

# Free Trade Agreement Impacts on Procurement of Design Services

**NSW government agencies have new obligations for procurement to encourage an open market approach.**

**These obligations result from Australia's international Free Trade Agreements and the Procurement (Enforceable Procurement Provisions) Direction 2019.**

**Strategic design services over \$657,000 excluding GST and construction-related design services over \$9.247 million excluding GST are impacted.**

**The Government Architect's Strategy and Design Prequalification Scheme complies with the Direction.**

## Introduction

Procurement of design services by NSW government agencies must comply with federal and state guidelines, which have recently changed. Since November 2019, the Procurement (Enforceable Procurement Provisions) Direction [The Direction] is in effect.

The Direction establishes obligations arising from Australia's Free Trade Agreements. It applies to all NSW state agencies and may impact architects, landscape architects and urban designers doing business with government.

This Advisory Note summarises key considerations for the government buyers and industry suppliers who are procuring strategic design and construction-related services.

## Which Free Trade Agreements apply?

Australia is party to multiple Free Trade Agreements (FTA) with procurement provisions that impact how NSW Government agencies do business now and in the future.

These FTAs include country specific agreements, the Transpacific Partnerships TPP-11 (2018) and World Trade Organisation Government Procurement Agreement WTO-GPA (2019).

The Direction takes into account all current Free Trade Agreements and provides common direction to streamline agency compliance. The Direction supports an 'open approach to market' to enable international competition.

## CONTACTS

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## When does The Direction apply?

The Direction applies to government procurements over \$657,000 excluding GST (for goods and services) and over \$9.247 million excluding GST (for construction related services). Schedule 1 outlines which agencies must comply.

## Compliance thresholds

The compliance thresholds apply to design services as follows:

1) Strategic design work is deemed a 'service' and includes feasibility, business case and concept design when the future capital expenditure is indeterminate. The Direction applies to such procurements if the total value of consultancy fees is over \$657,000 excluding GST.

2) Design documentation services that relate to budgeted capital construction are deemed 'services relating to construction of buildings or works', termed 'construction'. The Direction applies for construction procurements over \$9.247 million excluding GST.

This 'construction' threshold is the value of consultancy fees unless the designer is embedded in a development team, when the total construction value applies.

Distinct procurement models and project conditions will impact when thresholds are triggered and if the Direction applies. The scenarios (overleaf) illustrate some examples.

Where ambiguity exists agencies should seek advice. Apply the lower threshold when in doubt.

**Scenario 1 - Strategic masterplan**

A consultant is engaged for \$50,000 to produce concept drawings for an urban precinct to be delivered in stages over 10 years. This is a service, valued below \$657,000: The Direction does not apply.

**Scenario 2 - Strategic advice**

A consultant is engaged to write a Stakeholder Engagement Plan for \$35,000 for a local council strategic framework that will spark future investment. There are no current construction commitments, so this is a service, valued below \$657,000: The Direction does not apply.

**Scenario 3 - Limited Tendering**

A multi-disciplinary design team wins an invited competition, conducted within Direction guidelines, and is awarded \$750,000 to lead the design and documentation of a landmark public building. Six months later, an adjacent public space is added to the design scope. The variation to fees is \$175,000. The variation is less than 50% of the original contract sum so limited tendering exemptions may apply. Seek advice.

**Scenario 4 - Staged delivery**

A landscape subconsultant is engaged for \$150,000 as part of a development team to prepare a precinct planting strategy. The cumulative investment is \$500 million to be staged over five years. This is a construction related service. Total contract value is over \$9.247 million: The Direction applies.

**How does this impact government agencies?**

Government agencies procuring design services are responsible for identifying and implementing the state's procurement obligations. Other NSW procurement policies will continue to apply.

Projects that trigger the Direction compliance thresholds for design services may include schools, cultural institutions, hospitals, infrastructure and transport. For such procurements, Government Architect NSW can provide advice on procurement methods, design competitions and ways to encourage international participation.

The Government Architect's Strategy and Design Prequalification Scheme enables international participation and complies with the Direction.

**How does this impact designers?**

A preliminary analysis of state spending from 2015-2019 suggests that a significant portion of typical design consultancies will fall below the required thresholds.

The project types that exceed compliance thresholds are already procured through open tenders and design competitions, which will continue. Advertising for these procurements will give access to international applicants. This does not preclude Australian suppliers from competing for such projects.

Professional registration and ABN requirements for working in NSW are unchanged by The Direction.

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**Are there any exemptions?**

Schedule 2 of The Direction lists all exemptions. Projects that support bushfire and flood affected communities are exempt as per Procurement Board Direction 2020-01: <https://arp.nsw.gov.au/pbd-2020-01-support-for-bushfire-affected-communities>.

Limited tendering exemptions apply for projects procured in line with the Direction, including for variations under 50% of the original value.

**Further information**

Information contained here is advisory only. Agencies should seek independent project-specific advice.

Enforceable Procurement Provisions and Direction 2019 are located here: <https://buy.nsw.gov.au/buy/before-you-buy/other-considerations/enforceable-procurement-provisions>

The Direction is made under the NSW Public Works & Procurement Act 1912: <https://legislation.nsw.gov.au/#/view/act/2018/72>

Further details on the Government Architect's Strategy and Design Prequalification Scheme are here: <https://www.governmentarchitect.nsw.gov.au/review/prequalification-scheme>

Government Architect NSW Advisory Notes including 'How to Select Consultants' and 'How to Develop a Design Brief' are here: <https://www.governmentarchitect.nsw.gov.au/resources/advisory-notes>