# Arbitration clause – International agreements

## Complaints or challenges

### Application of this [clause/condition]

This [clause/condition] applies only:

if this [RFP etc] is a covered procurement; and

to suppliers (as defined in [sub-clause/condition] 1.2 following) with their principal place of business in relevant jurisdictions.

### Definitions

For the purpose of this [clause/condition]:

“covered procurement” means a procurement to which the requirements of international agreements apply, as set out in:

the Instructions *for Public Construction Procurement in Victoria*, published by the Department of Treasury and Finance; and

the *Government procurement under International Agreements – procurement guide*, published by the Victorian Government Purchasing Board and which is published at <https://www.buyingfor.vic.gov.au/government-procurement-under-international-agreements-goods-and-services-procurement-guide>;

‘measures’ means the Victorian Government’s measures to implement the procurement requirements of international agreements, a list of which is published at <https://www.buyingfor.vic.gov.au/measures-implementing-procurement-requirements-international-agreements>;

‘public interest certificate’ means a certificate issued on behalf of [insert procuring entity of the Victorian Government] stating that it is not in the public interest for this [RFP etc] to be suspended while a complaint by a supplier is being managed in accordance with this [clause/condition];

‘relevant jurisdictions’ means those jurisdictions to which the measures apply, a list of which is published at <https://www.buyingfor.vic.gov.au/relevant-jurisdictions-domestic-dispute-resolution-international-agreements>; and

‘supplier’ means a person or group of persons that provides or could provide goods or services.

### Resolution procedure

Any complaint or challenge by a supplier that there has been a failure of the procuring entity to comply with one or more measures (**complaint**) shall be resolved in accordance with this [clause/condition].

### Notice of complaint

A supplier who has a complaint:

may deliver to [insert procuring entity of the Victorian Government] a notice of complaint which must include:

a demand that the complaint be reviewed and resolved in accordance with this [clause/condition]; and

a description of the nature and circumstances of the complaint and a statement of the relief sought and, if compensation is claimed, the amount claimed from [insert procuring entity of the Victorian Government],

(**notice of complaint**); and

must deliver any notice of complaint within 21 days of the date on which the basis for the complaint became known or reasonably should have become known for the supplier.

### Negotiation

A representative of each of the supplier and [insert procuring entity of the Victorian Government], each having authority to resolve the complaint, must, within 21 days of delivery of the notice of complaint, meet and negotiate in good faith to resolve the complaint.

### Mediation

If the complaint is not resolved within 21 days of delivery of the complaint, either the supplier or [insert procuring entity of the Victorian Government] may by written notice to the other party refer the complaint for mediation under the Australian Centre for International Commercial Arbitration (ACICA) Mediation Rules (**mediation notice**).

The mediation will take place in Melbourne, Australia.

The mediator will be selected from the list of mediators established by the Victorian Government for the purposes of this [clause/condition] and published on <https://www.buyingfor.vic.gov.au/arbitrators-available-dispute-resolution-under-international-agreement>s (if such list is established) and otherwise in accordance with the ACICA Mediation Rules.

### Arbitration

If the complaint is not finally resolved by mediation in accordance with [clause/condition] 1.6 within 28 days of delivery of the mediation notice, the complaint shall be resolved by arbitration in accordance with the ACICA Arbitration Rules in force at the time subject to the provisions of this [clause/condition].

The tribunal shall comprise one arbitrator.

The arbitrator must be selected from the list of arbitrators established by the Victorian Government to determine complaints under this [clause/condition] and published at <https://www.buyingfor.vic.gov.au/arbitrators-available-dispute-resolution-under-international-agreement>s (if such list is established) and otherwise in accordance with the ACICA Arbitration Rules.

The language of the arbitration shall be English.

The place of arbitration shall be Melbourne, Australia.

In making procedural orders, the tribunal must:

order the delivery by the [insert procuring entity of the Victorian Government] to the tribunal of a written response to the complaint;

order the disclosure to the tribunal of all relevant documents;

convene a hearing at which all participants shall have the right to be heard and the right to be represented;

if requested by a participant, order that any hearing take place in public; and

if requested by a participant, order that witnesses may be presented at any hearing.

The tribunal must deliver its award in a timely fashion, in writing and setting out an explanation of the basis for each decision or recommendation contained in the award.

The powers of the tribunal constituted in accordance with this [clause/condition] include the power:

to make orders for the rapid interim measures to preserve the supplier’s opportunity to participate in the procurement;

to take into account, when making orders or the interim measures, any overriding adverse consequences for the interests concerned, including the public interest;

where the tribunal determines that there has been a failure of the procuring entity to comply with one or more measures, to award compensation or corrective action, however any compensation awarded to the supplier must not exceed

[select one of the following:]

the costs reasonably incurred by the supplier in the preparation of the tender giving rise to the complaint. [OR]

the costs reasonably incurred by the supplier in bringing the complaint.

If:

a public interest certificate has been issued in respect of [this RFP]; and

[this RFP] has not reached the stage where a contract has been entered into with a supplier,

then:

the tribunal must consider whether the award of corrective action would result in significant delay to [this RFP], and if so, whether awarding compensation would be a more appropriate remedy than an award of corrective action; and

if the tribunal is satisfied that an award of corrective action would result in a significant delay to [this RFP] and that awarding compensation is a more appropriate remedy, then the tribunal may refuse to award corrective action.

Any award rendered in arbitration proceedings conducted in accordance with this [clause/condition] may, no earlier than 90 days after the date of the award, be provided by [insert procuring entity of the Victorian Government] to a supplier (other than the supplier to whom the award relates) in a sanitized form if requested in writing by the supplier.

[insert procuring entity of the Victorian Government] is not obliged to disclose the award under [paragraph (i)] if the award is subject to judicial challenge or otherwise the subject of court proceedings.

Where an arbitration conducted pursuant to this [clause/condition] is subject to the *Commercial Arbitration Act 2011* (Vic), the parties agree that an appeal may be made under section 34A of that Act.

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