

20 MAR 2002



SENATOR THE HON NICK MINCHIN  
Minister for Finance and Administration

20 MAR 2002

Mr Bob Charles MP  
Chairman  
Joint Committee of Public Accounts and Audit  
Parliament House  
CANBERRA ACT 2600

Dear Bob,

I am pleased to advise that the Government has finalised its response to the Joint Committee of Public Accounts and Audit Report 379 *Contract Management in the Australian Public Service*. I attach two copies for your information.

Please note that consistent with the Department of the Prime Minister and Cabinet's *Guidelines for the Presentation of Government Documents, Ministerial Statements, and Government Responses to the Parliament* the Whole-of-Government response is under embargo until it is tabled in Parliament on Thursday, 21 March 2002.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Nick Minchin'.

Nick Minchin

**Government Response to**  
**Joint Committee of Public Accounts**  
**and Audit**  
**Report 379: Contract Management in**  
**the Australian Public Service**

March 2002

# 379<sup>th</sup> REPORT OF JOINT COMMITTEE OF PUBLIC ACCOUNTS AND AUDIT: CONTRACT MANAGEMENT IN THE AUSTRALIAN PUBLIC SERVICE

## WHOLE OF GOVERNMENT RESPONSE TO RECOMMENDATIONS 1-5

The 379<sup>th</sup> report of the Joint Committee of Public Accounts and Audit - Contract Management in the Australian Public Service - was tabled in the Parliament on 2 November 2000. The report was the conclusion of an inquiry into contract management that commenced on 5 September 1999. The key objective of the inquiry was to "analyse a range of examples in order to develop better practice approaches to contract management that can be applied across Government agencies".

The Government notes the importance that contract management now assumes in the Australian Public Service (APS) and the enhanced benefits that it can offer. The Government is also keenly aware of the importance of transparency and accountability when managing Government contracts.

The Government further notes that agencies remain accountable for the delivery of services, even where the service delivery is provided by the private sector. Central to the accountability principle is the need to maintain awareness of client needs and how they are being met.

It is appropriate to re-emphasise that APS agencies operate under a robust accountability framework that enables detailed scrutiny of any contracts that they may enter into. The legislative and policy framework governing APS agencies includes the:

- Financial Management and Accountability Act 1997;
- Financial Management and Accountability Regulations;
- Commonwealth Procurement Guidelines;
- Commonwealth Authorities and Companies Act 1997;
- Chief Executive's Instructions;
- Freedom of Information Act 1982;
- Ombudsman Act 1976;
- Auditor-General Act 1997;
- Public Accounts and Audit Committee Act 1951;
- Public Works Committee Act 1969; and
- Mandatory reporting of Commonwealth Contracts.

The diversity of agency function, structure and purpose, however, poses a unique challenge for broad scale contract management reform across the APS. In this regard, the Government is aware that the positive economic benefits of contract management

need not be lost through excessive or unworkable administrative requirements. With this in mind, the revised production of the *Commonwealth Procurement Guidelines and Best Practice Guidance – February 2002* is aiming to set workable and succinct guidance for Commonwealth agency contract management.

#### **Recommendation 1**

That the *Ombudsman Act 1976* be amended to extend the jurisdiction of the Ombudsman to include all government contractors.

#### **Response: Partially Agree**

The Government agrees that the Ombudsman should have jurisdiction to investigate the actions of private sector organisations that are contracted by Commonwealth agencies to provide goods and/or services to the public and will examine options for amending the *Ombudsman Act 1976*.

However, the Government considers that Government contractors who provide goods and/or services to agencies rather than to the public, should not be subject to the Ombudsman's jurisdiction as members of the public would not have sufficient interest in the actions of those contractors to warrant extending the Ombudsman's jurisdiction to them.

The Government considers that the Ombudsman should ensure that agencies are informed about investigations relating to their contractors. The level of agency involvement in particular investigations will be a matter for the Ombudsman to determine, in consultation with the agency, having regard to all the circumstances.

#### **Recommendation 2**

That all CEOs under the *Financial Management and Accountability Act 1997* should, whenever claiming commercial-in-confidence, issue a certificate stating which parts of a contract and why these parts are to be withheld.

#### **Response: Partially Agree**

In line with the *Commonwealth Procurement Guidelines and Best Practice Guidance – February 2002* agencies are required to record decisions and the reasons for making them, and in this context, the Government does not see any further advantage in establishing a certificate system.

The Government supports accountability in relation to government contracts and the principle that contractual arrangements should be transparent and open to public scrutiny where possible. The Government agrees that when an agency receives a request to disclose details on any contract that it has entered into, only the actual information in the contract that can legitimately be classified as commercial-in-confidence (CIC) should be classified as CIC. The Government does not support the

view that commercial information is inherently confidential. Any decision to withhold information on CIC grounds needs to be fully substantiated, fundamentally stating the reasons why such information should not be disclosed.

To assist agencies with the process, the Government will be issuing further guidance material that will better clarify how agencies should assess contracts to determine what should be classified as CIC to further enhance the existing robust accountability framework.

As a general approach the consideration of what should be CIC is normally done by assessing whether the release of information could unreasonably disadvantage the Commonwealth or a contractor and advantage their competitors in future tender processes, for example, details of commercial strategies or fee structures, details of intellectual property and other information of significant commercial value. The case by case assessment of what is CIC is appropriate as what may be assessed as CIC will vary over the life of the contract and after the contract has expired. Any documents that are produced as part of the contract can also contain information that may be classified as CIC and these need to also be assessed when an agency receives a request to release information.

The Government has agreed in principle to Senate Order 192 on Government Agency Contracts of 20 June 2001, which requires:

- information to be placed on an agency's website, including details of:
  - a list of agency contracts of \$100,000 or more which have been entered into by the agency which has not been fully performed or which has been entered into during the previous 12 months;
  - the contractor and the subject matter of each contract;
  - whether each contract contains provisions requiring the parties to maintain confidentiality of any of its provisions, or whether any provisions of the contract are regarded by the parties as confidential, and a statement of the reasons for confidentiality; and
  - an estimate of the cost of complying with the order.

The Government tabled a statement that compliance with the order will be based on the following terms:

- 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 new requirements.

Under the *Financial Management and Accountability Act 1997* Chief Executives are accountable for procurement decisions, including decisions on the disclosure of information. It is the responsibility of individual agencies to implement procedures

for the management of their contracts, including recording decisions relating to the disclosure of information, that best suit their individual needs.

### **Recommendation 3**

That all agencies must establish and maintain an effective contract register.

#### **Response: Agree in principle**

The Senate order on the publication of Government agency contracts, outlined in the response to Recommendation 2, requires a list of agency contracts exceeding \$100,000 in value to be placed on the agency's website. The order also requires, as part of information provided in the listing, that there is an indication whether each contract contains confidential provisions and that a statement is provided giving reasons for confidentiality.

One of the more visible aspects of the accountability framework is the mandatory reporting requirements for Commonwealth agencies to publicly gazette all contracts, (with limited exceptions such as national security), with a value of \$2000 or more in the Commonwealth Purchasing and Disposals Gazette (the 'Gazette').

The *Commonwealth Procurement Guidelines and Best Practice Guidance – February 2002* (CPGs) are also a key part of this accountability framework. The CPGs outline accountability and reporting requirements that govern Commonwealth procurement, including the mandatory reporting requirement. The CPGs state at page 7:

*"Accountability supports agencies' business and performance management through visibility.*

*Officials, departments and agencies are answerable and accountable for any plans, actions and outcomes that involve spending public monies. Agencies should include provisions in tender documentation and contracts that alert prospective providers to the public accountability requirements of the Commonwealth, including disclosure to Parliament and its Committees.*

*Chief Executives are:*

- *accountable for their agency's procurement performance (Financial Management and Accountability Act 1997);*
- *authorised to issue Chief Executive's Instructions (CEIs), which may include directions to officials involved in procuring goods and services (Financial Management and Accountability Regulation 6(1)); and*
- *responsible for ensuring adequate systems for recording decisions and reasons for making them are maintained.*

*Officials with procurement duties must act in accordance with their CEIs and these Guidelines."*

The responsibility for determining how to manage contracts within an agency properly belongs to the Chief Executive. It is the responsibility of individual agencies

to implement procedures for the management of their contracts that best suit their individual and special needs.

#### **Recommendation 4**

That the Auditor-General conduct a review, as part of an existing or potential performance audit, of agency performance in complying with the reporting requirements of the Gazette Publishing System (GaPS).

#### **Response: Noted**

The Government notes that the ANAO has conducted a high level audit review of GaPS as part of the audit of the use of confidentiality provisions in Commonwealth contracts and issued its finding in Report No. 38: The Use of Confidentiality Provisions in Commonwealth Contracts.

#### **Recommendation 5**

The Committee reaffirms the need for the Auditor-General to have access to contractors' premises as previously stated by the Committee in Recommendation 5 of Report 368.

#### **Response: Agree in principle**

In 2001 Finance, in conjunction with the ANAO, developed a standard ANAO access clause with a non-mandatory application for agencies' use. This clause allows ANAO access to contractor premises.

The government's response to JCPAA Report No. 368 was tabled in the Parliament on 8 February 2001:

#### **Response**

"The government recognises the importance of the Auditor-General having access to information for the performance of his statutory responsibilities to the Parliament. In some cases, this will require access by the Australian National Audit Office (ANAO) to the premises of a contractor.

The Government's preferred approach is not to mandate obligations, through legislative or other means, to provide the Auditor-General an automatic right of access to contractors' premises. Given the diverse range of contracts in the Commonwealth sector it is unlikely that access by the Auditor-General will be required in all circumstances. Imposing a blanket right of access regardless of the circumstances would lead to unnecessary costs in the administration of contracts and the government considers that a case by case approach is more desirable.

Commonwealth bodies are best placed to exercise the primary responsibility of ensuring that appropriate information is available to satisfy their own and external accountability and performance monitoring functions. The most suitable mechanism for these obligations to be imposed on third parties is in the contract itself. In this regard, we note that the ANAO has developed standard access clauses for inclusion in contracts. These were forwarded to agencies in September 1997.

The Government supports Commonwealth bodies including appropriate clauses in contracts as the best and most cost effective mechanism to facilitate access by the ANAO to a contractor's premises in appropriate circumstances.”

However, the Government recognises that agencies need to give greater prominence to issues of access, and the overall quality of contracts, and believes this can be achieved through a number of avenues. Commonwealth agencies covered by the FMA Act must have regard to the *Commonwealth Procurement Guidelines* issued by the Minister for Finance and Administration, under the *Financial Management and Accountability Regulations*, in respect of the procurement of property and services.” (Senate Hansard, 8 February 2001, p.21719).

The *Commonwealth Procurement Guidelines and Best Practice Guidance – September 2001* emphasise the importance of agencies ensuring they are able to satisfy all relevant accountability obligations, including ANAO access to records and premises. Section 1.2 of the CPGs (Accountability and Transparency), states:

“As part of their accountability responsibilities, agencies must consider, on a case-by-case basis, including a provision in contracts to enable the Australian National Audit Office access to 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”.

In addition to these formal measures, the ANAO might also consider the development of an information package for agencies, which gives practical examples of best practice and illustrates the benefits to agencies in negotiating appropriate provisions with their contractors. However, as an independent agency, this is a matter for the ANAO.