

**Government Response to
Senate Finance and Public
Administration References Committee
Report**

Departmental and agency contracts

June 2003

SENATE FINANCE AND PUBLIC ADMINISTRATION REFERENCES COMMITTEE REPORT: *DEPARTMENTAL AND AGENCY CONTRACTS*

GOVERNMENT RESPONSE TO RECOMMENDATIONS 1-17

The Government is committed to transparency and accountability in Commonwealth contracting, a commitment attested to by the robust accountability framework under which *Financial Management and Accountability Act 1997* (FMA Act) agencies operate.

The Government recognises the important role that the Senate Order on departmental and agency contracts (the Order) plays in this framework. Accordingly, it agrees that it will comply with the spirit of the latest amendment to the Order proposed through Recommendation 17 of this report (subject to the Senate's passing of this amendment) under the same terms contained in its response to the original Order of 20 June 2001 and the subsequent amendment of 27 September 2001. In particular, it will comply with the spirit of the Order on the basis that:

- agencies will use the Department of Prime Minister and Cabinet guidelines on the scope of public interest immunity (in Government Guidelines for Official Witnesses before Parliamentary Committees) to determine whether information regarding individual contracts will be provided;
- agencies will not disclose information if disclosure would be contrary to the *Privacy Act 1988*, or to other statutory secrecy provisions, or if the Commonwealth has given an undertaking to another party that the information will not be disclosed; and
- compliance with the Senate order will be progressive as agencies covered by the *Financial Management and Accountability Act 1997* refine arrangements and processes to meet the requirements.

Consistent with the response to Recommendation 11 of this Report, the Government does not support the extension of the Order to cover *Commonwealth Authorities and Companies Act 1997* (CAC Act) bodies from 1 January 2004. The Government has taken this position as CAC Act bodies operate under a completely different legislative and governance framework compared with their FMA Act counterparts, with this arrangement endorsed by the Parliament through the enactment of a separate legislative framework for these bodies in the form of the CAC Act.

Following are the Government's responses to the individual recommendations of the Report:

Number	Recommendation	Response
1	<p>The Committee recommends that agencies include all government contracts in contract listings, including procurement contracts, lease arrangements, sales contracts, certain grants and funding agreements, certain employment contracts, demand-driven contracts with an expected whole-of-life value of at least \$100,000 and other arrangements that might be deemed to be contracts at law.</p>	<p>Agree</p> <p>The scope of contracts detailed by the Committee is consistent with that set out in the Australian Government Solicitor advice – <i>'Contracts' for the purposes of the Senate Order on Government Agency Contracts, and related matters</i> which the Department of Finance and Administration (Finance) provided to agencies, and with other advice provided by Finance.</p> <p>The Government notes that grants and funding agreements will be included in the Order listings when they satisfy the 'Contract Criteria' set out in the Australian Government Solicitor advice.</p> <p>The inclusion of non-procurement related contracts places an additional workload on many departments and agencies as they will need to have in place a separate process for the reporting of these contracts.</p>
2	<p>The Committee recommends that agencies with large numbers of similar types of contracts (for example, agreements under a particular piece of legislation) record a generic entry for this type of contract in their contract listings, including a notation setting out the nature of that type of contract in general terms.</p>	<p>Agree</p> <p>The Government considers that the recording of a generic entry for similar types of contracts instead of individual listing of every contract will maintain a high level of transparency whilst reducing the reporting demands placed upon agencies. The decision as to whether such arrangements are listed individually or through a generic entry will remain at the discretion of individual agencies.</p>

		<p>Finance will seek clarification from the Senate Finance and Public Administration References Committee on the implementation of this recommendation including the scope of contracts that may be recorded through a generic entry.</p> <p>The information will be included in Finance's guidance on complying with the Senate Order that is being developed in consultation with the ANAO.</p>
3	<p>The Committee recommends that the Department of Finance and Administration, in consultation with the Australian National Audit Office and agencies, develop advice for agencies on a means of indicating the nature of commercial confidentiality as it applies to individual contracts, and that this be included in updates to the whole-of-government best practice guidance on determining commercial confidentiality for contracts.</p>	<p>Agree</p> <p>Finance has held discussions with the ANAO to develop a list of generic categories of confidential information for prospective use by agencies.</p> <p>The information will also be included in Finance's guidance on complying with the Senate Order that is being developed in consultation with the ANAO. This guidance will be cross-referenced with the <i>Guidance on Confidentiality of Contractors' Commercial Information</i>.</p>
4	<p>The Committee recommends that any additional requirements that may be required under the order as a result of guidelines developed by the ANAO should, as far as possible, be included as additional information to be collected in the GaPS system. This might include provision to indicate the nature of commercial confidentiality for each contract, that is, either (1) where specific contract provisions have been agreed by the parties to be kept confidential, and/or (2) where the parties have agreed to a general non-disclosure clause for the contract.</p>	<p>Agree-in-principle</p> <p>As discussed through the Report, agencies have the option to utilise GaPS to report Order information for procurement related contracts at their discretion.</p> <p>Finance has held discussions with the ANAO to develop a list of generic categories of confidential information for prospective use by agencies along with a set of guidance on complying with Order.</p>

5	<p>The Committee recommends that paragraph (9) of the order be amended to align the twelve-month period covered by each set of listings with the end of the calendar and financial years. This would mean that listings would cover the previous twelve months ending on either 31 December or 30 June, as the case may be.</p>	<p>Agree</p> <p>The Government is pleased to note that the Committee has endorsed its suggestions in this area.</p> <p>This change will maintain transparency whilst reducing the reporting demands for agencies and increase the ability to reconcile listings from different periods.</p>
6	<p>The Committee recommends that reporting under the order continue at six-monthly intervals. The Committee requests that the Auditor-General suggests to the Committee that the frequency of reporting under the order be changed to once every twelve months rather than twice-yearly, when the Auditor-General considered that this was appropriate.</p>	<p>Agree</p> <p>The Government notes that the Auditor-General has identified an ongoing improvement in agencies compliance with the Order.</p>
7	<p>The Committee recommends that agencies develop systems and processes that allow for continual additions to contract listings as new contracts are entered into or amendments to existing contracts made.</p>	<p>Disagree</p> <p>Under current mechanisms, ongoing transparency is largely provided by agencies being required to gazette procurement-related contracts with a value of \$2000 or more in the Gazette Publishing System (GaPS) within six weeks of entering into the arrangement. This system is publicly available at www.contracts.gov.au</p> <p>Any proposal to develop systems to enable agencies' lists of non-procurement related contracts (including grants and funding agreements) to be continually updated would need to be balanced against the cost of implementing and administering such systems.</p>

		Accordingly the Government is not in favour of mandating such a requirement.
8	The Committee recommends that paragraph (1) of the order be amended to provide for ministers' letters to be tabled by not later than two calendar months after the last day of the financial or calendar year. That is, by not later than the last day of February (for calendar year listings) and 31 August (for financial year listings).	<p>Agree</p> <p>Noting Recommendation 5 provides agencies with more time to ensure that their lists are complete and accurate, a two month period for the tabling of the letters would provide agencies with a reasonable time period to prepare listings and table letters of compliance.</p>
9	The Committee recommends that bodies subject to the <i>Commonwealth Authorities and Companies Act 1997</i> (the CAC Act) extend the DOFA commercial confidentiality best practice guidance to all new contracts entered into from 1 January 2003.	<p>Noted</p> <p>CAC Act bodies will be provided with Finance's <i>Guidance on Confidentiality of Contractors' Commercial Information</i>, which they have the option to use at their own discretion.</p>
10	The Committee recommends that the Auditor-General write to bodies subject to the <i>Commonwealth Authorities and Companies Act 1997</i> (the CAC Act), suggesting that they apply to all new contracts entered into from 1 January 2003 the DOFA commercial confidentiality best practice guidance.	<p>Noted</p> <p>The Government considers that, given its responsibility for Commonwealth Government Procurement policy, it was more appropriate for Finance to prepare this correspondence.</p> <p>As such, Finance will write to CAC Act bodies providing Finance's <i>Guidance on Confidentiality of Contractors' Commercial Information</i> and informing them of Recommendations 9, 10 and 11 of <i>Departmental and agency contracts</i>.</p>

11	The Committee recommends that the Senate order for the production of lists of departmental and agency contracts be extended to cover CAC Act bodies from 1 January 2004.	<p>Disagree</p> <p>The Government is not in favour of extending the Order to CAC Act bodies as they operate under a completely different legislative and governance framework compared with their <i>Financial Management and Accountability Act 1997</i> counterparts.</p> <p>This arrangement was endorsed by the Parliament when it enacted a separate legislative framework for these bodies in the form of the CAC Act.</p> <p>In particular, these bodies:</p> <ul style="list-style-type: none"> • are separate legal entities from the Government (with authorities being separate bodies corporate subject to unique enabling legislation and companies governed by their individual constitutions); and • commonly operate with financial independence from the Government.
12	The Committee suggests that the Department of the House of Representatives comply with the Senate order for the production of lists of departmental and agency contracts. If the Senate agrees with this suggestion, the Committee recommends that its suggestion be conveyed to the Speaker of the House of Representatives by the President of the Senate.	<p>Noted</p> <p>This is a matter for the Senate and the House of Representatives.</p>
13	The Committee recommends that the Auditor-General and the Department of Finance and Administration discuss with ASIO and ASIS options for compliance with the order.	<p>Agree</p> <p>Finance and the ANAO have commenced discussions with ASIO and ASIS regarding options for compliance with the Order.</p>

		Finance will write to the Committee Secretary to advise of the outcome of these discussions.
14	<p>The Committee recommends that paragraph (2(b)) of the order be amended to include the following additional information:</p> <ul style="list-style-type: none"> - contract commencement date; - duration of the contract; - the relevant reporting period; and - the twelve-month period relating to the contracts. 	<p>Agree-in-principle</p> <p>For future listings agencies will be required to include the contract commencement date.</p> <p>However, as there are different ways to interpret what is meant by “duration of contract”, agencies will be required to report the end date of contracts. This will enable the duration to be determined.</p> <p>The title of listings will also include the reporting period (and twelve-month period relating to the contracts) for example, the title of a listing relating to the period 1 January 2003 – 31 December 2003 will include wording to the effect of <i>2003 Calendar year listing covering contracts relating to the period 1 January 2003 – 31 December 2003.</i></p> <p>The inclusion of this additional information will be prospective, relating to contracts entered into and listings uploaded since the tabling of this Government response.</p>
15	<p>The Committee recommends that the Australian National Audit Office, in consultation with the Department of Finance and Administration, develop guidelines for the content, presentation and format of contract listings that will ensure the provision of comprehensive information about contracts in a user-friendly template.</p>	<p>Agree-in-principle</p> <p>In line with their responsibility for Commonwealth Government Procurement policy, Finance, in consultation with the ANAO, is in the process of developing a guide for agencies on complying with the Order, which will include a standard template for the presentation of agency information to comply with the</p>

		<p>requirements of the Order.</p> <p>As agencies have already established systems for capturing and reporting the necessary information to comply with the Order, they have the option to utilise the template at their discretion.</p>
16	<p>The Committee recommends that paragraph (7) of the order be amended to provide for consideration and report on the second year of operation of the order by the Finance and Public Administration References Committee.</p>	<p>Noted</p>
17	<p>The Committee commends its recommendations to the Senate. If accepted, the Committee recommends that the order passed by the Senate on 27 September 2001 be amended to read as follows:</p> <p>7 Departmental and agency contracts</p> <p>1. There be laid on the table, by each minister in the Senate, in respect of each agency administered by that minister, or by a minister in the House of Representatives represented by that minister, by not later than 2 calendar months after the last day of the financial and calendar year, a letter of advice that a list of contracts in accordance with paragraph (2) has been placed on the Internet, with access to the list through the department's or agency's home page.</p> <p>2. The list of contracts referred to in paragraph (1) indicate:</p> <p>a. each contract entered into by the agency which has not been fully performed or which has been entered</p>	<p>Noted</p>

	<p>into during the previous 12 months, and which provides for a consideration to the value of \$100 000 or more;</p> <p>b. the contractor, the amount of the consideration, the subject matter of each such contract, the commencement date of the contract, the duration of the contract, the relevant reporting period and the twelve-month period relating to the contract listings;</p> <p>c. whether each such contract contains provisions requiring the parties to maintain confidentiality of any of its provisions, or whether there are any other requirements of confidentiality, and a statement of the reasons for the confidentiality; and</p> <p>d. an estimate of the cost of complying with this order and a statement of the method used to make the estimate.</p> <p>3. If a list under paragraph (1) does not fully comply with the requirements of paragraph (2), the letter under paragraph (1) indicate the extent of, and reasons for, non-compliance, and when full compliance is expected to be achieved. Examples of non-compliance may include:</p> <p>a. the list is not up to date;</p> <p>b. not all relevant agencies are included; and</p> <p>c. contracts all of which are confidential are not included.</p> <p>4. Where no contracts have been entered into by a department or agency, the letter under paragraph (1) is to advise accordingly.</p>	
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5. In respect of contracts identified as containing provisions of the kind referred to in paragraph (2)(c), the Auditor-General be requested to provide to the Senate, within 6 months after each day mentioned in paragraph (1), 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.
6. In respect of letters including matter under paragraph (3), the Auditor-General be requested to indicate in a report under paragraph (5) that the Auditor-General has examined a number of contracts, selected by the Auditor-General, which have not been included in a list, and to indicate whether the contracts should be listed.
7. The Finance and Public Administration References Committee consider and report on the first and second years of operation of this order.
8. This order has effect on and after 1 July 2001.
9. In this order:
“**agency**” means an agency within the meaning of the *Financial Management and Accountability Act 1997*; and
“**previous 12 months**” means the period of 12 months ending on either 31 December or 30 June, as the case may be.
(20 June 2001 J.4358, amended 27 September 2001 J.4994)