



30 January 2014

Senator the Hon Kate Lundy, Chair
Finance and Public Administration References Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Senator Lundy

Submission: Inquiry into the operation of the Senate Order of Continuing Effect on Departmental and Agency Contracts

I refer to your letter of 12 December 2013 inviting the Australian National Audit Office (ANAO) to make a submission to the Senate Finance and Public Administration References Committee's inquiry on the above topic. The Australian National Audit Office welcomes the opportunity to make a contribution to the inquiry and provides the following information for the Committee's consideration.

Background

The *Senate Procedural Order of Continuing Effect 11: Departmental and Agency Contracts* (the Senate Order/the Order) was introduced in 2001 and sought to improve public access to information about government contracting. At that time, the level of information available to the Parliament and to the public about government contracting, had not kept pace with the increased rate of contracting out, particularly in the outsourcing of functions previously performed by Australian Government agencies.

A motion by (then) Senator Murray which was passed in 2001, led to the establishment of the Senate Order. The main principle on which the Senate Order was based is that parliamentary and public access to government contract information should not be prevented, or otherwise restricted, through the use of confidentiality provisions, unless there is sound reason to do so. Supporting this principle, successive governments have agreed to comply with the requirements of the Senate Order and its subsequent amendments. The Order requires that Ministers table letters of advice, for each financial and calendar year period, confirming that agencies have published lists of contracts valued at \$100 000 or more, which identify whether any of the listed contracts contain confidentiality provisions.

The role of the Auditor-General

The Senate Order also requests that the Auditor-General provide to the Senate, by no later than 30 September each year, a report indicating that the Auditor-General has examined a number of such contracts selected by the Auditor-General, and indicating whether any inappropriate use of such provisions was detected in that examination.¹

Since the introduction of the Senate Order the ANAO has conducted 16 cross agency audits of the use of confidentiality provisions in contracts. Over this period, the proportion of contracts reported as containing confidentiality provisions across Government agencies has declined significantly from 24 per cent for the 2001–02 financial year to four per cent for the 2012 calendar year. To specifically assess the appropriateness of confidentiality provisions, each audit entailed an examination of a sample of contracts, across at least four agencies, reported to contain such provisions. As each audit has covered different agencies and different contracts, a definitive assessment of the year on year trends on the appropriateness of use of confidentiality provisions is difficult. However, our audits have observed that where there has been inappropriate use of confidentiality provisions, it has been generally due to a lack of understanding in agencies of how to identify, apply and report the various types of confidentiality provisions under the Order.

Since 2011 the ANAO's audits have not made any new recommendations regarding the inappropriate use of confidentiality provisions. Attachment A provides a summary of previous Senate Order audit reports and their findings. The reduction in the reported use of confidentiality provisions and the low instances of identified inappropriate use of these provisions indicates that the Order has proven effective in achieving greater transparency in Australian Government contracts. As access by Parliament and the public to Australian Government contract information is now less likely to be impeded by unsupportable claims of commercial sensitivity or confidentiality, I consider that the need for specific annual Senate Order audits has diminished.

Proposed audit approach for the consideration of the appropriateness of the use of confidentiality provisions in future audits

Against this background and having regard to the other demands on our audit program, I propose that an assessment of the appropriateness of the use of confidentiality provisions in contracts could be addressed within the context of the ANAO's audit of programs more generally. This would involve consideration of the appropriateness of the reported use of confidentiality provisions in contracts reviewed as part of procurement and grant audits. Audit findings in relation to any identified inappropriate use of confidentiality provisions would be included in the relevant audit report. If, over time, these audits suggest an increase in the appropriate use of confidentiality provisions further specific cross agency audits of compliance with the Order could then be considered. If the Committee were to agree with this general approach, the ANAO would table a final Senate Order specific annual report on 2013 compliance in September 2014.

Developments in online reporting

The main focus of the ANAO audits of the Senate Order is the appropriateness of the use of confidentiality provisions. These audits have not directly examined broader developments in online contract reporting however, in Report 27 of 2005–06, the ANAO recommended that options for improving the accuracy and completeness of reporting of Government procurement could include the rationalisation of the number of reporting regimes.² Since the introduction of AusTender in 2007, progress has been made in removing the duplication of contract reporting by expanding the types of contracts (for example consultancy contracts) and arrangements that may be reported on AusTender.

¹ In 2003, the Senate Order was amended to request that the Auditor-General provide an annual report to the Senate rather than twice yearly as specified in the original Order.

² ANAO, *Reporting of Expenditure on Consultancies*, Audit Report No.27 2005-2006, January 2006, p. 68.

With reference to Senate Order reporting, the Senate Standing Committee on Finance and Public Administration recommended in 2007, that the Order be retained while AusTender was implemented, with departments and agencies advising through their Ministers' letters that they had fulfilled the requirements of the Senate Order by placing details of their relevant procurement contracts on AusTender.³ In the most recent audit, Report No 4 2013-14, the ANAO suggested that the Department of Finance update the Senate Order guidance to reflect the availability of this reporting method for agencies. I understand that the Minister for Finance has recently written to the Committee (November 2013) requesting support to update the Senate Order guidance. If the guidance is updated it will support more complete and accurate public reporting.

Other matters

Since 2007, ANAO audits have included a limited comparison of the contract information reported by the audited agencies in the Senate Order listings to the information reported on AusTender. The audits have identified issues with the completeness, accuracy and timeliness of agencies' contract reporting in both media. Examples of this have included agencies inadvertently excluding contracts, double reporting contracts, reporting purchase orders as contracts or, in some instances, not recording the same contract information (such as differing contract periods, values, dates and/or types of confidentiality provisions used) consistently in both media. A high level summary of our findings over the past three audits is provided at Attachment B. Your letter asked if the ANAO could provide an updated comparative analysis for the 2012-13 financial year. A comparative analysis will be included in the report due to table in September this year. Unfortunately, the ANAO is unable to provide this analysis in advance of the report. The reason for this is that to complete the work to the required standard, the ANAO would need to undertake additional fieldwork (under the relevant section of the *Auditor-General Act 1997*) and this would require input from affected agencies. With respect to the timeframe covered by the next report, the Committee may also wish to note that since 2003 audits have been conducted on a calendar year basis, if the Committee requires the 2013 audit report to be provided on a financial year basis this could be arranged. However, I would suggest maintaining the current calendar year approach, as it provides for year by year comparisons across the audit series.

I look forward to further discussing the ANAO's submission with the Committee.

Yours sincerely

Ian McPhee
Auditor-General

³ The Senate, Standing Committee on Finance and Public Administration, *Department and agency contracts, Second report on operation of the Senate order for the production of lists of departmental and agencies contracts (2003-06)*, February 2007, Recommendation 1, p. ix.

Attachment A - Previous ANAO audit reports on the Senate Order

Audit Report	Recommendation(s)
Audit Report No.4 2013–14 (Calendar Year 2012 Compliance)	<p>The report did not contain any recommendations but emphasised the need for agencies to improve the:</p> <ul style="list-style-type: none"> • identification and reporting on the use of confidentiality provisions, particularly pricing information and the difference between general and specific confidentiality provisions; and • implement enhanced processes to support data capture, reporting and quality assurance of contract information.
Audit Report No.4 2012–13 (Calendar Year 2011 Compliance)	<p>The report did not contain any recommendations but emphasised the need for agencies to:</p> <ul style="list-style-type: none"> • better tailor guidance and training materials to help ensure that key processes, such as identifying the appropriate use of confidentiality provisions (particularly pricing information and the difference between general and specific confidentiality provisions), are commonly understood and applied; and • implement enhanced processes to support data capture, reporting and quality assurance.
Audit Report No.2 2011–12 (Calendar Year 2010 Compliance)	<p>The report did not contain any recommendations but emphasised the need for agencies to improve the appropriate use and reporting of confidentiality provisions through better communication of the key requirements to agency staff and improving processes to support the accurate reporting of contract information.</p>
Audit Report No.7 2010–11 (Calendar Year 2009 Compliance)	<p>Recommendation No.1 Paragraph 3.29</p> <p>To assist agencies to provide more accurate, timely and complete procurement reporting, the ANAO recommends that the Department of Finance and Deregulation review opportunities to consolidate procurement reporting requirements, in conjunction with the department's continuing focus on improving AusTender functionality.</p> <p>Recommendation No.2 Paragraph 4.40</p> <p>The ANAO recommends that agencies assess whether their contract preparation processes support adequate consideration of the appropriate use of confidentiality provisions in contracts.</p>
Audit Report No.6 2009–10 (Calendar Year 2008 Compliance)	<p>Recommendation No. 1 Paragraph 2.22</p> <p>To assist agencies to meet the requirements of the next and any subsequent Senate Orders, the ANAO recommends that they:</p> <ul style="list-style-type: none"> • embed in their relevant policies and practices, the guidance and instructions in Financial Management Guidance 3, including the details of the four criteria test for confidentiality; and • provide suitable training and guidance to staff on these policies and procedures.
Audit Report No.5 2008–09 (Calendar Year 2007 Compliance)	<p>Recommendation No. 1 Paragraph 2.25</p> <p>The ANAO recommends agencies implement review measures to assess the appropriateness of decisions to include confidentiality provisions in contracts and provide suitable feedback to staff involved in procurement.</p>
Audit Report No.7 2007–08 (Calendar Year 2006 Compliance)	<p>Recommendation No.1 Paragraph 4.23</p> <p>The ANAO recommends that agencies improve the accuracy and completeness of their Internet listings by:</p> <ul style="list-style-type: none"> • implementing controls to assist in confirming that Internet listings are complete and accurate. This could include, for example, reconciling the Internet listing details to AusTender and other relevant sources of information such as Financial Management Information System records; and • developing quality assurance processes to improve the accuracy of the Internet listing.

Audit Report	Recommendation(s)
<p>Audit Report No.5 2006–07 (Calendar Year 2005 Compliance)</p>	<p>Recommendation No.1 Paragraph 2.35 The ANAO recommends that agencies improve the accuracy and completeness of their contract listings by:</p> <ul style="list-style-type: none"> • implementing controls to assist in confirming that contract listings are complete and accurate. This could include, for example, reconciling the contract listing details to other relevant sources of information, such as Financial Management Information System records or to AusTender; and • developing quality assurance processes to improve the accuracy of the contract listing. <p>Recommendation No.2 Paragraph 3.38 The ANAO recommends that agencies provide guidance to those staff responsible for negotiating contracts and completing the Senate Order contract listing, to improve the level of understanding of the Senate Order, particularly relating to the use of confidentiality provisions.</p>
<p>Audit Report No.11 2005–06 (Calendar Year 2004 Compliance)</p>	<p>Recommendation No. 1 Paragraph 2.35 The ANAO recommends that agencies, that have not already done so, implement additional controls designed to ensure the completeness and accuracy of their Internet listings. These controls could include reconciling the Senate Order listing to AusTender information and/ or contract details include in their Financial Management Information System.</p> <p>Recommendation No. 2 Paragraph 3.20 The ANAO recommends that agencies provide further guidance, together with training and/ or awareness raising sessions on the requirements of the Senate Order to all staff responsible for negotiating contracts.</p> <p>Recommendation No. 3 Paragraph 3.58 The ANAO recommends that agencies ensure adequate documentation of the reasons for agreeing to identify specified information in contracts as being confidential.</p>
<p>Audit Report No.10 2004–05 (Calendar Year 2003 Compliance)</p>	<p>The report did not contain any recommendations however noted a number of contracts had been inappropriately listed as there was no information that satisfied the criteria for protection as confidential information. In addition agencies should make sure that the policies are known, and acted upon, at all levels within the agency.</p>
<p>Audit Report No.31 2003–04 (Financial Year 2002-03 Compliance)</p>	<p>The report did not contain any recommendations however noted that agencies had difficulty identifying what information should be protected as confidential information, and found many instances where information was inappropriately identified as confidential information.</p>
<p>Audit Report No.5 2003–04 (Autumn 2003 Compliance)</p>	<p>The report did not contain any recommendations however noted that 'although agencies have made changes to their policies and procedures to address the issue of protecting contractual information as confidential, all agencies must continue efforts to ensure that their policies are both regularly reviewed to accord with Government policy, and reflected in their practices'.</p>
<p>Audit Report No.32 2002–03 (Spring 2002 Compliance)</p>	<p>The report did not contain any recommendations however noted that some claims of confidentiality were not appropriate as the information claimed to be confidential was not specified, or where it was specified, it did not satisfy the established criteria to make it confidential. In addition better communication of the established policies and procedures was required.</p>

Audit Report	Recommendation(s)
<p>Audit Report No.8 2002–03 (Autumn 2002 Compliance)</p>	<p>Recommendation No. 1 Paragraph 2.42 To assist with the compilation of the Internet listing, the ANAO recommends that all FMA agencies, as appropriate:</p> <ul style="list-style-type: none"> • give priority consideration to establishing contract registers where the number of contracts makes it a practicable solution; and • implement quality assurance processes, as necessary, to ensure the completeness and accuracy of the contract information listed on the Internet. <p>Recommendation No. 2 Paragraph 3.24 The ANAO recommends that all FMA agencies, as appropriate:</p> <ul style="list-style-type: none"> • review the standard forms of request for tender and contract to ensure contractors are made fully aware of the Commonwealth's governance and accountability requirements; • implement procedures which require a case-by-case consideration of requests for information in, or associated with, contracts to be treated as confidential; • provide guidance and training for procurement officers to assist them determine the appropriateness of claims of confidentiality made by potential contractors; and • establish a training and staff awareness program covering the new governance and accountability framework for contracting for all relevant staff.
<p>Audit Report No.33 2001–02 Senate Order of 20 June 2001 (February 2002)</p>	<p>The report did not contain any recommendations but noted that development of processes and guidance by agencies underway at that time would assist in promoting the appropriate use of confidentiality provision in contracts.</p>
<p>Audit Report No.38 2000–01 The Use of Confidentiality Provisions in Commonwealth Contracts</p>	<p>Recommendation No. 1 Paragraph 5.24 The ANAO recommends that agencies should include provisions in tender documentation that alert prospective tenderers or contractors to the implications of the public accountability responsibilities of agencies. The principle to be applied is that contractual provisions (and related matters) should be disclosed to Parliament and its committees unless there is a sound basis for their confidentiality.</p> <p>The effectiveness of this recommendation would be enhanced if high level advice to this effect is included in the next edition of the Commonwealth Procurement Guidelines</p> <p>Recommendation No. 2 Paragraph 5.36 In the case of contracts that contain performance measures, the ANAO recommends that agencies have available data that would allow them, if requested, to provide summarised performance information on progress against relevant measures in contracts to parliamentary committees.</p>

Attachment B – identified gaps and inconsistencies in contract reporting

Since 2007, during the course of the Senate Order audits, the ANAO has conducted a limited comparison of the procurement contract information reported by the audited agencies' in their Senate Orders listings with the procurement contract information reported on AusTender covering the same time period. The ANAO's comparisons found discrepancies in relation to the contract information reported and the use of confidentiality provisions attributed to the contracts. The following tables provide summaries of these findings for the past three years.

Table B.1: Consistency of contract reporting in Senate Order listings and on AusTender 2010 calendar year reporting period

2010 calendar year reporting period					Total	
	MDBA*	Finance	DCCEE	ACMA	No.	%
Number of procurement contracts with a corresponding AusTender entry	67	120	121	60	368	68
Number of procurement contracts with no corresponding AusTender entry	23	70	75	7	175	32
Total number	90	190	196	67	543	100

Table B.2: Consistency of contract reporting in Senate Order listings and on AusTender 2011 calendar year reporting period

2011 calendar year reporting period					Total	
	AEC	CrimTrac	DHS	SEWPaC	No.	%
Number of procurement contracts with a corresponding AusTender entry	20	6	44	7	77	75
Number of procurement contracts with no corresponding AusTender entry	5	2	1	17	25	25
Total number	25	8	45	24	102	100

Table B.3: Consistency of contract reporting in Senate Order listings and on AusTender for the 2012 calendar year reporting period

2012 calendar year reporting period					Total	
	AGD	AUSTRAC	ComSuper	DoHA	No.	%
Number of procurement contracts with a corresponding AusTender entry	165	116	74	446	801	74
Number of procurement contracts with no corresponding AusTender entry	25	4	0	246	275	26
Total number	190	120	74	692	1 076	100

*** Key**

ACMA	Australian Communication and Media Authority	DCCEE	The (then) Department of Climate Change and Energy Efficiency
AEC	Australian Electoral Commission	DHS	The Department of Human Services
AGD	The Attorney-General's Department	DoHA	The (then) Department of Health and Ageing
AUSTRAC	Australian Transaction Reports and Analysis Centre	Finance	The (then) Department of Finance and Deregulation
ComSuper	ComSuper	MDBA	Murray-Darling Basin Authority
CrimTrac	The CrimTrac Agency	SEWPaC	The (then) Department of Sustainability, Environment, Water, Population and Communities