

# Chapter 2

## Developments related to the order since 2002

### Introduction

2.1 There have been a number of important developments relevant to the operation of the order since the Committee reported in December 2002:

- the government responded favourably to the Committee's report on the first year of operation, agreeing to most of the Committee's recommendations;
- the Senate agreed to three sets of amendments to the order;
- DOFA issued three sets of guidance relevant to the order; and
- the ANAO, DOFA, ASIO and ASIS discussed and agreed on a process for examining whether ASIO and ASIS contracting arrangements comply with relevant legislative and policy requirements.

2.2 This chapter examines each of these in turn.

2.3 A more recent development, mentioned in chapter 1, concerns a DOFA proposal for a single reporting mechanism for government procurement. This is discussed in chapter 4 in relation to measures for improving compliance and transparency.

### Government response to the 2002 report

2.4 In its response to the Committee's 2002 report, the Government reiterated its commitment to transparency and accountability in Commonwealth contracting. The Government agreed to comply with the spirit of the order, on the same terms as the original and the amended order.<sup>1</sup> That is, agencies would not provide information contrary to the *Privacy Act 1988*, other statutory provisions or where a confidentiality undertaking had already been given, and agency compliance with the order would continue to be progressive.

2.5 Of the 17 recommendations made in the Committee's report, the Government disagreed with two – Recommendations 7 and 11. In relation to Recommendation 7 (that agencies develop systems and processes that allow for continual additions to contract listings), the Government's view was that ongoing transparency is largely provided by agencies under the requirement to gazette procurement-related contracts in GaPS. The government considered any further system development in order to

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1 Government Response to Senate Finance and Public Administration References Committee Report, *Departmental and agency contracts*, June 2003 (hereafter 'Government response'), p. 1.

comply with the Committee's recommendation would need to be balanced against the cost of implementing and administering such systems.<sup>2</sup>

2.6 Recommendation 11 concerned the extension of the order to cover CAC Act bodies from 1 January 2004. The Government was not in favour of extending the order, noting that CAC Act bodies operate under a different legislative and governance framework to FMA Act agencies.<sup>3</sup>

2.7 The Government also sought clarification of the intention and scope of Recommendation 2 — that agencies with a large number of similar types of contracts record a generic entry for this type of contract. The Committee's response to this request took into account advice from the Clerk of the Senate, Mr Harry Evans, and the ANAO.<sup>4</sup> The Committee confirmed that the intention of the recommendation was to 'enable departments and agencies to combine similar contracts into one entry',<sup>5</sup> and that 'this should be achieved in a format that has the least possible impact on transparency'.<sup>6</sup>

2.8 The Committee agreed with the Clerk's suggestion that certain contract details could be recorded in terms of the range covered by the individual contracts under the generic entry. The Committee's view was that the move to generic reporting should proceed at first on a limited basis, and should be restricted to grants and funding agreements. The Committee noted that generic entries for such contracts might need to be sub categorised, by the type of grant and by the program under which the grant was made, and that such approaches should be included in DOFA's guidance to departments and agencies.<sup>7</sup>

2.9 The Government's response to Recommendation 2 noted that the decision to list relevant contracts individually or generically would remain at the discretion of the agency.

### **Amendments to the order**

2.10 The Senate agreed to amend the order for departmental and agency contracts on 18 June 2003 and 26 June 2003. The first set of amendments reflected recommendations made in the Committee's 2002 report. The second amendment was a minor change, to ensure consistency in the definitions given in the order.

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2 Government response, p. 2.

3 Government response p. 6.

4 Mr Harry Evans, Clerk of the Senate, correspondence, 13 June 2003; ANAO correspondence, 3 September 2003.

5 Finance and Public Administration References Committee, correspondence, 17 October 2003.

6 Finance and Public Administration References Committee, correspondence, 17 October 2003.

7 Finance and Public Administration References Committee, correspondence, 17 October 2003.

2.11 In moving the first set of amendments, the chair of the references committee, Senator Forshaw, noted that in response to Government concerns the order had not been extended to CAC Act bodies. Senator Forshaw further noted that 'this order is the subject of ongoing review and report by the Committee and this is a matter that no doubt can be considered by the Committee in due course'.<sup>8</sup>

2.12 In its report on the first year of operation of the order, the Committee undertook to review the frequency of ANAO audits of agency compliance. The Auditor-General provided advice to the Committee on this matter in September 2003,<sup>9</sup> and ANAO officers briefed the Committee on it in December 2003. The Committee agreed that the frequency of the audits be reduced from once every six months to once every twelve months, with audits to be provided to the Senate by 30 September each year. An amendment to the order to effect this change was adopted by the Senate on 4 December 2003.

### **Procurement and confidentiality guidelines**

2.13 As noted above, DOFA has released three sets of guidance relevant to the order since the Committee's 2002 report. This section provides an overview of each guidance.

#### *Guidance on Confidentiality of Contractor's Commercial Information*

2.14 This guidance was published in February 2003. It aims to assist agencies 'ensure that they enter into appropriate commitments to maintain confidentiality of commercial information in the context of procurement processes'.<sup>10</sup>

2.15 The guidance emphasises the accountability principles governing Commonwealth contracting, and states:

The principle of Accountability and Transparency suggests that contracting information should not be confidential unless there is sound reason, informed by legal principle, for maintenance of the confidentiality of that information. It places the onus on Commonwealth officials to make a specific assessment of whether information should be kept confidential before agreeing to make any contractual commitment of confidentiality.<sup>11</sup>

2.16 An important feature in this guidance is the emphasis placed on agency staff addressing whether confidentiality clauses are appropriate *during* contract

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8 Senator Michael Forshaw, *Senate Hansard*, 18 June 2003, p. 11709.

9 ANAO correspondence, 11 September 2003.

10 Department of Finance and Administration, 2003, *Guidance on Confidentiality of Contractor's Commercial Information*, p. 3.

11 Department of Finance and Administration, 2003, *Guidance on Confidentiality of Contractor's Commercial Information*, p. 4.

negotiations, rather than after the event as a response to the order's Internet listing requirement.

2.17 The guidance sets out four initial criteria for agencies to apply in deciding whether information should be kept confidential. It notes that *all* of the criteria must be met if information is to be treated as confidential. The criteria are:

Criterion 1: that the information to be protected must be identified in specific rather than global terms;

Criterion 2: that the information must have the necessary quality of confidentiality;

Criterion 3: that disclosure would cause detriment to the contractor or other third party; and

Criterion 4: that the information was provided under an understanding that it would remain confidential.<sup>12</sup>

2.18 In addition to specifying these criteria, the guidance provides:

- explanation of the criteria and guidance on establishing whether the criteria have been met;
- the appropriate process for dealing with confidential information in contracts, from the initial tender documentation through to post contract considerations;
- examples which demonstrate the application of the confidentiality criteria in determining the appropriateness of confidentiality claims; and
- model clauses for use in tender documents and contracts.

2.19 These confidentiality criteria are intended to be the key point of reference in the drafting of contracts and should have a major bearing on agency compliance with the Senate order.

#### *Guidance on the Listing of Contract Details on the Internet*

2.20 This second set of guidelines, *Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)* was published in January 2004. The Committee recommended in its 2002 report that DOFA develop guidelines of this sort. The guidance covers the following topics:

- the Government's policy in relation to compliance with the order;
- the format and content of the Internet listing, including advice in relation to the presentation of generic entries;
- what constitutes a 'contract' for the purposes of the order, with examples given;

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12 Department of Finance and Administration, 2003, *Guidance on Confidentiality of Contractor's Commercial Information*, p. 5.

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- the identification and reporting of confidential contract information, including specified categories for reporting the reasons for any confidentiality provisions;
  - requirements for Ministers' letter of compliance,
  - the audit requirements of the order; and
  - templates for agencies' Internet lists and for Ministers' letters of compliance.

2.21 The guidance is essentially intended to help agencies comply with the specific requirements of the order. However, by referring to the principles underlying the order, and to the related *Guidance on Confidentiality of Contractor's Commercial Information*, it also draws agencies' attention to the transparency and accountability principles which underpin the requirements of the order.

#### *Commonwealth procurement guidelines*

2.22 DOFA's third set of guidance, *Commonwealth procurement guidelines*, was issued in January 2005. It establishes the government's policy procurement framework and includes important new prescriptions on procurement procedures.

2.23 Accountability and transparency feature as one of the four pillars of the procurement framework (the other pillars are the principle of value for money, encouraging competition and efficient, effective and ethical use of resources). This section of the guidelines sets out requirements for disclosure and reporting, including the Senate order. Among other things, the guidelines state:

Steps need to be taken to plan for, and facilitate, appropriate disclosure of procurement information. In particular, officials should:

- include provisions in request documentation and contracts that alert prospective providers to the public accountability requirements of the Australian Government, including disclosure to the Parliament and its Committees;
- where relevant, include a provision in contracts to enable the Australian National Audit Office to access contractors' records and premises to carry out appropriate audits (model access clauses have been developed for agencies to tailor and, where appropriate, incorporate into relevant contracts);
- consider, on a case-by-case basis, any request by a potential supplier for material to be treated confidentially, only entering into commitments to maintain confidentiality of contractors' information where these are appropriate, and having regard to the Finance publication *Guidance on Confidentiality of Contractors' Commercial Information*;

- be aware of the requirements for the disclosure of information consistent with the *Freedom of Information Act 1982*.<sup>13</sup>

2.24 The guidelines also refer to the requirements for the Order, annual reports and disclosure by officers to the Parliament and its committees.

### **ASIO and ASIS**

2.25 In accordance with the Committee's recommendation following the order's first year of operation, DOFA and ANAO discussed with ASIO and ASIS options for compliance by these agencies. All parties agreed that:

...the best option would be for the ANAO to examine ASIO and ASIS contracting processes to confirm their compliance with all relevant legislative and policy requirements. This will be done as part of the ANAO's next audit of agencies' compliance with the Order.<sup>14</sup>

2.26 The results of the evaluation were included in ANAO Audit Report No.10 2004-2005 for the 2003 calendar year. While it is recognised that ASIS and ASIO may be exempt from listing their contract details publicly, it was expected that these agencies would adhere to the principle of accountability in relation to government contracting. In its audit, the ANAO expected that these agencies would have in place the following mechanisms for accountable contract management:

- an up-to-date set of Chief Executive Instructions with instructions on spending of public money and procurement;
- procedures for the identification and recording of contracts;
- tender and contract templates, which had been updated in accordance with Finance guidance; and
- an up-to-date formal instrument of financial delegations.<sup>15</sup>

2.27 The audit findings raised significant accountability concerns. For example, both agencies advised that their Director-Generals had determined that contract details should remain confidential for security reasons. However, neither agency had appropriate documentation recording these determinations. ASIO's procurement manual was significantly out of date (September 1995) and as a result 'did not reflect the new accountability environment, nor did it incorporate the latest Finance guidance on procurement'.<sup>16</sup> ASIO did not have a formal register for its contracts and ASIS had only recently developed one. Neither agency had satisfactory tender and contract templates for use in contract negotiations.

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13 DOFA, *Commonwealth procurement guidelines – January 2005*, Financial Management Guidance No. 1, p. 20.

14 Department of Finance and Administration correspondence, 18 February 2004.

15 ANAO Report No.10, p. 38.

16 ANAO Report No.10, p. 38.

2.28 At a general level, the audit findings highlight the kind of governance and internal management shortcomings that can occur and persist in an accountability and transparency vacuum. The findings therefore indicate the advantages of regular, ongoing monitoring of such agencies' adherence to accountability principles.

2.29 ANAO agreed with the Committee's view and indicated it would 'make the necessary arrangements to audit ASIO's and ASIS's contracting processes on a regular cycle'.<sup>17</sup>

2.30 The Committee learnt at its hearing with ANAO in November 2006 that no further audit work has been conducted in either agency in relation to the order since the original 2004 audit. It remained unclear to the Committee whether ANAO had put in place any arrangements to audit these agencies on a regular basis, or whether DOFA had been monitoring these matters.

2.31 Because of the lack of external scrutiny that comes from listing contracts on the Internet, these agencies are at some risk of not maintaining contracting processes and practices consistent with the order's requirements and the government's own policy on enhanced accountability in this area. Due to the secretive nature of their work and culture, ASIO and ASIS may also be at more risk than other agencies of unnecessarily or inappropriately treating government contract information as confidential.

2.32 For these reasons the Committee considers that the ANAO should establish arrangements with ASIO and ASIS to audit their contracting process on a regular basis, and DOFA should engage in discussion to ensure its guidelines and directions are well understood. In view of the two years that have passed since these agencies were audited, a three-yearly cycle may be suitable.

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17 ANAO correspondence, 7 May 2004.

