

Senate Finance and Public Administration Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Prime Minister and Cabinet Portfolio

Department of the Prime Minister and Cabinet

~~Budget~~ Estimates Hearings 2005-2006, 31 October 2005

Supplementary

Question: PM 55

Outcome 1

Topic: Order for departmental and agency contracts

Hansard Page: Direct on Notice

Senator Murray asked:

1. What guidance is provided to staff with responsibilities for contract negotiations specifically about the requirements of the Senate Order? If relevant guidance is not provided, please explain why this is the case.

Answer:

The following guidance is provided to departmental staff with responsibilities for procurement and contract management:

- Guidance on Confidentiality of Contractor's Commercial Information
 - Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Department and Agency Contracts)
 - Guidance on Procurement Publishing Obligations
 - Chief Executive Instruction Chapter 5 Part 2
 - Procurement Process Guidance / Checklist
 - Tender and contract templates.
2. What training and awareness sessions are provided, either in-house or through other training providers (eg. DOFA, APS Commission or private firms) in respect of the Order? Please provide a list of the dates, the identity of the training providers and the content of the training that staff attended in 2005. If training and awareness sessions are not provided, please explain why this is the case.

Answer:

See Attachment A.

3. Has the department/agency revised its procurement guidelines to incorporate the new Commonwealth Procurement Guidelines that took effect from 1 January 2005, particularly with respect to the confidentiality elements contained in those guidelines? If so, when did this occur and can a copy be provided? If not, what is the cause of the delay and when will the revision occur?

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Answer:

Yes. The department revised its procurement and related guidance material in January 2005 to ensure that it was compliant with the revised Commonwealth Procurement Guidelines (CPGs) that took effect from 1 January 2005. The new CPGs confirmed the requirement for agencies to plan for, and facilitate, appropriate disclosure of procurement information. The department's Procurement Process Guidance / Checklist (refer Attachment B) was revised to incorporate specific guidance on the identification of confidential information. The department's CEIs already provided guidance regarding the use of confidentiality provisions and tender documentation and contracts included provisions for determining the confidentiality of information.

4. ANAO audits for the last three years have revealed a consistently low level of compliance across most agencies with DOFA confidentiality criteria (February 2003) for determining whether commercial information should be protected as confidential. The ANAO's latest report on the Order (No.11 2005-2006, September 2005) states that departments and agencies need to give higher priority with this important requirement of the Senate Order.
- What specific measures have been or will be taken to address this problem, give it higher priority and raise compliance levels?
 - What guidance and training are provided to staff about the confidentiality criteria and the four tests employed to determine whether information should be protected?
 - What internal auditing or checking is performed to test compliance in this area? If none is performed, why not and is the agency considering the adoption of internal controls and checks?

Answer:

The department has strengthened its process for the coordination and compilation of the Senate Order listing by reconciling the contract listing to contract information held in the Financial Management Information System (FMIS) database and on AusTender (replacement for the Gazette Publishing System (GaPS)) to provide added assurance that the listing is accurate and complete.

Contracts are checked prior to signing to ensure that confidentiality provisions have been identified correctly.

Refer also to responses to Questions (1), (2) and (3).

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5. What problems, if any, has the agency and/or relevant staff experienced in complying with the Senate Order? What is the nature and cause of any problems? What measures have been, or could be, adopted to address these concerns?

Answer:

The department does not have any problems in complying with the Senate Order. However, the variety and timing of reporting mechanisms that agencies must comply with can lead to confusion and a lack of consistency in complying with the reporting requirements. There are three existing reporting requirements – the Senate Order on contracts over \$100,000, the AusTender system for all contracts over \$10,000 and the requirement to report consultancy expenses in agencies' Annual Reports.

The administrative burden on agencies could be reduced by rationalising the separate reporting requirements so that all information is provided in response to one requirement through one mechanism.

Attachment A

Description of Training	Training Provider	Dates
Information sessions on the Commonwealth Procurement Guidelines - January 2005	In-house	Jan - Feb 2005
Information session addressing the findings and recommendations of the Draft ANAO Audit Report – <i>The Senate Order for Departmental and Agency Contracts (Calendar Year 2004 Compliance)</i> . In particular, the session addressed the identification of confidential information in contracts.	In-house	13 Sep 2005
Information session addressing the Senate Order, guidance on application of the four criteria for determining whether information is confidential and departmental processes for complying with the requirements of the Senate Order.	ANAO and in-house	17 Nov 2005

Attachment B

PROCUREMENT PROCESS GUIDANCE / CHECKLIST

Preliminaries		Completed
1.	Identify need and define requirement. (Make sure you are clear in what you want from the procurement)	<input type="checkbox"/>
2.	Obtain in-principle approval to conduct a procurement process.	<input type="checkbox"/>
3.	Prepare Procurement Plan. (How are you going to go to the market? Is it the most appropriate method?)	<input type="checkbox"/>
4.	Prepare procurement documentation (Procurement Approval Minute [FMA Regulation 10 and Regulation 9], Request for Tender - RFT, Request for Expressions of Interest – REOI etc.).	<input type="checkbox"/>
Process		
5.	Prepare Tender Evaluation Plan. (How are you going to evaluate the responses?)	<input type="checkbox"/>
6.	Receipt and evaluation of responses (Document the process. This will form part of your Procurement Report).	<input type="checkbox"/>
7.	Prepare Tender Evaluation Report including recommendation of preferred tenderer to appropriate Delegate.	<input type="checkbox"/>
8.	Approval received by Delegate.	<input type="checkbox"/>
9.	Conduct negotiations with preferred tenderer. (If required)	<input type="checkbox"/>
10.	Consider the Contractors Confidential Information and apply the test (Attachment A) for inclusion into the contract.	<input type="checkbox"/>
11.	Execute contract. (The appropriate Delegate should sign the contract after consideration of FMA Reg. 13).	<input type="checkbox"/>
12.	Raise Purchase Order on Finance1 if \$2000 or over.	<input type="checkbox"/>
13.	Finance1 gazettals are uploaded into the Government gazette (GaPS) website each fortnight by the Corporate Services Section. (If procurement has a total estimated value of \$10,000 or above be sure to select "YES" in the "Include in Gazettal" field in Finance1).	<input type="checkbox"/>

REFERENCES: Commonwealth Procurement Guidelines, Chief Executive Instructions, FMA Act 1996, FMA Regulations 6, 7, 8, 9, 10, 11, 12 and 13.

Contractor Confidential Information

(Extract from Short Form Template Contracts)

The decision about what is to be included as Contractor Confidential Information should be made after considering any requests from the Department and Consultant/Contractor to treat the information as Confidential Information. Decisions should be on a case-by-case basis.

Contractors/Consultants will need to be made aware of the Commonwealth's responsibility to be publicly accountable for all procurement. To this end, unless just reason can be provided by contractor for provisions in the contract to become confidential, contractual details may, upon request, be publicly available. Typically, identified provisions in contracts will only be considered commercial-in-confidence where the detail includes the contractor's commercial strategies, trade secrets, intellectual property or information with commercial value that could benefit competitors (refer to the www.anao.gov.au – Audit Report No.38 – “The Use of Confidentiality Provisions in Commonwealth Contracts”).

Consistent with the guidance provided in ANAO Report No. 38, the Department of Finance and Administration has produced “Guidance on Confidentiality of Contractors' Commercial Information” a document designed to ensure agencies enter into appropriate commitments to maintain confidentiality of commercial information in the context of procurement. This guidance provides the initial criteria that must be applied in deciding whether information should be kept confidential. These criteria, based on legal principle, are:

1. That the information to be protected must be identified in specific rather than global terms;
2. That the information must have the necessary quality of confidentiality;
3. That disclosure would cause detriment to the contractor or third party; and
4. That the information was provided under an understanding that it would remain confidential.

No information will be considered as confidential unless all four of the above criteria are met.

Onus of justifying classification of confidentiality rests with the contractor. All decisions will be made after negotiation with suppliers and on a case-by-case basis.