *Work Health and Safety Act 2011* (ACT)

- (p) *Workers Compensation Act 1951 (ACT)*
- (q) *Workplace Gender Equality Act 2012 (Cth).*

Registered Employee Association has the same meaning as in the *Fair Work Act 2009 (Cth)*.

Related Entities means, for a secure local jobs code certificate applicant, a second entity that is:

- (a) an associate of the applicant by application of section 50AAA of the *Corporations Act 2001 (Cth)*;
- (b) a body corporate, one of whose directors is also a director of the applicant, currently registered (whether or not under any form of external administration), or, if not currently registered (as that term is defined in the *Corporations Act 2001 (Cth)*) that was registered at any time during the 5 years prior to the date of the applicant's application.

Subcontractor means an entity engaged, or to be engaged under a subcontract or sub-subcontract at any tier in the supply chain in connection with the territory-funded work, regardless of whether there is a written contract or agreement in place, and includes an entity that provides a Code Certified Entity with:

- (a) another person to do work; and/or
- (b) plant or equipment to be used,
for or by the Code Certified Entity:
- (c) in relation to territory-funded work; and
- (d) in circumstances where the entity:
 - i. and the Code Certified Entity are each part of an entity or group of entities that carry on business collectively as one recognisable business (Group); and
 - ii. is not predominantly in the business of providing the services of workers, or hiring plant and equipment, to other persons or entities where those persons or entities include persons or entities who are not part of the Group.

Examples—

- 1 a landscaping business comprises a number of companies that are responsible for different aspects of the business. The business's workers are all employed by one of the companies and are supplied to work for one or more of the other companies within the business.
- 2 a road resurfacing business comprises a number of companies that are responsible for different aspects of the business. The business's heavy machinery, plant and equipment are all owned by one of the companies and are supplied to one or more of the other companies within the business.

3 Objectives

- (1) This Code has been developed to:

- (a) support the awarding of territory-funded work to businesses that meet the highest ethical and labour standards across their business;
- (b) work alongside the Local Industry Participation Policy to provide for the creation of secure local jobs being a key consideration when awarding territory-funded work;
- (c) promote job security in the Territory and reduce the incidence of insecure work;
- (d) ensure entities that choose to tender for territory-funded work and/or are awarded territory-funded work comply with their employee and industrial relations obligations in respect of their workers, contractors and sub-contractors, particularly with regard to the fair treatment of workers and upholding their workplace rights and safety;
- (e) promote workforce diversity and inclusive workplaces;
- (f) help the Territory to identify, and engage in procurement with, entities that have a track record of compliance with Industrial Laws and in so doing foster a level playing field for businesses competing for territory-funded work;
- (g) foster and promote cooperative, constructive relationships between employers, employees and their representatives in the Territory; and
- (h) promote improved industrial relations planning and management at both the enterprise level and on specific projects.

4 Application of the Code

- (1) This Code applies to entities that hold a secure local jobs code certificate.
- (2) This Code applies to territory entities in so far as section 10 places obligations on a territory entity.

5 Code Oversight and Administration

- (1) The Minister has overall responsibility for the implementation of the Code.
- (2) The registrar is responsible for the administration of the Code, monitoring the compliance of Code Certified Entities, investigating complaints and apparent non-conformance with the Code, and supporting Territory Entities to comply with the Code, in accordance with its functions outlined in the GPA.
- (3) The responsible chief executive officer for a territory entity is responsible for the territory entity's compliance with the Code.
- (4) The secure local jobs code advisory council is responsible for providing advice to the Minister in accordance with its functions outlined in the GPA.

6 Interaction with Commonwealth laws

- (1) Where there is evidence that the Code places an obligation on an entity which is inconsistent with a Commonwealth law in force in the Territory, the entity may apply for an exemption from that obligation under section 22P of the GPA.
- (2) In applying for an exemption under section 22P of the GPA the entity may only apply to be exempt to the extent of any inconsistency with a Commonwealth law.

Part 2 Requirements for Territory Funded Work

7 Code Certification

- (1) A contractor, or Subcontractor, must hold a valid secure local jobs code certificate:
 - (a) at the time it submits a response to any request for quote, request for proposal, request for establishment of a panel arrangement, work orders or request for tender (howsoever described), but not including market soundings, for territory-funded work;
 - (b) at the time of entering into any contract, agreement or other arrangement with a territory entity, or subcontract, for territory-funded work; and
 - (c) for the term of the relevant contract, agreement or other arrangement with a territory entity, or subcontract, for territory-funded work.
- (2) A Code Certified Entity must comply with any conditions on its secure local jobs code certificate.

8 Subcontractors

- (1) Prior to engaging any Subcontractor in relation to territory-funded work, a Code Certified Entity (in contract with a territory entity) must provide details of the proposed Subcontractor to the Territory.

Note: If a form is approved by the Minister for this section, the form must be used.
- (2) A Code Certified Entity (that is in contract with a territory entity) must ensure that any Subcontractors engaged in connection with territory-funded work have a valid secure local jobs code certificate and comply with the Code in relation to that work.

9 Contact Persons for territory-funded work

- (1) A Code Certified Entity must provide the territory entity with a person or persons, workforce locations and working hours for territory-funded work for the purposes of assisting the exercise of a lawful right of entry in accordance with Part 3-4 of the *Fair Work Act 2009* (Cth) or Part 7 of the *Work Health and Safety Act 2011*.
- (2) A Code Certified Entity must provide the information required under subsection (1) to the territory entity prior to the commencement of territory-funded work.

- (3) A Code Certified Entity must advise the territory entity within 14 days if there is a change to the information provided in accordance with subsection (1).
- (4) The registrar is responsible for maintaining the information provided in accordance with subsection (1).
- (5) A request to the registrar to access the information provided under subsection (1) must specify that it is required for the purposes of exercising a lawful right of entry in accordance with Part 3-4 of the *Fair Work Act 2009* (Cth) or Part 7 of the *Work Health and Safety Act 2011* and be made in writing.
- (6) The person requesting information in accordance with subsection (5) must:
 - (a) if the request is made for the purposes of exercising a lawful right of entry in accordance with Part 3-4 of the *Fair Work Act 2009* (Cth), be a permit holder under the *Fair Work Act 2009* (Cth); or
 - (b) if the request is made for the purposes of exercising a lawful right of entry in accordance with Part 7 of the *Work Health and Safety Act 2011*, be a WHS entry permit-holder under the *Work Health and Safety Act 2011*.
- (7) The registrar must release information requested under subsection (5) if satisfied that:
 - (a) the applicant is a permit holder under the *Fair Work Act 2009* (Cth) or a WHS entry permit-holder under the *Work Health and Safety Act 2011*; and
 - (b) the applicant requires the information for the purpose of exercising any right of entry under the *Fair Work Act 2009* (Cth) or the *Work Health and Safety Act 2011*.

10 Requirements of territory entities

- (1) A territory entity must, subject to any exemptions granted under the GPA:
 - (a) require compliance with the Code by any Code Certified Entity with whom it contracts or enters into an agreement or arrangement to undertake territory-funded work;
 - (b) ensure that any request for quote, request for proposal, request for establishment of a panel arrangement, work orders or request for tender (howsoever described), but not including market soundings, issued by a territory entity for territory-funded work requires respondents to confirm that they:
 - i. will comply with the Code if engaged for the territory-funded work; and
 - ii. will comply with the Code during the currency of any secure local jobs code certificate; and
 - iii. will comply with Code related terms and conditions in contracts for territory-funded work; and
 - iv. will comply with reasonable requests or directions from authorised personnel in connection with monitoring and investigating compliance with the Code, including but not limited to officers of the registrar;

- (c) take into account in its evaluation of responses to a request for quote, request for proposal, request for establishment of a panel arrangement, work orders or request for tender (howsoever described), but not including market soundings, the labour, relations, training and workplace equality plan where required by the GPA.
- (d) take into account in its evaluation of responses to any request for quote, request for proposal, request for establishment of a panel arrangement, work orders or request for tender (howsoever described), but not including market soundings, any report from the registrar about a Code Certified Entity's past conformance with the Code or terms of a labour relations, training and workplace equity plan included in a contract for territory-funded work.

Part 3 Obligations of a Code Certified Entity

11 Adherence to the Law

- (1) A Code Certified Entity must comply with:
 - (a) applicable Industrial Law, including but not limited to, the Prescribed Legislation;
 - (b) all applicable orders, directions and decisions of any court, tribunal, board, commission or other entity (including but not limited to the Fair Work Commission) with jurisdiction to consider the interpretation, breach or any other matter concerning the Prescribed Legislation; and
 - (c) any Industrial Instrument that applies to that entity.
- (2) A Code Certified Entity must notify the registrar in writing of any Adverse Ruling made against it, or its Subcontractors, or it becoming aware of a failure to comply with Code obligations, within 5 working days of such a ruling being made or such awareness arising.

12 Requests for information

- (1) A Code Certified Entity must, subject to law, comply with any reasonable request for information, access to records and directions given by the registrar or an approved auditor for the purposes of investigating Code compliance pursuant to this Code and the GPA.
- (2) Without limiting section 12(1) of this Code, a Code Certified Entity must provide the registrar with a declaration in a form approved by the registrar regarding the entity's compliance with the Code within 5 working days (or such longer time approved by the registrar) of a written request from the registrar.

13 Workplace Representation

- (1) A Code Certified Entity must if requested by two or more employees facilitate the conduct of an election amongst its employees to elect whichever of the following is requested:
 - (a) a union workplace delegate; or
 - (b) other employee representative.
- (2) Where a union workplace delegate or other employee representative has been elected, the Code Certified Entity must ensure:
 - (a) there is no unlawful discrimination against the union workplace delegate or employee representative in their employment;
 - (b) there is no Adverse Action taken by the Code Certified Entity as an employer against a union workplace delegate or employee representative who is an employee on the basis that they are a union workplace delegate or employee representative;
 - (c) reasonable requests from a union workplace delegate to represent an employee, who is an employee eligible to be a member of the union workplace delegates Eligible Union, in relation to a grievance, dispute or discussion with another employee of a Code Certified Entity are not refused; and
 - (d) reasonable requests from an employee representative to represent an employee, who is an employee who participated in the election of the employee representative, in relation to a grievance, dispute or discussion with another employee of a Code Certified Entity are not refused.
- (3) Code Certified Entities must ensure that their employees have a right to decide whether or not they will be represented in grievance or dispute procedures (whether or not pursuant to an Enterprise Agreement), and, if so, by whom.
- (4) If a union workplace delegate or employee representative is elected under subsection (1) for a Code Certified Entity, the Code Certified Entity must put in place practices and procedures to facilitate the conduct of union workplace delegates' or employee representative's roles at the workplace level, and which recognise that the rights of a union workplace delegate or employee representative (where in place) include but are not limited to:
 - (a) the right to be treated fairly and to perform their role without any discrimination in their employment;
 - (b) recognition by the Code Certified Entity that union workplace delegates or employee representatives elected under subsection (1) speak on behalf of employees who elected them;
 - (c) the right to participate in collective bargaining on behalf of those whom they represent, as per the *Fair Work Act 2009* (Cth);
 - (d) the right to reasonable paid time to provide information to and seek feedback from the employees that elected them on workplace relations matters during normal working hours of the Code Certified Entity;

- (e) the right, subject to law, to email employees who they represent to provide information and seek feedback, subject to individual employees exercising a right to opt out;
- (f) reasonable access to Code Certified Entity facilities (including telephone, facsimile, photocopying, internet and email facilities, meeting rooms, lunch rooms, tea rooms and other areas where employees meet) and relevant information for the purpose of carrying out work as a union workplace delegate or employee representative, including meeting and consulting with employees who elected them or any other interested employee, subject to the Code Certified Entity's policies and protocols;
- (g) the right to reasonable paid time for union workplace delegates or employee representatives to attend accredited union training (in the case of a union workplace delegate) or other relevant training (in the case of employee representatives); and
- (h) the right to reasonable paid time for union workplace delegates or employee representatives to represent the interests of those that elected them, to the employer, or before industrial tribunals.

14 Employee Representation and Workplace Inductions

- (1) A Code Certified Entity must understand and respect their employees' rights, including in relation to freedom of association and the right to representation at work as required by Part 3-1 of the *Fair Work Act 2009* (Cth). This includes acknowledging employees' right to join or not to join a union and be represented at work.
- (2) For the purposes of the Code, subsection (1), will be considered met if a Code Certified Entity:
 - (a) informs all new employees who are eligible to become members of Eligible Union(s) at the commencement of employment, about their right to choose to join or not join an Eligible Union, including providing information about the Eligible Union(s) and an application form for membership of the Eligible Union(s);
 - (b) informs all new employees that they have the right to elect an employee representative.
- (3) A Code Certified Entity must make copies of the applicable Industrial Instrument(s) available to all employees in the most accessible format.
- (4) A Code Certified Entity must ensure new employees receive induction training from an appropriately skilled and experienced person and that the training is tailored to their specific duties and workplace(s).
- (5) Employees must receive induction training while on paid time at the commencement of employment and/or the commencement of a project.
- (6) Induction training should be held on a group basis where practicable and provide training and information on:

- (a) the Code Certified Entity's employment policies; and
- (b) conditions of employment and service, including consultation and dispute resolution procedures and the employees' ability to have a representative of their choice (if they first elect to have a representative) in attendance during the dispute resolution process; and
- (c) lines of authority and accountability; and
- (d) health, safety, emergency and security procedures, including all hazards and risks associated with the tasks and the control measures to be used and procedures for reporting hazards and incidents.

15 Recognition of the Right to Collectively Bargain

(1) For this section:

bargaining representatives is defined in section 176 of the *Fair Work Act 2009* (Cth).

employee organisation means an organisation of employees.

(2) Code Certified Entities must make their employees aware of:

- (a) their employment rights, including the right to collectively bargain; and
- (b) their right to freely choose a bargaining representative for a proposed Enterprise Agreement; and
- (c) the default status of unions as bargaining representatives for union members in a manner consistent with s 176 of the Fair Work Act 2009 (Cth).

(3) Section 15(2) will be satisfied if the Code Certified Entity gives the registrar a written declaration that the Entity has:

- (a) invited, with a reasonable period of notice of the time and location of the meeting, its employees and representatives of Eligible Unions to attend a meeting; and
- (b) allowed invited employees and representatives of Eligible Unions to attend and participate in the meeting; and
- (c) at the meeting, made employees aware of the matters in section 15(2) or allowed representatives of an Eligible Union to do so;
- (d) any meeting held for the purpose of this clause must take place in paid time for the employees.

(4) For new employees, section 15(2) will also be satisfied if the Code Certified Entity provides a Fair Work Information Statement in accordance with section 125 of the *Fair Work Act 2009* (Cth) and provides induction training in accordance with section 14 of this Code.

(5) Where a Code Certified Entity has employees that are eligible to be members of an Eligible Union they must make such arrangements as are necessary to allow their employees', bargaining representatives from the Eligible Union(s) and all other bargaining representatives to participate in negotiations to develop Enterprise

Agreements that are appropriate to the circumstances of the individual enterprise or industry.

- (6) In undertaking negotiations related to the development of an Enterprise Agreement, a Code Certified Entity must recognise that employees are free to choose their bargaining representatives and must not adopt or implement policies or practices that seek to encourage their employees to appoint a particular entity or person as their bargaining representative.
- (7) A Code Certified Entity must not adopt or implement policies or practices that seek to encourage their employees to revoke the status of an employee organisation as their bargaining representative for a proposed Enterprise Agreement.
- (8) A Code Certified Entity shall make reasonable allowances for their employees and their bargaining representative (where in place) to participate in negotiations to develop Enterprise Agreements, including but not limited to:
 - (a) allowing employees paid time to meet with their bargaining representatives regarding Enterprise Agreement negotiations;
 - (b) meeting regularly with bargaining representatives in good faith for the purpose of enterprise bargaining negotiations; and
 - (c) allowing a union workplace delegate or employee representative to distribute material to the workplace concerning bargaining.
- (9) In the course of collective bargaining, a Code Certified Entity, or their representative or agents, must not:
 - (a) advise, encourage, incite or coerce an employee to revoke the bargaining status of the bargaining representative; or
 - (b) hold negotiations, including any meeting for the purpose of providing the information described in section 15(2), with relevant employees regarding the Enterprise Agreement without first providing bargaining representatives a reasonable opportunity to attend the negotiation.

16 Freedom of Association

- (1) A Code Certified Entity must respect employee rights in relation to freedom of association by adopting and implementing policies and practices that ensure employees are:
 - (a) free to become members of Eligible Unions; and
 - (b) free to be represented by Eligible Unions; and
 - (c) free to participate in lawful industrial activities; and
 - (d) not discriminated against in respect of benefits in the workplace because they are, or are not, members of an Eligible Union.
- (2) A Code Certified Entity will provide all protections in relation to freedom of association as required by the Fair Work Act and shall give full recognition to an employee's rights by:

- (a) not preventing or deterring an employee from joining and participating in the Eligible Union; and
- (b) allowing for payroll deduction or facilitating direct debit of union membership fees; and
- (c) not advising, encouraging, inciting or coercing an employee to resign their membership of an Eligible Union.

Part 4 Certification Process

17 Application for Code Certification

- (1) For the purposes of section 22I(2)(a) of the GPA a report from an approved auditor is to be considered as current if it has been issued in the last 20 business days.
- (2) In considering whether to grant a secure local jobs code certificate the registrar may (without limitation) consider the report from an approved auditor issued pursuant to section 22I(2)(a) of the GPA, the information provided in any application for secure local jobs code certificate and the information on the secure local jobs code register.
- (3) For the purposes of section 22J(1)(b) of the GPA, it is a requirement for issuance of a secure local jobs code certificate that:
 - (a) the applicant has a satisfactory history of compliance with the matters set out in section 11(1) of the Code;
 - (b) the applicant's Related Entities have a satisfactory history of compliance with the matters set out in section 11(1) of the Code;
 - (c) the applicant has a satisfactory history of compliance with the commitments contained in its labour relations, training and workplace equity plans (if any); and
 - (d) the applicant has a satisfactory history of compliance with any conditions on its secure local jobs code certificate.

18 Costs of the Approved Auditor

- (1) The costs of an approved auditor associated with the production of a report from an approved auditor pursuant to section 22I(2)(b) of the GPA will be met by the entity which is making the application.
- (2) The cost of an approved auditor appointed by the registrar for the purposes of conducting an audit under section 22R of the GPA as part of an investigation will be met by the registrar.

Part 5 Transitional Arrangements

19 Code applies to new procurements

- (1) Sections 7 to 10 of this Code only apply to (as applicable):

- (a) new procurements, and responses (howsoever named) to new procurements for territory-funded work;
- (b) new contracts for procurement (or subcontracts), that relate to a new procurement for territory-funded work; and
- (c) Territory-funded work, and contractors or Subcontractors engaged to perform that work, where section 19(1)(a) and/or section 19(1)(b) applies.