

# CHAPTER SEVEN

## THE CONTRACT

A contract is an agreement between parties to do or deliver something. The primary aim of a contract is to ensure that the terms of agreement in a relationship existing between the parties are specified. Contracts provide a framework for planning, task allocation and risk allocation.

Commonwealth of Australia<sup>1</sup>

### The signing of the contract

7.1 On 13 July 2000, contracts for the construction of Australia's replacement nuclear research reactor were signed between ANSTO and the Argentinian company INVAP S.E. and its Australian alliance partners.<sup>2</sup>

7.2 This lump-sum fixed-term contract worth \$A286.4 million (1997 dollars) was heralded as the 'largest single investment in science and technology in Australia's history, and among the largest infrastructure developments of its kind in the Asia-Pacific region'.<sup>3</sup>

7.3 In this chapter, the Committee, before looking at contractual provisions, considers the cost assessments of the project. It then examines the nature of specific contractual commitments entered into by INVAP and ANSTO and the degree to which they are binding on the Commonwealth. In particular, the Committee will deal with:

- the timeframe and process to be followed by ARPANSA;
- other requirements for approvals from the Commonwealth, state or local governments;
- preconditions set in the Environmental Impact Statement and other previous inquiries; and
- the ability of either party to terminate the contract prior to completion of the project.

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1 Joint Committee of Public Accounts and Audit, *Contract Management in the Australian Public Service*, October 2000, p. 7.

2 'Replacement Research Reactor', ANSTO homepage, <http://www.ansto.gov.au/info.cnrr000.html> (18 August 2000).

3 'Contract Signed for Australia's History-Making Replacement Research Reactor', Ansto Press Release, INVAP Homepage, <http://2000.51.6.19/press/0713firma-ansto-e.htm> (17 August 2000) and ANSTO, 'ANSTO Confirms \$286.4 Million for Replacement Reactor Project', Media Release, 16 June 2000, ANSTO website, [http://www.ansto.gov.au/info/press/2000\\_08.html](http://www.ansto.gov.au/info/press/2000_08.html) (17 August 2000).

7.4 As part of this examination, the Committee examines the Commonwealth's obligations if approvals are not obtained or other preconditions not met or if a future Government decides not to proceed with the reactor. Finally, the Committee reviews whether the contract or related documents should be made public.

### **Accuracy of cost assessments**

7.5 To prepare a budget estimate, ANSTO approached a number of reactor vendors in 1992 including Technicatome, AECL and Siemens, seeking indicative costs for a new research reactor based on a performance specification. From this initial market survey, ANSTO, with the help of independent consultants, established a base figure for the appropriate cost estimate that would provide a reactor that would meet its requirements. According to ANSTO, this base figure was subsequently tested and refined over the next few years through discussions with international experts.<sup>4</sup> It was updated to meet the specific requirements of the project and to accord with the Department of Finance and Administration's criteria. Thus, ANSTO arrived at the final capital cost figure of \$286.4 million in 1997 dollars. Professor Garnett told the Parliamentary Standing Committee on Public Works:

The costing methodology has been independently verified by Sinclair Knight Merz, consultants for ANSTO, who also analysed the impact of inflation and exchange rate variants. The cost estimates and process were endorsed by the Department of Finance and Administration following their own independent review.<sup>5</sup>

7.6 Professor Garnett explained further:

The \$286.4 million figure is subject to adjustment in accordance with the Department of Finance and Administration's inflation parameters applicable in the year of cash draw-down. This estimated cost is completely compatible with the cost of construction of recent research reactors, for example in Egypt and with published information from vendors, for example in Canada, and was confirmed as appropriate in discussions with potential vendors during 1998. This cost estimate is therefore believed to be the most realistic estimate obtainable prior to issue of a request for tender.<sup>6</sup>

7.7 Questioned on whether the costs could be understated, Professor Garnett told the Public Works Committee that:

...there is a Canadian facility and two Canadian reactors currently being built, there is a third Canadian facility which is in detailed design and their

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4 ANSTO, submission no. 118A, p. 28.

5 Professor Helen Garnett, *Public Works Committee Hansard*, 5 May 1999, p. 138.

6 *ibid.*

cost estimates accord exactly with the sorts of cost estimates that we have put on the table.<sup>7</sup>

7.8 Siemens, however, suggested that the budget allocated to the project might have forced some bidders to deviate from the Request for Tender maximum requirements. It explained that it used its experience on the current design and construction of FM-II to make cost comparisons and was of the view that only a highly subsidised offer would be able to meet ANSTO's budget and simultaneously comply with all details of the RFT.<sup>8</sup>

7.9 ANSTO informed the Committee that all tenders, including Siemens, achieved 'the status of submitting compliant, fully evaluated proposals by the completion of the tender evaluation and assessment process within the allocated budget.'<sup>9</sup> One of the tenderers, Technicatome, told the Committee that it had decided to bid after completing a design-to-cost exercise to establish whether it could remain within budget with a proper solution and concept based on the HIFAR reactor. It found that although the budget would be tight, it could be possible, 'with returnable trade-offs, to put in a bid with a price that was inside this budget—and according to specifications'.<sup>10</sup>

7.10 Sutherland Shire Council obtained a memo from the Department of Industry, Science and Resources in June 2000 which revealed that the project cost had blown out to \$527 million.<sup>11</sup> ANSTO stands by its cost assessments.

### **Outline of the project under contract**

7.11 In looking at the contract, the Committee again finds itself constrained in conducting a thorough inquiry because it has not been granted access to relevant documents, including the contract itself, and has had to rely on ANSTO to select material it deems appropriate for the Committee's purposes.

7.12 According to ANSTO, the contract is to be a design and construct arrangement on a fit-for-purpose basis.<sup>12</sup> The project covered by the contract includes all works necessary for the provision of a functioning pool type research reactor and facility, including the buildings, the necessary plant and equipment and the provision of interfaces to integrate with existing site infrastructure, which is to remain operational to enable effective use of the facilities.<sup>13</sup> The project will be undertaken on

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7 Professor Helen Garnett, *Public Works Committee Hansard*, 5 May 1999, p. 146.

8 Siemens, submission no. 78.

9 ANSTO, submission no. 118A, p. 29.

10 Mr Jean-Luc Minguet, *Committee Hansard*, 5 December 2000, p. 431.

11 "Nuclear chiefs deny reactor cost blow-out", in *The Canberra Times*, 17 June 2000.

12 ANSTO, Replacement Research Reactor Project, *Report of the Tender Selection Review Committee*, 13 May 2000. Reprinted at Attachment F, ANSTO, submission no. 118.

13 Professor Helen Garnett, *Public Works Committee Hansard*, 5 May 1999, p. 136.

a lump-sum turnkey basis, which means that the reactor will be built and handed over ready for use.

7.13 The prime contractor, INVAP, is responsible for the delivery of ANSTO's required performance outcomes. It is required to deliver pre-determined levels of performance in relation to specifically defined parameters related to the ongoing performance of the facility. These pre-determined levels of performance are embedded in the contract provisions.<sup>14</sup> The contract is specific in terms of INVAP's obligations to meet ANSTO's performance requirements within budget and schedule. This means that INVAP is required to produce contract deliverables for each sub-plan against a pre-determined calendar of events for review and verification by ANSTO.<sup>15</sup>

7.14 ANSTO has linked payments to performance as a mechanism to minimise risk.<sup>16</sup> Contract payments will be based on measurable contract milestones. This means that payment will be paid progressively and only made for satisfactory performance against pre-determined contract stages. Work packages are structured to be paid, subject to measured progress, at 0/35/70/100% completion. Planned payments which are not achieved are removed from the claim for payment submitted by INVAP and paid at a later date, when it can be shown that the work has achieved the required level of completion. ANSTO said that its project management team will work in close consultation with INVAP and, where necessary, with ARPANSA to ensure that the contract is progressed in accordance with the contract schedule.<sup>17</sup>

7.15 When ANSTO was questioned during the Additional Estimates hearings of the Senate Economics Legislation Committee in early 2001, Professor Garnett was not able to reveal to the Committee which work packages at that stage had commenced or had been completed. ANSTO was also unable to provide information on how much had been paid or how much each work package was worth.

7.16 When asked to provide answers on notice regarding the details of the work packages and their value, Professor Garnett responded:

**Prof. Garnett** – No, I could not possibly do that because it comes right down to very, very detailed things which I think would be in conflict with some of our obligations. What we have done already is to provide information. Certainly the PBS says very clearly that in the financial year 2000-01 there will be \$50 million expended.

**Senator FORSHAW** – Yes, but on what? That is what I want to know. You can throw up these figures of \$286 million and \$50 million around, but

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14 ANSTO, Summary of Contract, *Additional Information*, 6 November 2000.

15 *ibid.*

16 ANAO recommends payments be made only on completion of clearly identified milestones. See Management Advisory Board/Management Improvement Advisory Committee, *Before You Sign the Dotted Line*, May 1997, p. 21 which insists on full completion of work before payments.

17 Mr Garry Seaborne, Public Work *Committee Hansard*, 5 May 1999, p. 141.

I am trying to find out – and I think the parliament has a right to know – how that is actually broken up. I find it somewhat incredible that you can be so firm that the price for this facility is going to be \$286.4 million in 1997 dollars and not a dollar more, but when I ask how you arrive at that figure by the way of the various packages, I am told that I cannot have that information.

**Prof. Garnett** – We will try to give you a reasonable answer that provides you with a bit more information, but you cannot readily break it down into just design constructs because they are not phases that go from A to B, and work packages are very complex things.<sup>18</sup>

7.17 Subsequently, on 27 April 2001 DISR provided some details on current expenditure on the project. They advised that as at 31 January 2001, \$9.2 million (excluding GST) had been spent on Phases I and II of the project. These phases involved activities and work associated with pre-qualification, development of tender documentation, preparation and approval of tender evaluation procedures, tender evaluation, clarification and reporting, pre-contract negotiations and awarding of the contract, and ANSTO project management costs.

7.18 DISR also advised that the ongoing costs for Phase III amounted to \$25.5 million of which \$24.7 million had been paid to INVAP for detailed design activities, preparation of documentation for the preliminary safety analysis, attendance at design reviews and INVAP project management costs.

7.19 DISR also provided a breakdown of the total cost of the new reactor (in 1999 dollars) according to the principal activities for the various stages of the project. The table of expenditure provided by DISR is included at Appendix 5.

7.20 The Committee again notes that ANSTO initially claimed that they were unable to provide such expenditure details. It was only after persistent requests for this information that it was eventually supplied by the Department.

7.21 INVAP is providing contract security to the value of 10% of the contract sum until the Contract Performance Acceptance Tests have been satisfactorily completed. At this time, the contract security reduces to 5% of the contract sum for two years, during which the operational availability and reliability of the facility will be measured.<sup>19</sup>

### **The timeframe and process to be followed by the Australian Radiation Protection and Nuclear Safety Agency**

7.22 Under the *Australian Radiation Protection and Nuclear Safety Act 1998*, a controlled person must not prepare a site for, construct, or have possession or operate a nuclear installation or a prescribed radiation facility, known as a controlled facility,

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18 *Committee Hansard*, 21 February 2001, p. E73.

19 ANSTO, Summary of Contract, *Additional Information*, 6 November 2000.

unless the person is authorised to do so by a facility licence.<sup>20</sup> Any person covered by a facility licence must comply with the conditions of the licence that are applicable to the person.<sup>21</sup>

7.23 The Act determines that the Chief Executive Officer (CEO) of ARPANSA may issue a licence that authorises persons to prepare a site for, construct or operate a controlled facility. It further stipulates that in deciding whether to issue a licence, the CEO must take into account international best practice in relation to radiation protection and nuclear safety.<sup>22</sup> An application for a licence must be in a form approved by the CEO who has the authority at any time to amend a licence by notice in writing given to the licence holder. Similarly the CEO may, under particular circumstances such as a breach of the conditions of the licence, suspend or cancel a licence. In addition the CEO may, where there are reasonable grounds to believe that a controlled person is not complying with the Act or regulations, issue directions to that person. Steps should be taken in accord with this direction within the time specified in the notice.<sup>23</sup>

7.24 Clearly, the CEO has extensive powers in granting or suspending a licence and has scope to use his discretion. The CEO, however, must also observe certain stringent requirements when deciding on a licence. For example, in deciding whether to issue a licence he must take account of matters which include:

- whether the information establishes that the proposed conduct can be carried out without undue risk to the health and safety of people, and to the environment;
- whether the applicant has shown that there is a net benefit from carrying out the conduct relating to the controlled facility; and
- the content of any submissions made by members of the public about the application.<sup>24</sup>

7.25 This legislation means that ANSTO must have the relevant licences before it can proceed with the construction and operation of the proposed research reactor and that it must comply with the conditions of the licence it now holds to prepare the site for construction or risk having it suspended.

7.26 After the signing of the contract, the siting licence was amended to cover INVAP. Before approving the amendment, the CEO of ARPANSA, Dr John Loy, requested ANSTO to brief him on a number of matters. He wanted information on the

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20 The Act defines a controlled person as a Commonwealth entity, a Commonwealth contractor, a person in the capacity of an employee of a Commonwealth contractor, or a person in a prescribed Commonwealth place.

21 Clause 30 and 31, Division 1, Part 5, *Australian Radiation Protection and Nuclear Safety Act 1998*.

22 Clause 32, *Australian Radiation Protection and Nuclear Safety Act 1998*.

23 Clause 41, *Australian Radiation Protection and Nuclear Safety Act 1998*.

24 Australian Radiation Protection and Nuclear Safety Regulations 1999, Division 3, Clause 41, p. 27.

work to be performed in preparing the site for the proposed reactor by INVAP, its employees and subcontractors and on the contractual relationship between ANSTO and INVAP covering this part of the work. He also requested information on the capacity and fitness of INVAP to undertake the works envisaged.<sup>25</sup> Dr Loy made the point:

Clearly, the evaluations leading to this licensing decision are carried out against a generic description of the reactor in the application. I have judged that to be sufficient to support a decision to issue a facility licence authorising ANSTO to prepare a site for the controlled facility proposed in the application. I expect that after evaluation of tenders, ANSTO will seek a licence to construct the Replacement Research Reactor and at that time I will evaluate that application against information flowing from a detailed design.<sup>26</sup>

7.27 He submitted that he will need to consider these and other relevant issues in greater depth in the context of any application by ANSTO for a facility licence authorising the organisation to construct the proposed replacement research reactor.<sup>27</sup> For example it is a condition of the contract that ARPANSA be satisfied that the Reference Accident assumptions be incorporated in the design.<sup>28</sup>

7.28 Dr Loy, said that he expected that ANSTO would apply for a licence to construct the proposed reactor during the second quarter of 2001. Upon receipt of the application and as required by legislation, he would then advertise his intention to make a decision about the application and invite public submissions on it. It is estimated that this process would take about nine months, including a minimum of three months for public review and submissions.<sup>29</sup>

7.29 The CEO explained that should a licence for the construction of the facility be granted, ARPANSA would audit and inspect the construction to ensure that the plant is built in accordance with the construction licence and any conditions that might be imposed. He stated further that during the final stages of construction, which is expected to be during the second half of 2004, ANSTO would apply for a licence to operate the reactor. This application would include a Final Safety Analysis Report (FSAR) on the constructed plant, the operating organisation and its plans, and arrangements and procedures for ensuring safe operation.

7.30 In tandem with ARPANSA's assessment, the CEO would make the FSAR available for public review and invite public submissions on the application. At this

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25 ARPANSA, submission no. 144, p. 3.

26 Statement by the CEO of ARPANSA, 'Issue of a Licence to the Australian Nuclear Science and Technology Organisation to Prepare a Site for a Replacement Research Reactor Facility, 22 September 1999'.

27 ARPANSA, submission no. 144, p. 3.

28 ANSTO, submission no. 118, Attachment O.

29 ARPANSA, submission no. 144, p. 1158.

stage, it is estimated that ARPANSA would take about six months to complete its assessment, and this would include a period of about three months for public review and comment.<sup>30</sup>

7.31 Dr Loy made the point that any risk that the project cannot proceed or requires substantive change as a result of subsequent licensing decisions is properly one for the parties to the contract to bear and to take into account in its contracting arrangements.<sup>31</sup>

7.32 Both INVAP and ANSTO understand that ARPANSA will be vitally involved throughout the duration of the project. They are certainly aware of the regulations under which the CEO operates before he can issue a licence to construct and the obligations placed on them to meet his requirements. Indeed, ANSTO confirmed that the contract for the replacement research reactor clearly requires the contractor to comply with all licensing requirements of ARPANSA as set down in the ARPANS Act and Regulations. Clause 3.2 of the contract reads:

INVAP shall fully comply with all requirements of the Regulator in respect to the safety and licensing of the Works to satisfy the condition precedent that ANSTO will cause to be constructed a facility which will meet the national and international safety principles, standards and requirements which apply to the design, construction, commissioning and operation of research reactors, and to fully comply with all commitments and conditions arising from the EIS process.<sup>32</sup>

7.33 ANSTO and INVAP also understand the obligations placed on each to meet specified requirements. ANSTO submitted:

The Contract requires the Contractor [INVAP] to ensure that the reactor facility can be licensed by the Regulator [ARPANSA]. In support of this, the Contractor shall prepare the documents that will be used by the Principal [ANSTO] to support the requisite applications to the Regulator and shall provide the Principal all necessary support to obtain the requisite licenses or authorisations from the Regulator.<sup>33</sup>

7.34 As noted in the above statement, under the terms of the contract INVAP is responsible for preparing the documents upon which the application for authorisation to construct the works will be based. Such documents are to include information on:

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30 ARPANSA, submission no. 144, p. 4.

31 Submission no. 114, p. 2 and *Committee Hansard*, 26 October 2000, p. 233. ANSTO Answers to question, no. 60 and 63, Additional Information from ANSTO,

32 See Summary of contract provided by ANSTO, Additional Information, 6 November 2000, Clause 17: Requirements of Statutes and Subordinate Legislation, ANSTO Submission no. 118, Attachment N and p. 25

33 ANSTO, *Additional Information*, 31 October 2000, p. 22.



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- the design of the works, including ways in which the design deals with the physical and environmental characteristics of the site;
  - any difficulties that will need to be resolved before any future authorisation is given;
  - the construction plan and schedule;
  - a preliminary safety analysis report that demonstrates the adequacy of the design of the reactor facility and identifies the structures, components and systems that are safety related items; and
  - the arrangements for testing and commissioning safety related items.

7.35 A similar requirement is placed on INVAP to prepare the documents upon which the application for authorisation to operate the works is based. In this case the documents will include information on the following matters:

- the arrangements for maintaining criticality, safety during loading, moving or storing nuclear fuel and other fissile materials;
- the arrangements for safe storage of controlled material;
- the description of the structures, components, systems and equipment of the Works as they have been constructed;
- a final safety analysis report that demonstrates the adequacy of the design of the Works and includes the results of the commissioning tests;
- the operational limits and conditions of the Works; and
- the arrangements for operating and maintaining the Works.<sup>34</sup>

7.36 ANSTO takes full responsibility for the achievement of the licensing of the facility at all stages, on the basis that INVAP fully satisfies all of its licensing related obligations under the contract with ANSTO.

7.37 It is important to note that where delays in the licensing process are attributable to shortcomings by INVAP, it will be required to make good, and will also be liable for predetermined liquidated damages provided for under the contract. On the other hand where delays are caused by ANSTO, it bears the responsibility to correct the deficiency at its cost, including any costs that INVAP may have a right to claim under the contract in such circumstances.

7.38 The contract also provides for any hold-ups in the construction of the new research reactor as a result of the actions of the Regulator, which was of a nature not reasonably foreseen by INVAP at the contract base date of 23 November 1999. In this case ANSTO is required to accept responsibility for delays in the issuing of a licence

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34 ANSTO, submission no. 118, pp. 25–26.

that disrupts INVAP's schedule. In such cases, however, INVAP shall not be entitled to recover additional costs unless a delay in excess of 15 working days occurs.<sup>35</sup>

7.39 According to ANSTO the terms of the contract set out INVAP's responsibilities and those of ANSTO in satisfying ARPANSA's requirements for the issuing of a licence to construct the reactor and to operate it. Clearly, if they do not meet these conditions, the CEO of ARPANSA has the authority to cancel the existing licence to prepare the site for construction and to refuse to grant a licence for proceeding with the construction and operation of the facility.

**Other requirements for approvals from the Commonwealth, state or local governments and the consequences if such approvals are not obtained.**

7.40 The Commonwealth Constitution confers on the Parliament the exclusive power to make laws for the peace, order and good government of the Commonwealth with respect to all places acquired by the Commonwealth for public purposes.<sup>36</sup>

7.41 ANSTO is a Commonwealth authority established by the *Australian Nuclear Science and Technology Organisation Act 1987*. Section 7A of this Act, provides ANSTO with immunity from certain classes of State and Territory laws and regulations. More specifically, ANSTO is not subject to State or Territory laws so far as they relate to the use or proposed use of land or premises, the environmental consequences of the use of land or premises, or radioactive materials or dangerous goods. Under Section 109 of the Constitution, when a law of a State is inconsistent with a Commonwealth law, the latter prevails.

7.42 Although exempt from these State or Territory laws and regulations, ANSTO advised that it has undertaken to comply with standards set under certain NSW environmental and radiation protection statutes. This action is in accordance with the principles underpinning the Inter-Governmental Agreement on the Environment and involves consultation with NSW regulatory authorities such as the Environment Protection Authority, the Department of Urban Affairs and Planning and the WorkCover Authority to ensure that regional issues are taken into account and relevant standards observed.<sup>37</sup>

7.43 The Committee notes however the concern of the Sutherland Shire Council in that it has no involvement in the planning and approval process for this project. This is a Commonwealth project being constructed on Commonwealth owned land, and therefore the Council is prevented from carrying out its normal duties and responsibilities with respect to planning and land use.

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35 ANSTO, submission no. 118, Attachment N.

36 *Commonwealth of Australia Constitution Act*, Clause 52.

37 ANSTO, submission no. 118, p. 28.

7.44 With regard to the construction of the replacement reactor, certain types of plant and equipment will have to be notified and registered under the *Occupational Health and Safety (Commonwealth Employment) Act 1991* and under State legislation. The construction of these items must meet recognised standards and satisfy the necessary tests and inspections before Comcare will issue a licence to operate them. Failure to obtain these licences means that the items cannot be used.

7.45 Over and above the need to satisfy ARPANSA's requirements, ANSTO has committed itself to observing certain other standards. It informed the Committee:

the replacement reactor will be designed to the exacting safety criteria of ARPANSA and will be in full conformance with international criteria set by the International Atomic Energy Agency. High quality engineering standards will also be applied to all construction and the reactor facility will be accredited to Australian quality and environmental management standards.<sup>38</sup>

### **Preconditions set in the Environmental Impact Statement (EIS) and other previous inquiries**

7.46 ANSTO informed the Committee that compliance with all undertakings and commitments given by it within the EIS and all relevant recommendations from the Minister for the Environment and Heritage was a mandatory component of the tender process and is part of the contractual arrangements. ANSTO assured the Committee that INVAP demonstrated that it would comply with those EIS undertakings and commitments through all phases of the replacement reactor project.<sup>39</sup>

7.47 The undertakings given by ANSTO in the EIS are comprehensive and cover environmental management during the construction and operation of the replacement research reactor. Management measures during construction include such things as phasing construction to confine disturbance to areas of workable size and minimise duration of disturbance, and maintaining natural vegetation to act as a buffer to minimise erosion and sedimentation. Management measures during the operation of the reactor include matters such as geology, soil and water, air quality, management of reactor products, spent fuel and wastes, hazards and risks, flora and fauna, planning and land use, and infrastructure and services.

7.48 The relevant conditions set by the Minister and now the responsibility of INVAP under the contract are also numerous. For example, INVAP must prepare an environmental impact management plan prior to the commencement of construction

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38 ANSTO, *Additional information*, answer to question no. 80, 31 October 2000, p. 32.

39 ANSTO, submission no. 118, Attachment O, p. 30; Professor Helen Garnett, *Committee Hansard*, 9 October 2000, p.4.

on the site.<sup>40</sup> A fuller discussion of the undertakings given in the EIS and of the Minister's conditions occurs in Chapter 9, and are listed at Appendices 3 and 4.

7.49 As these requirements are now part of the contractual agreements, failure to meet them would render INVAP in breach of its legal obligations and subject to whatever penalties are spelt out in the contract. Preconditions set or recommendations made by other inquiries place no legal obligation on the Commonwealth. As is the case with the commitments made by the Minister for the Environment and Heritage, such conditions or recommendations can be accepted by government and incorporated into legislation or formal agreements; otherwise they carry no legal force.

**The nature of any provisions in the contract related to the ability of either party to terminate the contract prior to completion and the provisions in relation to compensation for termination.**

7.50 There are three sets of circumstances in the contract that relate to early termination. These are: termination on the grounds of convenience; default or bankruptcy of INVAP; and default of ANSTO.

*Termination for Convenience (Clause 60, Conditions of Contract)*

7.51 Without prejudice to any of ANSTO's other rights or entitlements or powers under the Contract, ANSTO may for its sole convenience by written notice to INVAP terminate the employment of INVAP under the Contract. In such circumstances, INVAP shall be entitled to payment of the following amounts as determined by the project manager:

- the value of all work carried out in accordance with the Contract to the date of termination, less amounts previously paid to INVAP in respect thereof;
- all reasonable direct costs incurred by INVAP as a result of the termination, subject to its duty to mitigate such costs; and
- an amount of 3% of the difference between the Contract Sum and the total value of payments made in accordance with the Progress Certificates issued to the date of termination.<sup>41</sup>

7.52 This clause answers directly the question concerning the legal situation if a future government decides not to proceed with the research reactor.

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40 ANSTO, submission no. 118, Attachment O, 'Status Report on the Implementation of the Conditions Arising From the Environmental Impact Assessment of the Replacement Research Reactor at Lucas Heights', August 2000.

41 ANSTO, submission no. 118, p. 33.

*Default or Bankruptcy of INVAP (Clause 51)*

7.53 Under Clause 51.1 covering the procedure on default of contractor, the contract spells out the procedures to be followed should ANSTO be dissatisfied with INVAP's performance.

7.54 In simple terms, if INVAP defaults in the performance or observance of any condition in the contract, ANSTO may call upon INVAP to show cause why ANSTO should not take over the work to be completed or cancel the contract.<sup>42</sup>

7.55 If INVAP fails to show cause to the satisfaction of ANSTO why such measures should not be taken, ANSTO may proceed to take action against INVAP. Similarly, if INVAP notifies the Project Manager in writing that it is unable or unwilling to complete the Works, or to remedy the default, ANSTO again may either take over the work to be completed or cancel the contract.

7.56 Should ANSTO elect to complete the whole or any part of the work remaining to be completed, it may employ any person or persons other than INVAP to carry out that work. In this context, ANSTO shall have the express power and INVAP's consent to contract directly with INVAP's subcontractors including the Consultants.

7.57 The Contract also makes provision for bankruptcy proceedings. If INVAP takes or has taken or instituted against it any action or proceedings which may result in it being wound up or a receiver is appointed to carry on its business for the benefit of its creditors, ANSTO may take action against INVAP. This means that ANSTO may take over the work to be completed by INVAP or cancel the contract.<sup>43</sup>

7.58 Should INVAP experience financial difficulties, ANSTO told the Committee that:

in essence...in the event that INVAP became bankrupt while carrying out its obligations under the Contract, and in the most unlikely event that the Province of Rio Negro failed to honour its undertaking of primary support to INVAP, the Argentine Government would be prepared to assist in ensuring that a line of credit was established to enable INVAP to complete its obligations in accordance with the Contract.<sup>44</sup>

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42 ANSTO, submission no. 118, Attachment R.

43 ANSTO, submission no. 118, Attachment R.

44 ANSTO, *Additional Information*, answer to question no. 75, 31 October 2000, p. 31. See also Ambassador Stancanelli, *Committee Hansard*, 6 November 2000, p. 379. He provided a letter from the Secretary of Economic and Regional Planning to ANSTO which in part read, '...the Argentinean government backs INVAP SE and will, should it prove necessary, facilitate its access to financing in relation to the execution of its work for ANSTO in the construction of a nuclear replacement research reactor at Lucas Heights...

*Default of ANSTO (Clause 51A)*

7.59 If ANSTO commits a substantial breach of contract, for which damages are not an adequate remedy, INVAP may give ANSTO written notice to show cause why it should not take action against it.

Substantial breaches under the Contract are:

- failure to make a payment within the specified time; and
- failure by the project manager to issue a Certificate of Completion.

Any notice given under this clause shall substantiate the details of the claim. If ANSTO fails to show reasonable cause within the allocated time, by notice in writing, INVAP may suspend the whole or any part of the work under the Contract.

7.60 INVAP shall lift the suspension if ANSTO remedies the breach. If ANSTO fails to remedy the breach within the allocated time, or fails to make other arrangements to the reasonable satisfaction of INVAP or if the breach is not capable of remedy, INVAP may, by notice in writing to ANSTO, terminate the Contract. INVAP shall be entitled to recover from ANSTO any losses incurred by INVAP by reason of the suspension.

7.61 If the Contract is terminated pursuant to these provisions, the rights and liabilities of the parties shall be the same as they would have been at common law had the defaulting party repudiated the Contract and the other party elected to treat the Contract as at an end and recover damages.

**Summary**

7.62 As noted earlier, the Committee has not been provided with a complete copy of the contract and has therefore had to rely on ANSTO's written submission and evidence to the Committee. On this limited information, it would appear that the nature of the contractual commitments at least stipulate the responsibilities of each party to the agreement and the action to be taken should either party fail to meet its legal obligations.

**Whether all or part of the contract and other documents created during its consideration and approval should now be made public**

7.63 As mentioned earlier the Committee has had difficulty in obtaining the contract and related documents and now considers whether such material should be made public.

7.64 This matter follows closely, and indeed overlaps with, the discussion on public access to information about the replacement research reactor project during the tendering process. In this section, the Committee examines closely the Parliament's right to scrutinise and hold publicly funded agencies accountable. It then considers whether ANSTO's reasons for withholding documents relating to the contract are justified.

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### *Accountability to Parliament*

7.65 Accountability underpins the concept of modern democracy. A key aspect of accountability is the transparency of both decision-making by public administrators and the performance of the service provider. In 1995, the Australian Law Reform Commission (ALRC) and the Administrative Review Council highlighted the importance of public access to information in the joint review of the *Freedom of Information Act 1982*. They argue:

Access to government information is a pre-requisite to the proper functioning of a democratic society. Without information, people cannot exercise their rights and responsibilities or make informed choices. Information is necessary for government accountability. Limited information can distort the accountability process: governments are questioned about the wrong issues and programs are incorrectly evaluated. Without information people cannot make an informed choice at the ballot box and members of Parliament cannot supervise the Executive.<sup>45</sup>

7.66 Recently, the Auditor-General, Mr Pat Barrett, voiced his growing concern over government agencies inserting confidentiality clauses in agreements or contracts which can ‘impact adversely on parliament’s right to know...’.<sup>46</sup> A particular concern is that agencies may too readily agree to treat contractors’ documents as confidential, notwithstanding the wide access powers that may be provided to the Auditor-General.<sup>47</sup>

7.67 Mr Barrett maintained that the question as to whether or not commercial-in-confidence information should be disclosed to the Parliament should start from the general principle that information should be made public unless there is good reason for it not to be.<sup>48</sup> In other words, there should be a reversal of the onus of proof, which requires the party arguing for non-disclosure to substantiate that such disclosure would be harmful to its commercial interests.<sup>49</sup>

7.68 In 1998, the Administrative Review Council in its Report recommended that:

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45 Industry Commission, *Competitive Tendering and Contracting by Public Sector Agencies*, 24 October 1995, p.87.

46 P.J.Barrett, ‘Balancing Accountability and Efficiency in a More Competitive Public Sector Environment, delivered 25 May 2000 at the ‘Government in Excellence Summit 2000—Reinventing Government—A Manifesto for Achieving Excellence and Managing for Results, Singapore, p. 47 of 57.

47 *ibid.*, p. 49 of 57.

48 *ibid.*, p. 49 of 57.

49 *ibid.*, p. 33 of 57.

Agencies should include provisions in their contracts that require contractors to keep and provide sufficient information to allow for proper Parliamentary scrutiny of the contract and its management.<sup>50</sup>

In a similar vein, the Industry Commission has recommended that:

Recognising the balance between commercial confidentiality and accountability, governments should make public as much information as possible to enable interested people to assess contracting decisions made by agencies. Of particular importance is information on the specifications of the service, the criteria for tender evaluation, the criteria for the measurement of performance and how well the service provider has performed against those criteria.<sup>51</sup>

7.69 The Australasian Council of Auditor Generals warned that in many circumstances, committees of Parliament which have been granted the right to call for papers and persons also have the duty to examine these commercial documents in order to meet Parliament's requirements. As a practical matter, unless these committees do carefully consider commercial documents relevant to the terms of their inquiry, they are capable of being misled, of misleading Parliament and of causing Parliament to fail its oversighting and legislative role. It concluded:

Parliamentary democracy and responsible Government provide the foundation for Australia's politic. Inherent in these is the necessity for Parliament to scrutinise the activities of Government and for the Government to facilitate that scrutiny through the provision of information.<sup>52</sup>

#### *Reasons for documents withheld*

7.70 For the purposes of this discussion, the Committee considers that the documents relating to the contract for the new reactor can be divided into two sets. The first set is the Request for Tender documentation, which includes *inter alia* the conditions of tender and the Principal's Project Requirements. That is, this set includes ANSTO's specification of what it was looking for, in response to which the vendors submitted their bids. The second set is the contract documents, which it is claimed, include intellectual property and trade secrets belonging to the vendors and submitted in response to the Request for Tender, as well as commercial information.

7.71 At a public hearing on 9 October 2000, the Chair of the Committee requested that ANSTO provide some of the first set of documents relating to the tendering

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50 Administrative Review Council, *The Contracting Out of Government Services*, Report to the Attorney-General, Report No. 42, August 1998, p. 9. See also Joint Committee of Public Accounts and Audit, *Contract Management in the Australian Public Service*, October 2000, p. 12.

51 Joint Committee of Public Accounts and Audit, *Contract Management in the Australian Public Service*, October 2000, p.12.

52 Australasian Council of Auditors-General, *Statement of Principles: Commercial Confidentiality and the Public Interest*, <http://www.acag.org.au/accomm02.htm> (7 November 2000).



process, including the Principal's Project Requirements. In reply, Professor Garnett said:

We have some problems with providing some of the information on the public record. I think everyone is aware that ANSTO as an organisation is required to obtain certain revenues and returns, and there are certainly expectations in regard to some business opportunities that might emerge from the replacement reactor. ANSTO has some problems determining and putting quite openly on the public record what its requirements are because it flags what our business will be in the future.<sup>53</sup>

7.72 A week later, on 17 October, the Chair wrote to the CEO of ANSTO requesting documentation including the Request for Tender. In reply, the CEO refused again to supply this documentation, noting that whilst the Request for Tender is not covered by the confidentiality clauses which cover the information supplied in response to the Request and the contract itself, it does contain material that would cause damage to ANSTO should it be made public.<sup>54</sup>

7.73 As outlined in chapter 6, ANSTO's refusal to provide various documents to the Committee led to the Senate, on 6 February 2001, passing an order for the production of documents by the Minister for Industry, Science and Resources. The full text of that order is set out in Appendix 6.

7.74 On 8 February 2001, in response to the order, the Minister for Industry, Science and Resources stated again that the Request for Tender document is 'commercially confidential', but conceded that 'it may be shown to members of the Senate on an in-confidence basis'.<sup>55</sup>

**7.75 The Committee finds this situation unsatisfactory. It does not believe that making documents, such as the Request for Tender and the Principal's Project Requirements, public would result in an unreasonable disclosure of information with commercial value. Indeed, the Committee remains unconvinced that a disclosure of such material would prejudice ANSTO's commercial interests, since ANSTO is the sole operator of a research reactor in Australia. It remains entirely unclear how 'flagging its future business', as Professor Garnett put it, will compromise its competitiveness. Further, given that the research reactor is allegedly justified more on 'national interest' than on commercial grounds, the whole idea that ANSTO has significant commercial interests seems exaggerated. The Committee found ANSTO's explanation for withholding this information to be thin. The onus of proof was on ANSTO to establish that the release of this material would harm its commercial interests—it has failed to do so.**

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53 Profesor Helen Garnett, *Committee Hansard*, 9 October 2000, p. 8.

54 ANSTO, Additional Information, 27 October 2000.

55 *Return to Order*, Documents Relating to the Design and Construction of a Replacement Research Reactor at Lucas Heights, Tabled by the Minister for Industry, Science and Resources on 8 February 2001 in response to the motion moved by Senator Forshaw on 6 February 2001.

7.76 The Minister for Industry, Science and Resources offered to show these documents to members of the Senate on an in-confidence basis only after repeated requests for this material from the Committee. Again the Committee finds this situation unsatisfactory. It does not consider that such in-confidence access is sufficient to allow for proper parliamentary scrutiny of this documentation, and neither would it allow the Committee the freedom it might well require to satisfy its reporting obligations to the Senate. In-confidence access denies the Committee the opportunity to seek independent advice about the documents, and denies it the opportunity to discuss them at hearings or in its report. Moreover, the Committee does not consider that ANSTO has established a case for deeming them confidential in the first place.

7.77 This Committee has found itself in a position where it has had to repeatedly seek access to information central to its investigation. The Committee is highly critical of ANSTO's attitude which seeks to make a parliamentary committee subordinate to the whims of a government agency and prevents that committee from exercising its responsibility to scrutinise the executive. The Committee therefore appreciates the frustration experienced by the Sutherland Shire Council and members of the public who have experienced a similar attitude.

7.78 In relation to the second set of documents, the contract documents themselves, ANSTO's original submission to the Committee provided the contractual provisions relevant to licensing of the works and those relating to the default or bankruptcy of the contractor.<sup>56</sup> A summary of the key provisions of the contract was provided in response to the Chair's request for the contract itself, made on 17 October 2000. The table of contents of the contract was provided in response to the Senate's Return to Order motion of 6 February 2001. In a public hearing on 9 February 2001, Professor Garnett indicated that further information about particular contractual provisions may be able to be made available.<sup>57</sup>

7.79 The basis upon which ANSTO refused to provide the Committee with the full contract documentation was that it had provided the tenderers with a guarantee of confidentiality in the Conditions of Tender, subject only to the provisions of the *Freedom of Information Act 1982*.<sup>58</sup> Under that guarantee, and apart from persons officially concerned with the examination and evaluation of the tenders, ANSTO had promised the tenderers that the only persons to whom the information would be made available were the Minister for Industry, Science and Resources, officers of the Minister's department, and the Commonwealth Auditor-General.<sup>59</sup>

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56 ANSTO, submission no. 118, Attachments N and R.

57 Professor Helen Garnett, *Committee Hansard*, 9 February 2001, p. 549.

58 ANSTO, submission no. 118, p. 724.

59 ANSTO, submission no. 118, p. 724.

7.80 On this matter of confidentiality, the Business Council of Australia submitted that ‘material provided in confidence should not be released unilaterally and in violation of that confidence’. It maintained:

This issue is important because it goes to the broad issue of how business interacts with the public sector. If there is a lack of trust, then it will undermine the relationship, and preclude future co-operative possibilities.

Our preferred position is that the issues of how and when material is released into the public domain, is considered and agreed during the contractual phase. This prior commitment will mean that neither side is surprised by the actions of the other.<sup>60</sup>

7.81 The Committee fully agrees with this view. It does not accept, however, that ANSTO acted as a responsible government agency in adequately informing the tenders of its responsibilities.

7.82 For example, the Committee attempted to ascertain whether ANSTO had advised the tenderers of its obligations, as a government agency, to be accountable to parliament and thus of the possibility that the information and documentation provided by them may be requested by the Federal Parliament.

7.83 A series of questions was put to ANSTO on this issue. Professor Garnett replied that she believed that ‘each of [the tenderers] as a result of their own diligence knew what they would expect in operating in a country like Australia, and we acted in good faith’.<sup>61</sup> Despite seeking further clarification on this matter, the Committee received only evasive answers which indicated that, although the Australian Government Solicitor had reviewed and approved the tender documentation, explicit advice had not been given to the vendors on ANSTO’s responsibility to Parliament.<sup>62</sup>

7.84 At this point, the Committee draws attention to comments made by the Audit Office of NSW:

A contract can be written to maintain or even enhance accountability and access, or can be written to diminish both.<sup>63</sup>

It appears to the Committee that ANSTO’s approach favoured the latter.

7.85 The Committee is not convinced, on the evidence available, that ANSTO made a genuine attempt to inform the tenderers of its responsibilities to Parliament and through Parliament to the Australian people. Thus, although ANSTO advised the

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60 Business Council of Australia, Submission no. 155.

61 Professor Helen Garnett, *Committee Hansard*, 9 February 2001, p. 519.

62 *Committee Hansard*, 9 February 2001, pp. 518-20.

63 Audit Office of New South Wales, *Contacting Out Review Guide*, <http://www.audit.nsw.gov.au/contoutrev/contchklst.htm> (7 November 2000).

Committee that it was cognisant of the Senate's view 'with regard to providing as much transparency as possible to government contracts',<sup>64</sup> its behaviour belied that assurance.

7.86 The Committee was disturbed that ANSTO gave the tenderers such a broad and general assurance of confidentiality in the Conditions of Tender and finds that, at the very least, ANSTO was lax in its duty to ensure that they were fully aware of ANSTO's obligation to be accountable to the Parliament. It fully endorses and alerts ANSTO to the recommendation made by the Administrative Review Council cited earlier but repeated here:

That agencies include provisions in their contracts that require contractors to keep and provide sufficient information to allow for proper Parliamentary scrutiny of the contract and its management.<sup>65</sup>

7.87 The Committee notes ANSTO's advice that its contract with INVAP was developed directly from INVAP's response to the Request for Tender and that it incorporates detailed intellectual property and trade secrets belonging to INVAP. ANSTO argued that, for that reason, ANSTO 'and ultimately the Commonwealth, have a duty of confidence to INVAP'.<sup>66</sup>

7.88 The Committee is sensitive to the need to respect the confidentiality of genuine 'commercial-in-confidence' material. It is also conscious of the pressures of the market place with its highly competitive environment and the importance for private firms to protect their interests as far as possible. The Committee therefore understands INVAP's submission that disclosure of certain information might cause harm to both INVAP and its partners by providing an unfair advantage to their competitors in future tenders.

7.89 The Committee, however, is also conscious of its responsibility to ensure adequate parliamentary scrutiny of government activities. The research reactor project forms an integral part of Australia's scientific infrastructure and involves public health and safety concerns, and the Committee has a serious responsibility to ensure that the Parliament and the people of Australia have confidence in it.

7.90 According to Senate procedures, the power of the Senate to make an order for the production of information '... is one of the most significant powers available to a legislature to enable it to carry out its functions of scrutinising legislation and the performance of the executive arm of government.'<sup>67</sup> The decision of ANSTO and the Minister to ignore the Senate's order is regretted by the Committee. Although the

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64 Professor Helen Garnett, *Committee Hansard*, 9 October 2000, p. 4.

65 Administrative Review Council, *The Contracting Out of Government Services*, Report to the Attorney-General, Report No. 42, August 1998, p. 9.

66 ANSTO, submission no. 118, p. 724.

67 *Brief Guides to Senate Procedure*, "No. 11 Orders for Production of Documents", p. 1.

Minister and ANSTO have claimed commercial confidentiality reasons, it is up to the Senate to decide what is in the public interest and what is not. The Senate has not adopted a broad interpretation of commercial confidentiality which the Minister and ANSTO is relying upon.

7.91 Refusal to comply with Senate orders can be seen as contempt of the Senate and raises questions about ministerial accountability. Indeed, it is a contempt to disobey without reasonable excuse a lawful order of the Senate.<sup>68</sup> The Committee considers that the Minister should be censured by the Senate for refusing to comply fully with the Senate order.

7.92 ANSTO has also made it extremely difficult for local community based organisations and news groups to gain access to documentation under freedom of information provisions. In August 2000, the *Sydney Morning Herald* requested ‘documents relating to the criteria on which the successful tenderer for the replacement research reactor was chosen and any documents or correspondence between the Minister, Senator Minchin, and ANSTO, on the criteria.’ The newspaper was told that this request would involve 1,350 pages of which they would only be allowed 2 pages, and that this would cost \$7099.78.<sup>69</sup>

7.93 Greenpeace found itself in a similar situation. It had requested ‘documents relating to the tender process for the construction of a replacement research reactor and the contract arising therefrom’. The *Sydney Morning Herald* reported that this request would cost \$6,809.25 and involve 1,300 pages. ANSTO agreed that two pages could be released ‘with deletions’, and a further 20 that were not exempt.<sup>70</sup>

7.94 The Committee regrets that, during the course of this inquiry, ANSTO has been reluctant to release provisions of the contract to it. The Committee is troubled by the fact that it is the government agency rather than the Parliament which is making the decision as to what level of disclosure is appropriate in each case. Relatedly, it questions ANSTO’s justification for applying commercial-in-confidence provisions to the entire contract rather than simply to selected provisions of it.

7.95 The Committee considers that, because of the difficulty it has experienced in gaining access to the contract, it has been prevented from addressing fully the responsibilities with which it has been charged by the Senate.

7.96 In summing up this section, the Committee is highly critical of ANSTO’s approach to providing documents to the Committee. ANSTO’s attitude seems to stem from a culture of secrecy so embedded that it has forgotten its responsibility to be accountable to the Parliament.

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68 H. Evans, ed., *Odgers Australian Senate Practice*, 8<sup>th</sup> Edition, AGPS, 1997, p. 430.

69 A. Clennell, “Two pages, \$7,000 – and nuclear deal stays secret”, in *The Sydney Morning Herald*, 15 October, 2000.

70 A. Clennell, “Two pages, \$7,000 – and nuclear deal stays secret”, in *The Sydney Morning Herald*, 15 October, 2000.

