

The Auditor-General
Audit Report No.2 2011–12
Performance Audit

**Confidentiality in Government Contracts:
Senate Order for Departmental and Agency
Contracts (Calendar Year 2010 Compliance)**

Australian National Audit Office

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of Australia 2011

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Executive Director
Corporate Management Branch
Australian National Audit Office
19 National Circuit
BARTON ACT 2600

Or via email:
webmaster@anao.gov.au



Canberra ACT
25 August 2011

Dear Mr President
Dear Mr Speaker

The Australian National Audit Office has undertaken an independent performance audit across agencies in accordance with the authority contained in the *Auditor-General Act 1997*. I present the report of this audit and the accompanying brochure to the Parliament. The report is titled *Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2010 Compliance)*.

Following its tabling in Parliament, the report will be placed on the Australian National Audit Office's Homepage—<http://www.anao.gov.au>.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Ian McPhee', is positioned above the printed name.

Ian McPhee
Auditor-General

The Honourable the President of the Senate
The Honourable the Speaker of the House of Representatives
Parliament House
Canberra ACT

AUDITING FOR AUSTRALIA

The Auditor-General is head of the Australian National Audit Office (ANAO). The ANAO assists the Auditor-General to carry out his duties under the *Auditor-General Act 1997* to undertake performance audits and financial statement audits of Commonwealth public sector bodies and to provide independent reports and advice for the Parliament, the Australian Government and the community. The aim is to improve Commonwealth public sector administration and accountability.

For further information contact:
The Publications Manager
Australian National Audit Office
GPO Box 707
Canberra ACT 2601

Telephone: (02) 6203 7505
Fax: (02) 6203 7519
Email: webmaster@anao.gov.au

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<http://www.anao.gov.au>

Audit Team

Brendan Mason
Jess Scully
Stuart Turnbull

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Abbreviations and Glossary

ACMA	Australian Communications and Media Authority
ANAO	Australian National Audit Office
agencies	Agencies include Departments of State, Departments of Parliament and 'prescribed agencies' for the purpose of the <i>Financial Management and Accountability Act 1997</i> .
agency agreement	An agreement between Australian Government agencies that articulates respective agency responsibilities but is not legally enforceable.
AusTender	The Australian Government's web-based procurement information system.
confidentiality provisions	The clauses of a contract that operate to create the contractual confidentiality obligations on the parties to the contract in respect of information that is specified in the contract.
CPU	central procurement unit
DCCEE	Department of Climate Change and Energy Efficiency
Finance	Department of Finance and Deregulation
FMA Act	<i>Financial Management and Accountability Act 1997</i>
FMG	Financial Management Guidance
FMIS	Financial Management Information System
MDBA	Murray-Darling Basin Authority
The Senate Order/the Order	The Senate Order for Departmental and Agency Contracts.

Summary

Summary

Introduction

1. The Senate Order for Departmental and Agency Contracts (the Senate Order/the Order) was introduced in June 2001 to improve public access to information about Australian Government procurement. The Government agreed to comply with the Order and its subsequent amendments.¹ The main principle that underpins the Order is that the access of the Parliament and the public to information on government contracts should not be prevented, or otherwise restricted, through the use of confidentiality provisions, unless there is a sound reason to do so.

2. To accord with the Order, ministers are to table letters of advice that all agencies which they administer have placed on the Internet lists of contracts of \$100 000 or more, by no later than two calendar months after the end of each financial and calendar year. The lists are to include contracts that have not been fully performed, and any contracts entered into during the previous 12 months, and are to indicate, among other things, whether the contracts contain confidentiality provisions. The Order also requests the Auditor-General to annually review contract lists and to report any inappropriate use of confidentiality provisions.

3. The Australian National Audit Office (ANAO) used the Department of Finance and Deregulation's (Finance) Financial Management Guidance (FMG) in its assessment of the use of confidentiality provisions, to fulfil the Senate's request to the Auditor-General. In particular, FMG 3—*Guidance on Confidentiality in Procurement*, July 2007 contains four tests which agencies must apply in determining confidentiality of contracts (the Confidentiality Test). The tests are:

- the information to be protected must be specifically identified;
- the information must be commercially 'sensitive';

¹ The Government agreed to comply with the spirit of the Order and advised that information regarding individual contracts would not be provided where disclosure would be contrary to the public interest, legislative requirements and undertakings given.

- disclosure would cause unreasonable detriment to the owner of the information or another party; and
- the information was provided under an understanding that it would remain confidential.

4. In addition to the Senate Order, agencies are required to report their procurement activity in their Annual Report and on AusTender, according to varying procurement reporting requirements. Consultancy contracts in excess of \$100 000, for example, are required to be reported in each of an agency's Senate Order contract listing, its Annual Report and on AusTender. AusTender also captures information about the use of confidentiality provisions in contracts.

Audit objective, criteria and scope

5. This audit is the thirteenth in a series of audits that have fulfilled the Senate's request for the Auditor-General to provide an annual report on agencies' compliance with the Order, since it was introduced in 2001. The audit objective was to assess the appropriateness of the use and reporting of confidentiality provisions in Australian Government contracts.

6. The three high level criteria used to assess the performance of agencies' compliance with the Senate Order were: the appropriateness of the use of confidentiality provisions in a sample of contracts reported to contain confidentiality provisions for the audited agencies; the extent of compliance with the specific requirements of the Order by all FMA Act agencies; and the consistency of AusTender contract reporting and Senate Order listings for audited agencies.

7. The audit also reviewed progress made by Finance in relation to the ANAO's 2010–11 Senate Order audit recommendation to explore opportunities to consolidate procurement reporting obligations, in conjunction with a continuing focus on improving AusTender functionality.²

8. The agencies selected for the audit were the: Australian Communications and Media Authority (ACMA); Department of Climate

² ANAO Audit Report No.7 2010–11, *Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2009 Compliance)*, p. 51.

Change and Energy Efficiency (DCCEE); Department of Finance and Deregulation (Finance); and Murray-Darling Basin Authority (MDBA).³ The ANAO selected different sized agencies that had not been involved in recent ANAO Senate Order audits.⁴

Overall conclusion

9. The Senate Order contract listings for the 2010 calendar year contained 39 116 contracts for property and services totalling \$164.2 billion, of which 3397 contracts (nine per cent) were reported as containing confidentiality provisions. The reported use of confidentiality provisions by audited agencies, in around 10 per cent of contracts, has been constant over the last four calendar years and reflects a significant decline from 24 per cent of contracts in 2001–02, when the Order was first introduced.

10. The ANAO examined a sample of 110 contracts, managed by four agencies, which were reported to contain confidentiality provisions. Of the 110 contracts examined, 14 contracts (13 per cent)⁵ correctly included specific confidentiality provisions, having regard to FMG 3 – *Guidance on Confidentiality in Procurement*. The remaining 96 contracts were incorrectly listed as containing confidentiality provisions for the following reasons:

- (a) seven contracts (six per cent of all contracts examined) included specific confidentiality provisions which did not meet FMG 3's Confidentiality Test;
- (b) 78 contracts (71 per cent) contained only general confidentiality provisions.⁶ Such contracts should not be classified as containing confidentiality provisions for the purpose of the Senate Order; and

³ In December 2008, MDBA assumed responsibility for all of the functions of the former Murray-Darling Basin Commission, and in the process became an FMA Act agency subject to the Senate Order.

⁴ ACMA, DCCEE and MDBA had not been audited for the purposes of the Senate Order and Finance was last audited in 2002.

⁵ This represents a decrease in comparison to previous years, which is partly attributable to all 49 MDBA contracts not containing specific confidential information. Excluding MDBA, 23 per cent of the contracts were considered to appropriately use confidentiality provisions, a result more similar to previous audits.

⁶ General confidentiality provisions either restate legislative obligations for confidentiality (such as under the *Privacy Act 1988*), or set out a general understanding between the parties in relation to how they will deal with information when performing the contract.

(c) 11 contracts (10 per cent) contained no confidentiality provisions.

11. In the context of these findings, it is important to note that the primary focus of the Senate Order was to reduce instances of contracts including confidentiality provisions which are not justified ((a) above); and in the last two years the proportion of audit sample contracts which included such provisions has been low. Nevertheless, many contracts continue to be incorrectly listed as containing confidentiality provisions, which potentially dissuades the Parliament and the public from seeking to access contractual information, and could unduly affect agency decisions to release contractual information.

12. A large majority of FMA Act agencies (81 of 100 agencies) subject to the Order⁷ published contract listings, or a statement that no contracts had been entered into by the agency, on the Internet, by the due date of 28 February 2011. This represented a slight decline from the previous two years. Of the agencies that did not publish a contract listing on time, 11 agencies published within one month, one agency within two months and seven agencies had not published a listing by 31 July 2011. Ministers' letters representing 65 agencies were tabled by the due date (also a slight decline from the previous two years), with letters representing another 20 agencies tabled in the following month, and letters representing a further 11 agencies tabled within three months of the due date. The remaining ministers' letters covering three agencies were not tabled as at 31 July 2011.

13. Of the 93 agencies that had posted a Senate Order listing for the 2010 calendar year, 33 listings were consistent with all of the Order's information requirements. The remaining listings did not include reasons for contract confidentiality (15 per cent of agencies); did not include both the cost of compliance and its method of calculation (17 per cent of agencies); and/or included some additional information not required by the Order (such as contracts valued below \$100 000, 40 per cent of all agencies' listings).

14. For the 2010 calendar year, taking into account differences in the information the two reporting mechanisms are designed to capture, the ANAO

⁷ This includes 99 agencies required to meet the Order and the Department of the Senate which complies voluntarily. A minister's letter is not tabled for the Department of the Senate as it is not administered by a minister.

compared the audited agencies' AusTender contract reporting and Senate Order listings. The comparison found significant discrepancies in reporting of contracts and the details attributed to those contracts. Further, for the audit sample of contracts, both AusTender and Senate Order listings significantly overstated the number of contracts that actually contained confidential information; and, contract details (such as start and end dates, and values) were also regularly misreported through the two reporting mechanisms. In this context, and in response to an ANAO recommendation⁸, Finance advised that it expects to progress formal consideration of the consolidation of procurement reporting obligations in the third quarter of 2011, which would assist agencies to focus their effort to improve the accuracy of their contract reporting.

15. Overall, a decade after the introduction of the Senate Order, there remains scope for improvement in the appropriate use and reporting of confidentiality provisions in Australian Government contracts, notwithstanding that less Australian Government contracting information is being classified as confidential than in the past. For improvement to occur, it is necessary that agency staff better understand and apply the Confidentiality Test. To this end, there would be benefit in Finance, in conjunction with agencies, exploring means to better communicate key requirements and explain areas of guidance often misinterpreted by agency staff. More broadly, accurate reporting of contract information is reliant on sound agency-level data capture, collation and quality assurance, which would be supported by the consolidation of procurement reporting obligations being pursued by Finance.

16. This year's audit does not make any new recommendations. Agencies are instead advised to consider their practices in light of the recommendations of previous Senate Order audits (shown in Appendix 3). In this context, agency central procurement units and staff preparing contracts should bear in mind that if a contract only contains general confidentiality provisions (for example, for a contractor to maintain the confidentiality of information gathered during the course of the contract), Finance guidance states that such contracts are not to be classified as containing confidentiality provisions in an agency's Senate Order listing.

⁸ ANAO Audit Report No.7 2010–11, *Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2009 Compliance)*, p. 51.

Key findings by chapter

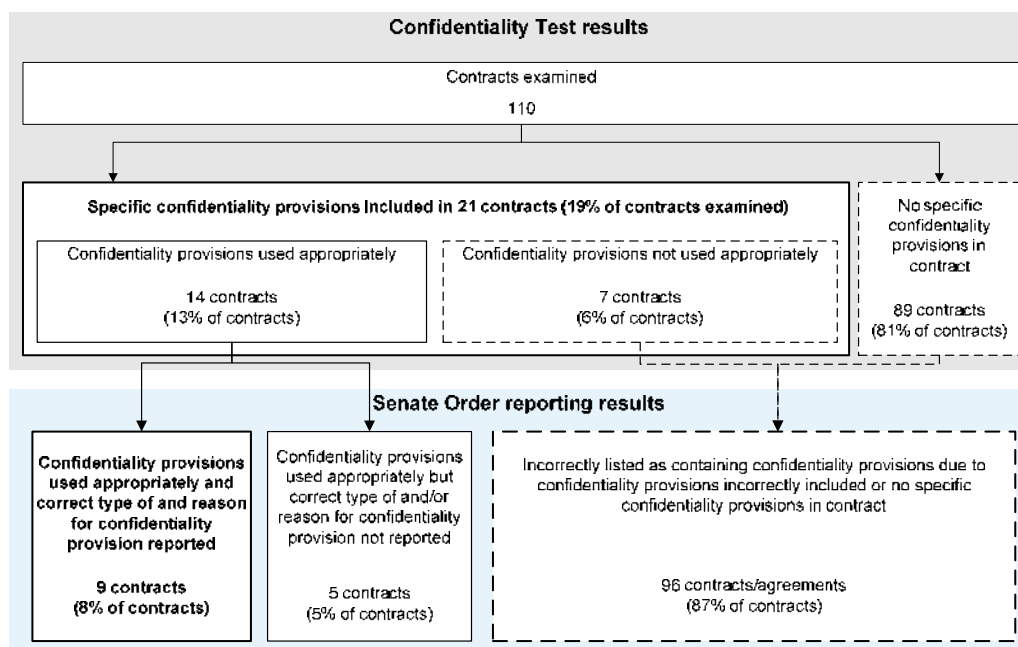
Confidentiality provisions in contracts (Chapter 2)

17. Agencies reported 39 116 contracts (valued at \$164.2 billion) in their 2010 contract listings, 3397 (nine per cent) of which were reported as containing confidentiality provisions. The ANAO examined 110 of the 3397 contracts.

18. As illustrated in Figure S.1, 89 of the 110 contracts (81 per cent) did not contain specific confidentiality provisions and seven contracts (six per cent) were assessed as including specific confidentiality provisions that were not justified, having regard to FMG 3. These 96 contracts were incorrectly listed for the Senate Order as containing confidentiality provisions. Of the 14 contracts (13 per cent) that were correctly listed as containing confidentiality provisions, nine (eight per cent) also reported the correct type of, and reason for, confidentiality.

Figure S.1

Contract analysis results: appropriateness of the use and reporting of confidentiality provisions



Source: ANAO analysis.

19. For the contracts examined, a sound practice observed was the inclusion of a section in contracts that outlines details of specific confidential information in the contract and the reasons for this information to be kept confidential. Where agencies had adopted this approach, they were more likely to use and report confidentiality provisions in contracts appropriately. The audited agencies should also review their processes for checking the presence of, and reporting of, confidentiality provisions in contracts, given that processes applied did not prevent inaccurate reporting.

20. Irrespective of the terms of a contract, agencies may be required to disclose confidential contract-related information, for example, to a Parliamentary committee or the ANAO. To ensure contract parties are fully aware of the potential for such disclosures, they should be set out in request documentation and in contracts.⁹ In this regard, approximately half of the contracts in the ANAO sample included appropriately worded clauses providing for the potential disclosure of contract-related information to a Parliamentary committee, and two-thirds provided for ANAO access. Where the audited agencies' current standard contract templates were used, contracts were found to contain appropriately worded clauses. These results suggest agencies review their use of contract templates, and whether model clauses are being appropriately applied.

Compliance with Senate Order requirements (Chapter 3)

21. The majority of agencies published Senate Order contract listings by the due date of 28 February 2011 (81 of 100 agencies). However, only a third of agencies' listings were consistent with all of the Order's information requirements (paragraphs 2(a)–(d) of the Order). This is a decline from the previous year, when approximately half of the agencies posted a contract listing consistent with all the required information.

22. As illustrated in Table S.1, the ANAO's review of the contract listings found that 40 agencies included 275 contracts valued at \$713 million¹⁰ that did

⁹ Department of Finance and Deregulation, *Guidance on Confidentiality in Procurement* (FMG 3), July 2007, p. 24.

¹⁰ The 275 contracts represent 0.7 per cent of total contracts listed and 0.4 per cent of the total value of all listed contracts.

not meet: FMG 8's contract criteria¹¹; the Order's requirements for contract timeframe; and/or the required contract value (\$100 000 or more), as per paragraph 2(a) of the Order. The overwhelming majority of agencies listed all the contract details required by paragraph 2(b) of the Order (92 of 100 agencies). A large majority of agencies (78), reported whether contracts contained specific confidentiality information, as well as the reason, in their Senate Order listings (paragraph 2(c)); and similarly, 76 agencies reported both the cost of complying with the Order and its method of calculation (paragraph 2(d)).

Table S.1

Summary of FMA Act agencies' compliance with the Senate Order

	Compliance with paragraph:			
	2(a) of the Order	2(b) of the Order	2(c) of the Order	2(d) of the Order
Number of agencies compliant	53	92	78	76
Number of agencies non-compliant	40	1	15	17
Agencies that did not publish a listing (non-compliant)	7	7	7	7
Total agencies	100	100	100	100

Source: ANAO analysis.

23. Examination of the audited agencies' Senate Order procedures found need for improvement in the:

- timeliness of some contract listings and ministers' letters, including the responsibility of departments of state to notify their portfolio agencies to prepare listings;
- comprehensiveness of guidance and training materials, some of which did not detail all requirements of the Order; and

¹¹ FMG 8 – *Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)*, January 2004 – contract criteria states that 'For a simple contract to exist, all of the following elements must be present:

- an offer;
- acceptance of an offer;
- consideration (unless the contract is executed as a deed); and
- an intention to create legal relations.'

- collection of contract data and associated quality assurance processes.¹²

The Senate Order and AusTender (Chapter 4)

24. As previously mentioned, a comparison of the audited agencies' AusTender reporting and 2010 calendar year Senate Order listings, found significant discrepancies in terms of the contracts reported and the details (including relating to confidentiality) attributed to those contracts. For example, there were 84 contracts across the four audited agencies, each valued at more than \$100 000 and from the relevant period, which were reported in AusTender but not in the agencies' 2010 calendar year Senate Order listings. The range of discrepancies identified reflected shortfalls in contract data capture, collation and quality assurance by agencies, different report timing and currency, and a known limitation in the ability of AusTender to link some contract variations with original contracts (for which a technical solution is currently being trialled).

25. To assist agencies in addressing contract data shortfalls, the ANAO previously recommended Finance review opportunities for the consolidation of procurement reporting obligations, in conjunction with a continuing focus on improving AusTender functionality. In response to this recommendation, Finance advised that it has commenced consultations with key stakeholders on consolidation of reporting and is currently testing AusTender system enhancements. Finance further advised that action to formally consider consolidation of procurement reporting is expected to commence in the third quarter of 2011. The ANAO notes the importance of consulting with stakeholders about the impacts of changes stemming from the consolidation of procurement reporting requirements, and the importance of trialling AusTender system refinements before commencing a broad rollout.

Summary of agencies' responses

26. General comments on the proposed audit report from the audited agencies are contained in full in Appendix 1. A summary of the responses is as follows:

¹² For the 110 contracts examined by the ANAO, 69 contracts (63 per cent) had discrepancies between 'start date', 'anticipated end date' and 'amount of consideration' details contained in the contract and/or the contract listings.

Australian Communications and Media Authority

27. The ACMA supports the audit findings. The ACMA values the clarity provided by the ANAO staff in the conduct of this audit and has applied the appropriate definitions for future Senate Order and AusTender reporting of confidentiality in Commonwealth contracts. The ACMA is pleased to continue to report eligible contracts to satisfy the Senate Order including the timely tabling of the Minister's Letter of Advice and identifying and reporting the methodology and costs of compliance with the Senate Order.

28. The ACMA also supports the proposed standardisation of reporting of confidentiality provisions in eligible contracts into a single reporting framework, as this would streamline administration for reporting requirements and eliminate the differences in reporting parameters between AusTender and the Senate Order listing.

Department of Climate Change and Energy Efficiency

29. The Department of Climate Change and Energy Efficiency (DCCEE) agrees with the findings in the ANAO audit report on Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2010 Compliance). DCCEE will continue to undertake ongoing improvements including, training, further quality assurance to improve data captured for reporting purposes and establishing processes to ensure reporting is undertaken in a timely manner.

Department of Finance and Deregulation

30. The audit identifies a significant decrease in the use of unnecessary confidentiality clauses in Australian Government contracts since inception of the Senate Order. This is evidence of an ongoing commitment by agencies, the ANAO and Finance to ensure confidentiality provisions in contracts are appropriate.

31. Finance considers that the Senate should review the need for the Senate Order in relation to procurement contracts. When it came into effect, the use of confidentiality clauses in government contracts was significantly higher than is the case now and there was no public reporting mechanism on such use. The use of confidentiality clauses in government contracts is now reported on AusTender, not only for contracts greater than \$100,000, but for all contracts reported (that is, at \$10,000 and above in value). As all procurement contracts awarded (at \$10,000 and above) are required to be reported on AusTender

within six weeks of the contract being signed, reporting is in 'real time', rather than the delayed point-in-time reporting delivered by the Senate Order.

32. Finance considers that AusTender should be the sole procurement reporting requirement. Finance will continue to work with departments and agencies to improve the accuracy of reporting on AusTender.

Murray-Darling Basin Authority

33. The Murray-Darling Basin Authority (MDBA) acknowledges the findings of the audit and has committed to, and is in the process of implementing, substantive improvements in internal control processes in order to rectify the matters of non-compliance with relevant Financial Management Guidelines.

34. In doing so, the MDBA also pointed to the significant and complex nature of transition from its predecessor, the Murray-Darling Basin Commission (MDBC) and the potential impact of this on the audit findings.

Audit Findings

1. Introduction

This chapter provides background information about the Senate Order and explains the audit approach.

The Senate Order

1.1 The Senate Order for Departmental and Agency Contracts (the Senate Order/the Order) was introduced in June 2001 to improve public access to information about Australian Government procurement. The Government agreed to comply with the Order and its subsequent amendments.¹³ To accord with the Order, Ministers are to table letters of advice that all agencies which they administer have placed on the Internet lists of contracts of \$100 000 or more, by no later than two calendar months after the end of each financial and calendar year. The lists are to include contracts that have not been fully performed, and any contracts entered into during the previous 12 months, and are to indicate, among other things, whether the contracts contain confidentiality provisions.

1.2 The Order requests that the Auditor-General provide an annual report indicating whether:

- agencies have appropriately used confidentiality provisions; and
- contracts not included in agencies' Internet contract listings should have been included.

1.3 The main principle that underpins the Order is that the access of the Parliament and the public to information on government contracts should not be prevented, or otherwise restricted, through the use of confidentiality provisions, unless there is a sound reason to do so. The need for confidentiality should be assessed on a case-by-case basis, and balanced against public accountability expectations and requirements. Readily available information on government contracts for property and services can lead to better results for the Australian Government and the public.

¹³ The Government agreed to comply with the spirit of the Order and advised that information regarding individual contracts would not be provided where disclosure would be contrary to the public interest, legislative requirements and undertakings given.

Senate Order guidance

1.4 The Department of Finance and Deregulation (Finance) has provided *Financial Management and Accountability Act 1997* (FMA Act) agencies with policy guidance on: confidentiality in procurement; compliance with the Senate Order; and procurement publishing obligations. This guidance is set out in the following Financial Management Guidance (FMG) publications:

- FMG 3—*Guidance on Confidentiality in Procurement*, July 2007: contains four tests which agencies must apply in determining confidentiality of contracts (the Confidentiality Test). The tests are:
 - the information to be protected must be specifically identified;
 - the information must be commercially ‘sensitive’;
 - disclosure would cause unreasonable detriment to the owner of the information or another party; and
 - the information was provided under an understanding that it would remain confidential;¹⁴
- FMG 8—*Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)*, January 2004: articulates the rationale of the Order, outlines its requirements and is designed to support agencies in developing their Senate Order listings; and
- FMG 15—*Guidance on Procurement Publishing Obligations*, July 2007: outlines the procurement reporting obligations agencies are to meet, particularly in relation to AusTender.¹⁵

AusTender

1.5 In addition to the Senate Order, agencies are required to report their procurement activity in AusTender. AusTender is a system administered by Finance and accessible to the public through the Internet. Agencies publish and

¹⁴ The complete Confidentiality Test is included at Appendix 2.

¹⁵ In May 2011, FMG 3 and 15 were incorporated into the *Buying for the Australian Government Guide*, accessible via: <http://www.finance.gov.au/procurement/procurement-policy-and-guidance/index.asp> [accessed 20 June 2011].

report a range of information regarding procurement and contracts on AusTender, including information about the use of confidentiality provisions in contracts.¹⁶

1.6 AusTender is a key component of the Government's commitment to accountability and transparency in government procurement. Use of AusTender is mandatory for all FMA Act agencies. Agencies are required to report contracts¹⁷ on AusTender that are valued at \$10 000 or above.

1.7 Although the criteria for reporting contracts in Senate Order contract listings and AusTender differ, both provide similar reporting and share the objective of ensuring accountability and transparency in Australian Government procurement activities.

1.8 Since 2005, Finance has proposed that AusTender should be the sole procurement reporting requirement for Australian Government agencies. Finance considers that AusTender provides superior timeliness, accountability, transparency and useability to the Senate Order's biannual written report on contracts over \$100 000.¹⁸

Previous ANAO Senate Order audits

1.9 This audit is the thirteenth in a series of audits that have fulfilled the Senate's request for the Auditor-General to provide an annual report on agencies' compliance with the Order, since it was introduced in 2001. The previous Senate Order audit reports and the recommendations made are listed in Appendix 3.

1.10 The last Senate Order audit (Calendar Year 2009 Compliance) made two recommendations. The first was that Finance review opportunities to consolidate procurement reporting requirements, in conjunction with the department's continuing focus on improving AusTender functionality. The second recommendation was that agencies assess whether their contract

¹⁶ The AusTender Internet page is <<https://www.tenders.gov.au/>>.

¹⁷ Including Commonwealth contracts, standing offer arrangements and agency agreements, or amendments thereto. An agency agreement is an agreement between Australian Government agencies that articulates respective agency responsibilities but is not legally enforceable.

¹⁸ ANAO Audit Report No.7 2010–11, *Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2009 Compliance)*, p. 20.

preparation processes support adequate consideration of the appropriate use of confidentiality provisions in contracts.

Audit approach

Audit objective, criteria and scope

1.11 The audit objective was to assess the appropriateness of the use and reporting of confidentiality provisions in Australian Government contracts. The three high level criteria used to assess the performance of agencies' compliance with the Senate Order were: the appropriateness of the use of confidentiality provisions in a sample of contracts reported to contain confidentiality provisions for the audited agencies; the extent of compliance with the specific requirements of the Order by all FMA Act agencies; and the consistency of AusTender contract reporting and Senate Order listings for audited agencies.

1.12 The audit also reviewed progress made by Finance in relation to the ANAO's 2010–11 Senate Order audit recommendation to explore opportunities to consolidate procurement reporting obligations, in conjunction with a continuing focus on improving AusTender functionality.¹⁹

1.13 The agencies selected for the audit were the: Australian Communications and Media Authority (ACMA); Department of Climate Change and Energy Efficiency (DCCEE); Department of Finance and Deregulation (Finance); and Murray-Darling Basin Authority (MDBA).²⁰ The ANAO selected different sized agencies that had not been involved in recent ANAO Senate Order audits.²¹

Audit methodology

1.14 A total of 119 contracts were selected from the four agencies for analysis from the 2010 calendar year Senate Order listings, consisting of a

¹⁹ ANAO Audit Report No.7 2010–11, *Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2009 Compliance)*, p. 51.

²⁰ In December 2008, MDBA assumed responsibility for all of the functions of the former Murray-Darling Basin Commission, and in the process became an FMA Act agency subject to the Senate Order.

²¹ ACMA, DCCEE and MDBA had not been audited for the purposes of the Senate Order and Finance was last audited in 2002.

sample (over 50 per cent) of MDBA contracts listed as containing confidentiality provisions and all contracts listed by the other three agencies as containing confidentiality provisions.

1.15 Nine of the sample contracts could not be examined as the agencies either reported the contract more than once in the listing or were not able to locate a signed copy of the contract. This left the sample totalling 110 contracts, consisting of: 49 MDBA contracts²²; 35 Finance contracts; 19 DCCEE contracts; and seven ACMA contracts.

1.16 The audit was conducted in accordance with ANAO auditing standards at a cost to the ANAO of approximately \$220 000.

Report structure

Chapter 2 Confidentiality Provisions in Contracts	Examines the appropriateness of the use and reporting of confidentiality provisions in Australian Government contracts, focusing on a sample of the audited agencies' contracts.
Chapter 3 Compliance with Senate Order Requirements	Examines agencies' compliance with the Senate Order requirements to table a minister's letter and post a complete contract listing for the 2010 calendar year by the due date. The audited agencies' procedures for complying with the Senate Order are also examined.
Chapter 4 The Senate Order and AusTender	Compares the audited agencies' reporting of contract details in Senate Order listings and AusTender, including confidentiality details. Finance's progress in exploring opportunities to consolidate procurement reporting obligations and in progressing improvements in AusTender functionality is also examined.

²² Seventeen out of the 49 contracts selected were executed by the MDBA's predecessor agency, the Murray-Darling Basin Commission.

2. Confidentiality Provisions in Contracts

This chapter examines the appropriateness of the use and reporting of confidentiality provisions in Australian Government contracts, focusing on a sample of the audited agencies' contracts.

Background

2.1 The Senate Order is underpinned by the principle that the Parliament and public should not be prevented from accessing contract information unless there is a sound basis for determining that the information should be kept confidential.²³ Finance has issued guidance to assist agencies to apply this principle through the appropriate use of confidentiality provisions²⁴ and correct reporting in Senate Order listings.²⁵

2.2 To determine the appropriateness of the use and reporting of confidentiality provisions, the ANAO examined:

- the trend in the reported use of confidentiality provisions from agencies' Senate Order contract listings;
- the use of confidentiality provisions for a sample of the audited agencies' contracts; and
- reporting of the confidentiality type and reason for the contract sample.

2.3 The ANAO also examined the audited agencies' use of Parliamentary and ANAO access clauses for the sample of contracts.

²³ Department of Finance and Deregulation, *Guidance on Confidentiality in Procurement* (FMG 3), July 2007, states: 'Irrespective of the terms of the contract, the Australian Government cannot provide an absolute guarantee of confidentiality. Agencies may be required to disclose confidential contract-related information to a parliamentary committee, the Auditor-General, to the public under a Freedom of Information request (if not exempted) or to a court. To ensure suppliers are fully aware of these obligations they should be set out in request documentation and in contracts which include confidentiality provisions', p. 24.

²⁴ Department of Finance and Deregulation, *Guidance on Confidentiality in Procurement* (FMG 3), July 2007.

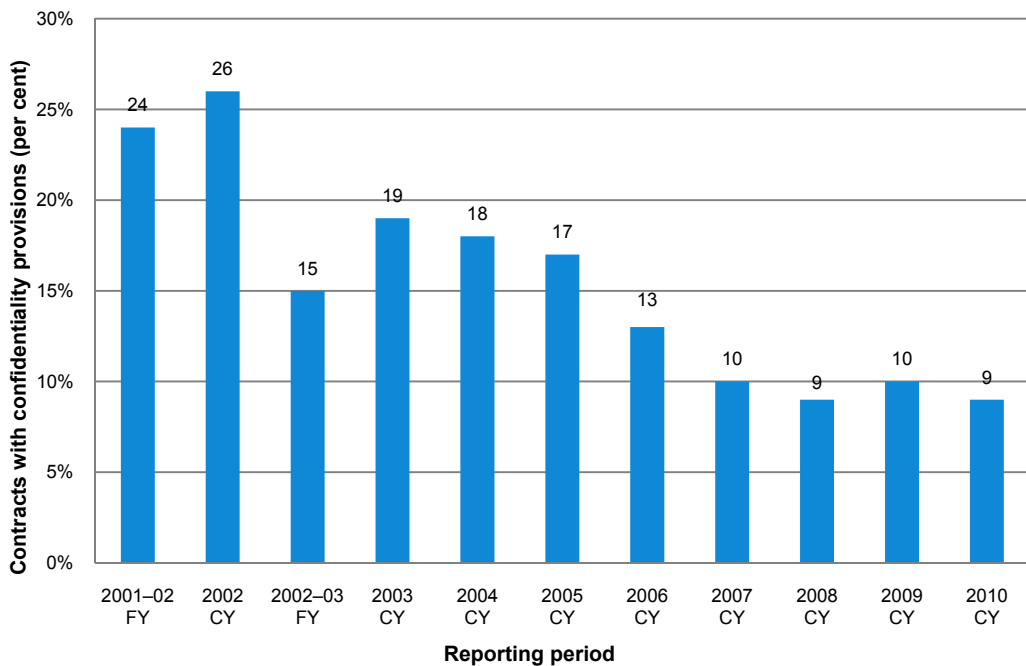
²⁵ Department of Finance and Deregulation, *Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)* (FMG 8), January 2004.

Reported use of confidentiality provisions

2.4 In response to the Senate's request, the ANAO has conducted annual reviews of the use of confidentiality provisions by agencies. Figure 2.1 shows the proportion of contracts reported by agencies as containing confidentiality provisions. The 2001–02 to 2008 figures are based on the contracts of a non-random sample of audited agencies. The 2009 and 2010 figures represent the contracts of all FMA Act agencies that listed contracts on the Internet.

Figure 2.1

Proportion of contracts reported as containing confidentiality provisions by audited agencies



Note: FY: Financial Year, CY: Calendar Year.

Source: ANAO analysis.

2.5 The proportion of contracts reported to contain confidentiality provisions by all agencies²⁶ in 2010 (nine per cent; 3397 of 39 116 of contracts reported) was slightly less than the proportion reported in the preceding year

²⁶ This includes 99 agencies required to meet the Senate Order and the Department of Senate that complies voluntarily.

(ten per cent; 4048 of 41 937 contracts reported). While the proportion of contracts reported as containing confidentiality provisions has remained fairly constant over the last four calendar years (at around 10 per cent), this proportion reflects a significant decline since the Order was introduced (from 24 per cent of contracts in 2001–02). Within this overall proportion, there was some variability in the proportion of contracts reported to contain confidentiality provisions by individual agencies. For example, eight agencies reported that more than half of their contracts contained confidentiality provisions.

2.6 Agencies may gain insight into the appropriateness of their use of confidentiality provisions, and the need for any further inquiries, by comparing the overall proportion of contracts reported to contain such provisions, and the proportion for their agency. Higher proportions of contracts containing confidentiality provisions may be appropriate given an agency's operating context and the nature of its contracts.

Use of confidentiality provisions in a sample of contracts

2.7 Agencies can be required to keep information confidential due to the operation of legislation, such as the *Privacy Act 1988*, or determine that it is necessary to keep information confidential in the public interest, to protect intellectual property or for other commercial reasons.²⁷ Confidentiality provisions are considered to be used appropriately if they meet the four criteria of the Confidentiality Test outlined in FMG 3:

- The information to be protected must be specifically identified (criterion 1);
- The information must be commercially sensitive. This means that information should not generally be known or ascertainable (criterion 2);
- Disclosure would cause unreasonable detriment to the owner of the information or another party (criterion 3); and

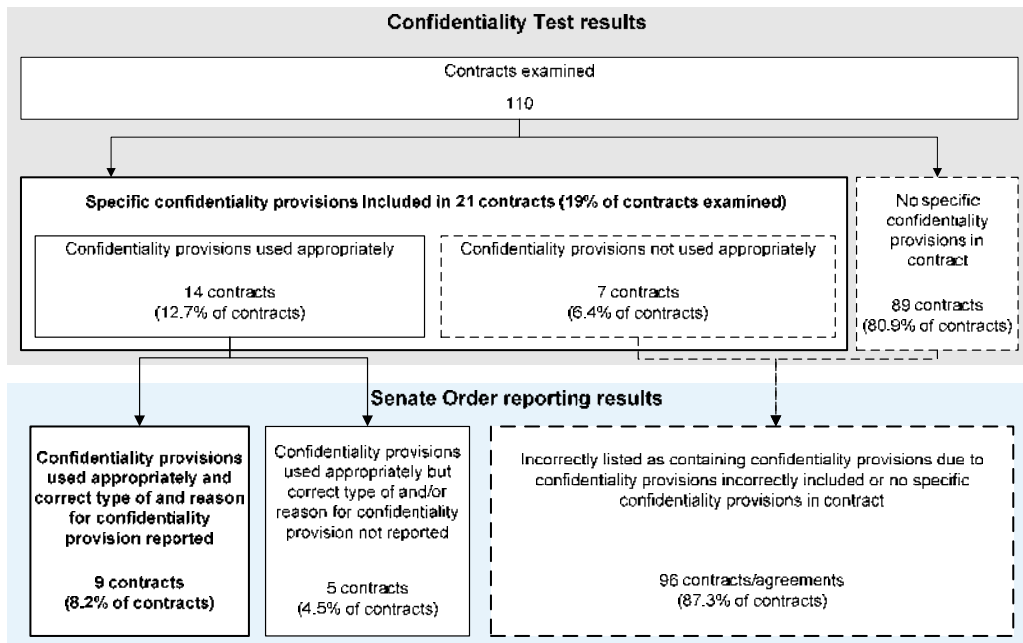
²⁷ Department of Finance and Deregulation, *Guidance on Confidentiality in Procurement* (FMG 3), July 2007, p. 9.

- The information was provided under an understanding that it would remain confidential (criterion 4).²⁸

2.8 To assess the appropriateness of the use and reporting of confidentiality provisions in contracts reported in agencies' Senate Order contract listings for the 2010 calendar year, the ANAO examined 110 of the 3397 contracts listed as containing confidentiality provisions. The ANAO's contract sample was selected from the four audited agencies' listings. The results of the ANAO's analysis of the appropriateness of the use (Confidentiality Test results) and the reporting (Senate Order reporting results) of confidentiality provisions are shown in Figure 2.2.

Figure 2.2

Contract analysis results: appropriateness of the use and reporting of confidentiality provisions



Source: ANAO analysis.

²⁸ The complete Confidentiality Test is included at Appendix 2.

2.9 The results of each of the four audited agencies are shown in Table 2.1.

Table 2.1

Contract analysis results: appropriateness of the use and reporting of confidentiality provisions (by agency)

Agency	Number of contracts reviewed	Passed Confidentiality Test 1		Passed all Confidentiality Tests		Correct confidentiality type and reason listed	
		No.	(%)	No.	(%)	No.	(%)
MDBA	49	0	0.0	0	0.0	0	0.0
Finance	35	11	31.4	9	25.7	6	17.1
DCCEE	19	7	36.8	4	21.1	2	10.5
ACMA	7	3	42.8	1	14.3	1	14.3
Total	110	21	19.1	14	12.7	9	8.2

Source: ANAO analysis.

Confidential information in the contract is specifically identified (criteria 1 and 4 of the Confidentiality Test)

2.10 The ANAO assessed the 110 contracts against the criteria of the Confidentiality Test. For a contract to be assessed as meeting criterion 1 of the Test, at least one contract provision must specifically identify information to be protected.²⁹

2.11 As shown in Figure 2.2, only 21 of 110 contracts (19 per cent) examined passed Confidentiality Test 1, and thus were considered to contain specific confidentiality provisions. The remaining contracts either contained general confidentiality provisions (78 contracts) or did not contain any confidentiality provisions (11 contracts).

2.12 Agencies consistently misinterpreted general confidentiality provisions as meeting the Confidentiality Test. General confidentiality provisions do not meet the Test because they do not record the specific information to be protected. FMG 3 instead describes the purposes of general confidentiality provisions as follows:

²⁹ The ANAO considers criterion 4 to be met if criterion 1 is met. If criterion 1 was not met, the other criteria were not assessed.

General confidentiality clauses are included in many contracts. Such clauses either restate legislative obligations for confidentiality (such as under the Privacy Act or a secrecy provision) or set out a general understanding between the parties in relation to how they will deal with information when performing the contract.³⁰

2.13 In addition to such provisions, the ANAO also classified contracts as containing only general confidentiality provisions where confidentiality information recorded was deemed to be not sufficiently specific. Table 2.2 shows examples of information in contracts deemed to be specific or general.

Table 2.2

Examples of specific and general confidentiality information in contracts

Specific	General
<ul style="list-style-type: none"> • price discount information; • agency's security arrangements, including floor plans; • the contractor's solution design or methodology; • the results of the survey (or research report). 	<ul style="list-style-type: none"> • all Commonwealth material; • all contract material; • all personal information held by...; • all data provided by...; • security classified information.

Source: ANAO, from audited agencies' contracts.

2.14 There are two processes that contribute to contracts being correctly listed as containing specific confidential information:

- recording specific information that is to be kept confidential in the contract, where appropriate; and
- accurately identifying the presence of any specific confidentiality provisions in contracts when the listing is being prepared.

Recording specific information that is to be kept confidential in the contract

2.15 All of the selected MDBA contracts, and a significant proportion of the other three agencies' contracts that were listed as containing confidentiality provisions, contained either only general or no confidentiality provisions, and therefore did not meet Confidentiality Test 1. In many instances, the contract template used did not contain a section to prompt staff to record any specific confidential information.

³⁰ Department of Finance and Deregulation, *Guidance on Confidentiality in Procurement* (FMG 3), July 2007, p. 20.

2.16 An example of a better practice contract template clause or schedule item, in terms of recording specific confidential information, is shown in Table 2.3. Such clause or schedule items, where completed, significantly increase the likelihood of passing Confidentiality Test 1, where appropriate. For example, in 2010, all 11 Finance contracts that passed Confidentiality Test 1 contained a specific area or schedule for confidential information.³¹ ANAO analysis also highlighted the importance of agency staff being prompted to complete the clause or schedule item, such as through guiding explanatory text in the contract template.

Table 2.3

Example: better practice contract template item

Information in the contract		
Information description	Reason(s) for confidentiality	Period of confidentiality
Enter Agency or Service Provider information description here	Select reason(s) from list	Enter period here

Information obtained or generated in the performance of the contract		
Information description	Reason(s) for confidentiality	Period of confidentiality
Enter Agency or Service Provider information description here	Select reason(s) from list	Enter period here

Source: ANAO, from Department of Finance and Deregulation contract templates and previous ANAO Senate Order reports.

Accurately identifying the presence of any specific confidentiality provisions in contracts when the listing is being prepared

2.17 Agencies record information on which of their contracts contain confidentiality provisions to fulfil a number of reporting requirements, including AusTender reporting and, twice yearly, their Senate Order listings.

2.18 There were a range of approaches for recording and checking of contract confidentiality provisions in the four audited agencies. In the two smaller agencies (ACMA and MDBA), the recording and checking of contract information was centralised in Central Procurement Units (CPUs). In the two

³¹ See also ANAO Audit Report No.7 2010–11, *Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2009 Compliance)*, p. 35. Contract analysis showed that 38 of the 52 contracts that met the Confidentiality Test contained a section similar to that depicted in Table 2.3.

larger agencies (DCCEE and Finance) the recording and checking of contract information was more decentralised.

2.19 In preparing their Senate Order, ACMA's CPU itself determined which contracts contained confidentiality provisions. To increase accuracy in identifying contracts to be recorded as containing specific confidentiality provisions, the CPU should bear in mind the need for such provisions to have been already documented in the contract.

2.20 The MDBA CPU sought advice from the areas of the agency that managed the contracts on whether those contracts should be listed as containing confidentiality provisions. MDBA advised that the areas' recommendations to list contracts as containing confidentiality provisions were in part due to a 'conservative' or 'risk-averse' approach. When seeking advice from line areas, agencies should remind them of the need for specific confidential information to have been recorded in the contract.

2.21 DCCEE and Finance had more decentralised arrangements. The recording of contract confidentiality information in each department's Financial Management Information System (FMIS) was the responsibility of the areas that managed the contracts. The CPUs then used this information as the basis for preparing Senate Order listings. In such circumstances, there is potential benefit in agencies providing more tailored guidance and/or training to relevant staff to improve the accuracy of identification and recording of specific confidential information.

2.22 Agencies with more decentralised arrangements should also consider the merit of an examination of a small, targeted sample of contracts listed as containing confidentiality provisions. This would increase assurance that listings accurately identify contracts as containing or not containing specific confidentiality provisions, and provide a basis for feedback to line areas.³²

Information is commercially sensitive and would cause detriment if made public (criteria 2 and 3 of the Confidentiality Test)

2.23 The Confidentiality Test states that for information to be considered confidential, it must be commercially sensitive, and disclosure of the

³² The preparation and quality assurance of Senate Order listings are further discussed at paragraphs 3.34 to 3.39.

information would cause detriment to the owner of the information or another party. FMG 3 provides examples of how to apply these criteria, and identifies information that may or may not meet the Confidentiality Test (see Table 2.4).

Table 2.4
Information that may or may not meet the requirements of the Confidentiality Test

May meet the requirements of the Confidentiality Test:	May <u>not</u> meet the requirements of the Confidentiality Test:
<ul style="list-style-type: none">• internal costing information or information about profit margins;• proprietary information, for example information about how a particular technical or business solution is to be provided;• pricing structures (where this information would reveal whether a potential supplier was making a profit or loss on the supply of a particular good or service);• artistic, literary or cultural secrets; these may include photo shoots, historic manuscripts, or secret Indigenous culture; and• intellectual property including trade secrets and other intellectual property matters where they relate to a potential supplier's competitive position.	<ul style="list-style-type: none">• performance and financial guarantees;• indemnities;• the price of an individual item or group of items;• rebates, liquidated damages and service credits;• performance measures;• clauses which describe how intellectual property rights are to be dealt with; and• payment arrangements.

Source: Department of Finance and Deregulation, *Guidance on Confidentiality in Procurement* (FMG 3), July 2007, p.11.

2.24 Of the 21 contracts that contained specific confidentiality provisions, 14 were considered to contain commercially sensitive information that would cause detriment if made public. For these 14 contracts, confidential costing or pricing information was most commonly included.

2.25 Of the seven contracts that contained specific confidentiality information but did not meet the Confidentiality Test, five related to costing/pricing information that was assessed as not being commercially sensitive. The information generally constituted ‘prices of an individual item or group of items’, rather than constituting ‘internal costing information or information about profit margins’ or ‘pricing structures’, as listed in Table 2.4. The misclassification of pricing information potentially reduces price transparency, which can increase competition among tenderers and lead to greater cost efficiencies for government.

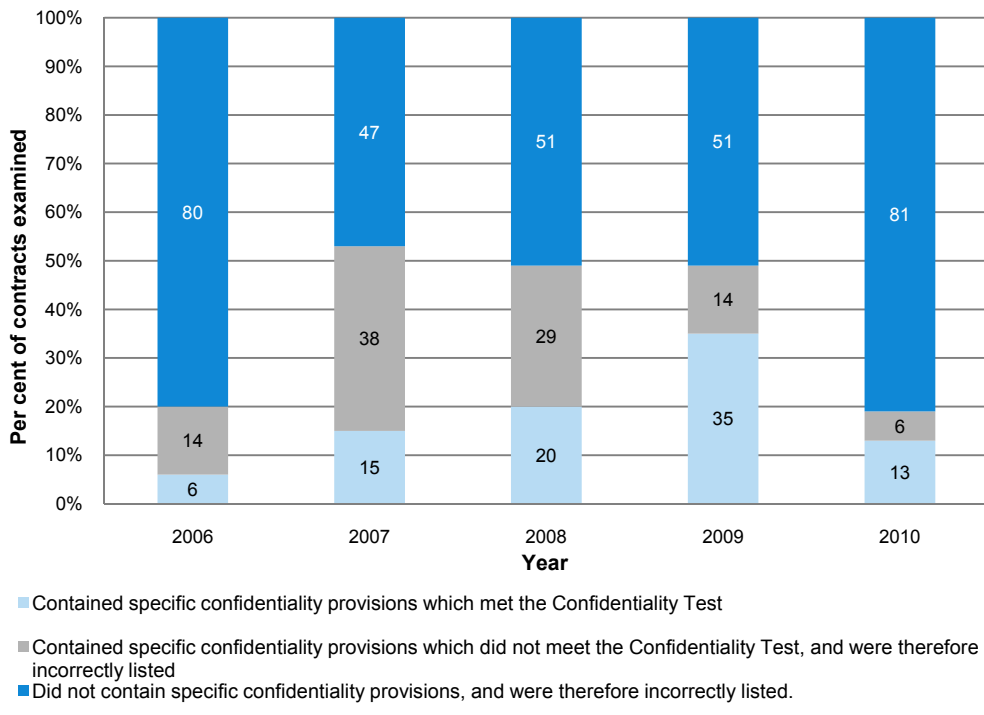
2.26 There is potential benefit in agencies revising their policy and guidance materials, or staff awareness activities, to improve understanding of the kinds of information that may or may not meet the requirements of the Test, in particular around the confidentiality of costing/pricing information.

Appropriateness of the use and reporting of confidentiality provisions over time

2.27 Since 2001 the ANAO has assessed the appropriateness of the use of confidentiality provisions, in samples of contracts reported to contain such provisions, from agencies' Senate Order listings. In its previous assessments, the ANAO found that a small to moderate proportion of such contracts contained specific confidentiality provisions that met the Confidentiality Test and were appropriately reported. Figure 2.3 shows the results from the previous four ANAO Senate Order performance audits, alongside this year's results.

Figure 2.3

Trends in the appropriate use and reporting of confidentiality provisions in contracts



Source: ANAO analysis.

2.28 For the 2010 calendar year, 13 per cent of the contracts examined (14 of 110 contracts) were considered to contain confidentiality provisions relating to specifically identified information that was commercially 'sensitive', and which would cause unreasonable detriment to the owner of the information or another party if disclosed. This represented a decrease in comparison to previous years, which was partly attributable to all 49 MDBA contracts not containing specific confidential information.³³ On a more positive note, for the last two calendar years only 14 per cent (2009) and six per cent (2010) of contracts examined included specific confidentiality provisions which were unjustified having regard to Confidentiality Test.

2.29 The results of this and other recent Senate Order audits show that around one in ten contracts report the use of confidentiality provisions, but of those that do, a significant proportion are incorrectly listed. The main reason has been agencies including only general confidentiality provisions in contracts, or no confidentiality provisions, and incorrectly reporting that these contracts meet the Confidentiality Test.

2.30 In this context, emphasis by Finance and agencies on better communicating key requirements of the Confidentiality Test and explaining areas of guidance often misinterpreted by agency staff would assist understanding and application of key requirements of the Test, including by staff infrequently involved in procurement.

Reporting of confidentiality type and reason

2.31 The Order requires agencies to indicate in their contract listings whether each contract:

contains provisions requiring the parties to maintain confidentiality of any of its provisions [contract contents], or whether there are any other requirements of confidentiality [contract outputs], and a statement of the reasons for the confidentiality.³⁴

³³ Excluding MDBA, 23 per cent of the contracts contained appropriate specific confidentiality provisions, a result more similar to previous years.

³⁴ Clause 2(c) of the Senate Order for Departmental and Agency Contracts.

2.32 For contracts to be reported correctly, the reported confidentiality provision type (contract contents or outputs) and reason/s must align with the nature of the contract.³⁵ FMG 3 provides a summary of the reporting of confidentiality types and reasons, for AusTender reporting purposes. The table is useful for, and aligns with, Senate Order reporting requirements (see Table 2.5).

Table 2.5

Reporting confidentiality provision types and reasons

Type	Information in the contract (contract contents)	Information obtained or generated in performing the contract (contract outputs)
Where there are general confidentiality provisions only	Report 'No'	Report 'No'
Where there are specific provision/s protecting information in the contract and information obtained or generated in performing the contract	Report 'Yes'	Report 'Yes'
Where there are specific provision/s protecting information in the contract only	Report 'Yes'	Report 'No'
Where there are specific provision/s protecting information obtained or generated in performing the contract only	Report 'No'	Report 'Yes'
Reasons available where a contract is reported as 'Yes'	<ul style="list-style-type: none"> • Costing/profit information • Intellectual property • Privacy Act • Public interest • Secrecy provisions • Other 	<ul style="list-style-type: none"> • Artistic, literary, cultural secrets • Intellectual property • Privacy Act • Public interest • Secrecy provisions • Other

Source: Department of Finance and Deregulation, *Guidance on Confidentiality in Procurement* (FMG 3), July 2007, p. 26.

2.33 As illustrated in Figure 2.2 and Table 2.1, of the 14 contracts that had appropriately used specific confidentiality provisions, nine contracts (nine per

³⁵ These requirements are reproduced as column headings in the template for Senate Order contract listings in FMG 8 (see Figure 3.1): Department of Finance and Deregulation, *Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)*, January 2004, p. 41.

cent of the sample of 110) also had the correct confidentiality type and reason listed.³⁶ The Privacy Act reason was listed in three of the five contracts with an incorrect reason reported, when in fact the information related to pricing/costing or intellectual property.

Parliamentary and ANAO access clauses

2.34 Where appropriate, Commonwealth contracts should contain clauses that provide, regardless of contract confidentiality, for:

- disclosure of contract-related information to the Parliament or Parliamentary committees; and
- access by the ANAO to a contractor's premises.³⁷

2.35 The inclusion of these clauses is significant as it means that both parties are aware, regardless of the use of confidentiality provisions, that there is no absolute guarantee of confidentiality of any information.

2.36 Table 2.6 shows that almost half of the sample of contracts for the four audited agencies contained appropriately worded clauses providing for the disclosure of contract-related information to Parliament.³⁸ A higher proportion of sample contracts (68 per cent) contained appropriately worded clauses that provided for ANAO access.

³⁶ Where multiple types and reasons were listed, the ANAO assessed a contract as being correctly listed where at least one of the types or reasons was correct based on an examination of the contract.

³⁷ Department of Finance and Deregulation, *Guidance on Confidentiality in Procurement* (FMG 3), July 2007, p. 24.

³⁸ The ANAO assessed contracts as containing appropriately worded clauses where they contained clauses that were similar to the model clauses provided in of FMG 3's Appendix 3.

Table 2.6**Parliamentary and ANAO access clauses**

Agency	No. of contracts examined	Percentage of contracts containing disclosure to Parliament (%)	Percentage of contracts dealing with ANAO access (%)
MDBA	49	18*	69
Finance	35	71	71
DCCEE	19	74	58
ACMA	7	57	71
Total	110	47	68

*Note: A number of MDBA contracts contained a clause that allows for disclosure if required: 'by any applicable law or order of any government, government body, authority or agency having authority over the disclosing party'. This clause was deemed to be not sufficiently similar to the model clauses provided in FMG 3. The MDBA's current contract template contains appropriately worded Parliamentary disclosure clauses.

Source: ANAO analysis.

2.37 The results of the above analysis suggest agencies review their use of contract templates, and whether model clauses are being appropriately applied. The current standard contract templates developed by audited agencies contained Parliamentary disclosure and ANAO access clauses, and all contracts that used the standard agency templates were found to contain appropriately worded clauses. While there are legitimate reasons for using non-standard contract template terms and conditions, care is required to ensure that appropriate disclosure and access clauses are included in contracts.

Conclusion

2.38 Since the Order was introduced, the reported use of confidentiality provisions in contracts has declined from 24 per cent of contracts in 2001–02, to nine per cent of contracts in 2010. This indicates that less Australian Government contracting information is being classified as confidential than in the past.

2.39 The ANAO examined a sample of 110 contracts, managed by four agencies, which were reported to contain confidentiality provisions. Of the 110 contracts examined, 14 contracts (13 per cent) correctly included specific confidentiality provisions, having regard to FMG 3 – *Guidance on Confidentiality in Procurement*. The remaining 96 contracts were incorrectly listed as containing confidentiality provisions for the following reasons:

- seven contracts (six per cent of all contracts examined) included specific confidentiality provisions which did not meet FMG 3's Confidentiality Test;
- 78 contracts (71 per cent) contained only general confidentiality provisions. Such contracts are not to be classified as containing confidentiality provisions for the purpose of the Senate Order; and
- 11 contracts (10 per cent) contained no confidentiality provisions.

2.40 To improve agencies' use of confidentiality provisions, and reduce instances of reporting provisions that do not exist or meet the Confidentiality Test, it may be beneficial for agencies to consider:

- the inclusion of a designated area in contract templates to prompt staff to record specific confidential information, where appropriate;
- the merit of strengthening relevant guidance materials, staff awareness activities or quality assurance measures to improve:
 - understanding of the kinds of information that may or may not meet the requirements of the Confidentiality Test;
 - the accurate recording of the presence of any specific confidential information in contracts in the systems or registers from which agency Senate Order listings are prepared; and
 - the accuracy of the confidentiality types and reasons reported in Senate Order listings;
- reviewing their use of contract templates and model clauses that provide for Parliamentary disclosure and ANAO access, to make contractual parties aware that regardless of the use of confidentiality provisions, there is no absolute guarantee of confidentiality of any information.

3. Compliance with Senate Order Requirements

This chapter examines agencies’ compliance with the Senate Order requirements to table a minister’s letter and post a complete contract listing for the 2010 calendar year by the due date. The audited agencies’ procedures for complying with the Senate Order are also examined.

Background

3.1 The Senate Order requires each FMA Act agency to publish certain details about contracts that meet the requirements of the Order on the Internet; and that the relevant minister table a letter of advice stating that the listing has been published, by no later than two calendar months after the end of each financial and calendar year. Where no contracts have been entered into by an agency, the Order requires that a statement to that effect be included in the minister’s letter and on the agency’s website.

3.2 Finance has developed guidance material to assist agencies in completing their contract listings. Figure 3.1 shows the template for Senate Order contract listings, as presented in FMG 8 – *Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)*. The template covers the contract details and confidentiality information required by the Order.

Figure 3.1

Template for contract listing

Contract details					Confidentiality information			
Contractor	Subject matter	Amount of consideration	Start Date	Anticipated end date	Provisions requiring confidentiality (Y/N)	Reason(s) [optional]	Other requirements of confidentiality (Y/N)	Reason(s)

Source: Department of Finance and Deregulation, *Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)* (FMG 8), January 2004, pp. 40–41.

3.3 For the 100³⁹ agencies subject to the Order for the 2010 calendar year, the ANAO assessed whether:

- Internet contract listings were published by the due date and met the listing requirements; and
- ministers' letters of advice were tabled by the due date and included statements of compliance.

3.4 The ANAO also examined the four audited agencies' Senate Order listings and their procedures for complying with the Order, with a focus on agency guidance materials; methods used to capture and collate Senate Order information; and quality assurance of listings.

Agencies' Internet contract listings

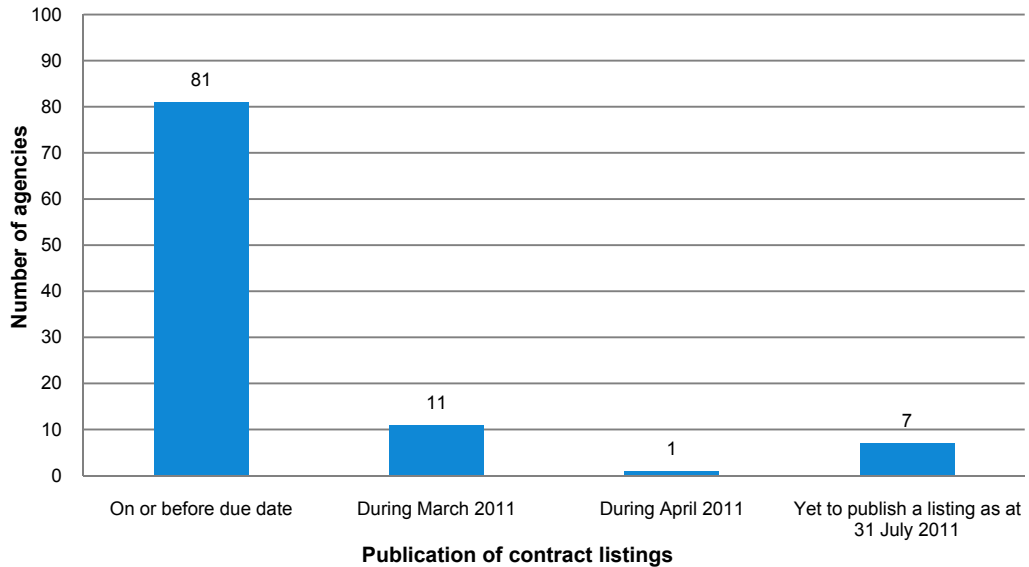
Timeliness of Internet listings

3.5 Eighty-one of the 100 agencies subject to the Order published a contract listing on the Internet by the due date of 28 February 2011. This is a small decline from the previous two years when 84 of 99 agencies (2009) and 82 of 99 agencies (2008) published Internet listings by the due date.

3.6 As at 31 July 2011, seven agencies were yet to publish a Senate Order listing or indicate that the agency had not entered into any relevant contracts, on the Internet.⁴⁰ Figure 3.2 illustrates the timeliness of the publication of agencies' Internet listings relative to the due date of 28 February 2011 for the 2010 calendar year.

³⁹ There were 104 FMA Act agencies on 31 December 2010. Two agencies, the Australian Security Intelligence Organisation and the Australian Secret Intelligence Service are exempt from the Senate Order for reasons of national security. The three Parliamentary departments, while classified as agencies under the FMA Act, are not Departments of State administered by ministers and are therefore exempt from the Senate Order. Nevertheless, the Department of the Senate (one of the Parliamentary Departments) publishes an Internet listing 'in the interest of transparency' and its results have been included in the ANAO analysis.

⁴⁰ The seven agencies were: the Seafarers Safety, Rehabilitation and Compensation Authority; the Equal Opportunity for Women in the Workplace Agency; the Professional Services Review Scheme; the Australian Transport Safety Bureau; IP Australia; and the Office of the Australian Information Commissioner.

Figure 3.2**Timeliness of Internet contract listings for the 2010 calendar year**

Source: ANAO analysis.

Comprehensiveness of Internet listings

3.7 As shown in Table 3.1, the 93 agencies that published listings reported 39 112 contracts totalling \$164.2 billion. The number of contracts listed as containing confidentiality provisions was 3397 valued at \$30 billion.

Table 3.1**Results from the review of agencies' Internet listings**

	2009	2010	% change
Total number of contracts reported	41 937	39 116	-6.7
Value of all reported contracts	\$164.9 billion	\$164.2 billion	-0.4
Total number of contracts reported as containing confidentiality provisions or an other requirement of confidentiality	4084	3397	-16.8
Total value of contracts reported as containing confidentiality provisions or an other requirement of confidentiality	\$33.5 billion	\$30 billion	-10.2

Source: The 93 FMA Act agencies' Senate Order listings published for 2010.

3.8 As noted previously, the Senate Order requires agencies to list certain information in their contracts listings. Specifically paragraph 2 of the Order requires that agencies' contract listings indicate:

- a) each contract entered into by the agency which has not been fully performed or which has been entered into during the previous 12 months, and which provides for a consideration to the value of \$100 000 or more;
- b) the contractor, the amount of the consideration and 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;
- 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
- d) an estimate of the cost of complying with this order and a statement of the method used to make the estimate.⁴¹

Overall compliance with the Order

3.9 Table 3.2 below summarises agencies' compliance with each requirement of the Senate Order.

Table 3.2

Summary of FMA Act agencies' compliance with the Senate Order

	Compliance with paragraph:			
	2(a) of the Order	2(b) of the Order	2(c) of the Order	2(d) of the Order
Number of agencies compliant	53	92	78	76
Number of agencies non-compliant	40	1	15	17
Agencies that did not publish a listing (non-compliant)	7	7	7	7
Total agencies	100	100	100	100

Source: ANAO analysis.

⁴¹ Parliament of Australia, *Procedural Orders of Continuing Effect*, 20 June 2001 J.4358, as amended 1 March 2007, J.3527, available from <http://www.aph.gov.au/Senate/pubs/standing_orders/d05.htm> [accessed 10 May 2011].

3.10 Overall, based on reported information, 33 agencies' listings were consistent with all of the Order's information requirements (paragraphs 2(a)–(d)) of the Order. This number of agencies was a decline from the previous year, when 47 of 98 agencies posted a contract listing consistent with all the required information.⁴²

Assessment against paragraph 2(a) of the Order

3.11 To comply with paragraph 2(a) of the Order, contracts listed need to:

- meet the contract criteria as set out in FMG 8;⁴³
- have not been fully performed or have been entered into, during the relevant period; and
- be valued at or over \$100 000.

3.12 The review of the contract listings found that 40 agencies included 275 contracts valued at \$713 million that did not meet the requirements in paragraph 2(a) of the Order. The 275 contracts represented only 0.7 per cent of total contracts listed and 0.4 per cent of the total value of all listed contracts. Of the 275 contracts:

- 135 were agency agreements⁴⁴ and did not meet the contract criteria of FMG 8;
- 129 were contracts listed with either a commencement date in 2011 or that were completed prior to 2010; and
- 11 were contracts listed as valued under \$100 000.

3.13 While the proportion and number of contracts incorrectly included in agencies' contract listings was low, there would be merit in agencies reviewing

⁴² ANAO Audit Report No.7 2010–11, *Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2009 Compliance)*, p. 44.

⁴³ FMG 8 contract criteria states that 'For a simple contract to exist, all of the following elements must be present:

- an offer;
- acceptance of an offer;
- consideration (unless the contract is executed as a deed); and
- an intention to create legal relations.'

⁴⁴ FMG 8 states that agreements between Australian Government departments are not legally enforceable as it is not possible for different parts of the same legal entity to enter into a legally enforceable agreement.

their Senate Order information for agency agreements, contracts not related to the reporting period and below the threshold, prior to publication on the Internet.

Assessment against paragraph 2(b) of the Order

3.14 Under the Senate Order agencies are required to report a number of contract details. All agencies that published a Senate Order listing (apart from one) included all the required contract details as required by the Order.⁴⁵ The high-level of compliance with this element may be attributed to the widespread use of Finance's template (Figure 3.1). Use of the template encourages agencies to include the required contract details under paragraph 2(b) of the Order.

Assessment against paragraph 2(c) of the Order

3.15 Seventy-eight agencies reported whether contracts contained specific confidentiality information, as well as the reason, in their Senate Order listings. This was consistent with findings from the previous year. Forty-six per cent of contracts containing confidentiality provisions were listed with a first reason of 'other'.⁴⁶ When using this reason, agencies are required to provide an explanation of the specific reason (almost all of the contracts listed with the 'other' reason included an explanation).

3.16 Of the 15 agencies that did not meet all the reporting requirements relating to confidentiality, the majority omitted reasons for confidentiality. One agency did not include both types of confidentiality information (as shown in Figure 3.1) in their listing, compared to five agencies that did not include one or both types for the 2009 calendar year.

3.17 The omission of details about confidentiality information from contract listings reduces the information available to the public about the use of confidentiality in government contracts.

⁴⁵ Only one agency that published a listing did not meet this element of the Senate Order as it provided a link to the AusTender website for the agency's procurement contracts. A link to the AusTender website does not sufficiently meet an agency's obligations under the Order.

⁴⁶ The next most common reason was costing/profit information, listed by 24 per cent of agencies as the first reason for confidentiality.

Assessment against paragraph 2(d) of the Order

3.18 The Order requires agencies to report both the cost of complying with the Order and the method used to calculate the cost of compliance. Seventy-six agencies correctly recorded both the cost and the method, a slight improvement from the 2009 calendar year (73 agencies). Ten agencies did not include either the cost or the method, six agencies stated the cost, but did not include the method of calculation, and one agency included the method of calculation, but did not state the cost.

3.19 Table 3.3 shows the total estimated cost of compliance, the average and median cost of compliance per agency, and the average cost of complying with the Order per contract.

Table 3.3

Cost of complying with the Senate Order

Estimated agencies' cost of compliance (\$)	
Total cost reported	1 053 170
Average cost per agency	12 844
Median cost per agency	1434
Average cost per contract*	29

*Note: Defence and Defence Materiel Organisation reported a combined estimated cost of compliance of \$716 616, 74 per cent of the total estimated cost of compliance. The average cost per contract, excluding Defence and Defence Materiel Organisation, is \$11.

Source: ANAO analysis of estimated cost of compliance as reported by 82 agencies.

Ministers' letters of advice

3.20 The ministers' letters of advice create an official record in Parliament and establish accountability for the completeness, accuracy and timeliness of agencies' contract listings. Ministers' letters are typically tabled at portfolio level, and contain details of the publication of the contract listings for all agencies in a minister's portfolio.

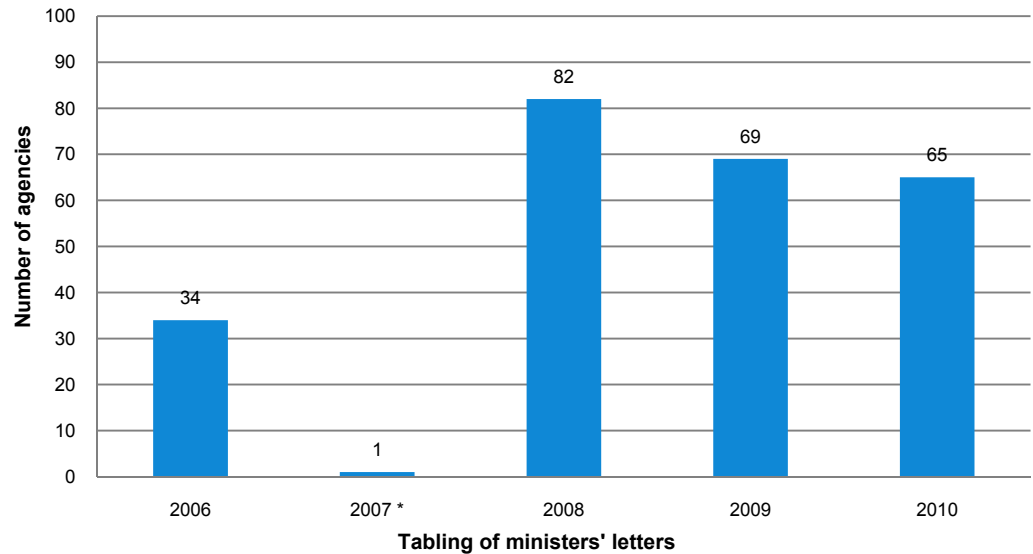
3.21 The ANAO reviewed whether the ministers' letters were tabled in the Senate by the due date, and assessed the letters' statements of compliance with the Order.

Timeliness of ministers' letters

3.22 Letters relating to 65 of the 99⁴⁷ agencies required to comply with the Order, were tabled in the Senate by the due date. This is a small decline from the previous two calendar years. Figure 3.3 shows the number of agencies for which a minister's letter of advice was tabled by the due date, for the past five years.

Figure 3.3

Tabling of ministers' letters on or before due date for the past five years



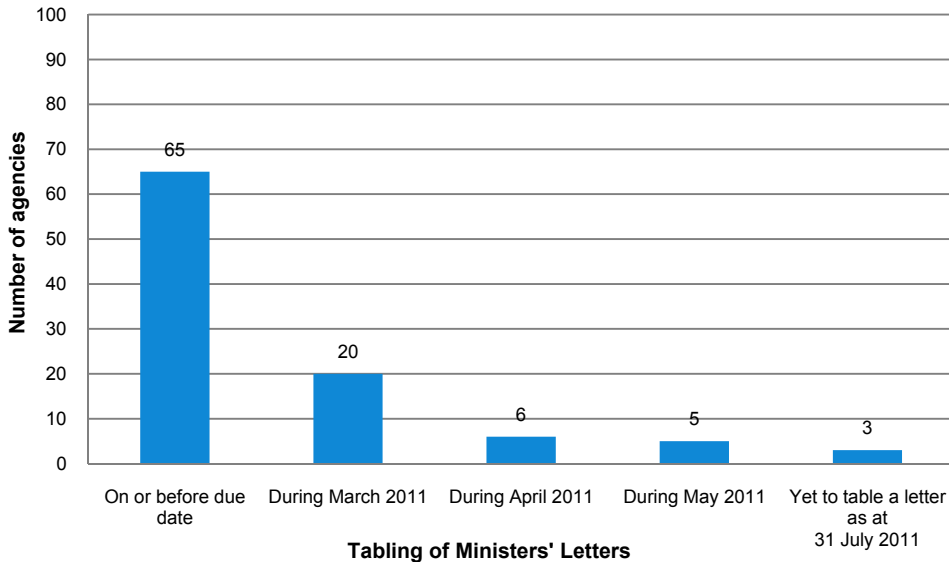
*Note: In 2007, ministers' letter representing 57 agencies were tabled on Monday the 3 March 2007, one business day late.

Source: ANAO analysis.

3.23 Figure 3.4 illustrates the timeliness of the tabling of ministers' letters relative to the due date of 28 February 2011 for the 2010 calendar year, including three agencies which were yet to table a letter as at 31 July 2011.⁴⁸

⁴⁷ A minister's letter is not tabled for the Department of the Senate as it is not administered by a minister.

⁴⁸ The three agencies were: DCCEE; the Office of Renewable Energy Regulator; and the Seafarers Safety, Rehabilitation and Compensation Authority.

Figure 3.4**Timeliness of ministers' letters of advice for the 2010 calendar year**

Source: ANAO analysis.

Ministers' letters' statement of compliance

3.24 As noted in the assessment of all FMA Act agencies' Order listings, 67 agencies' listings were not consistent with all of the Order's information requirements (paragraphs 2(a)–2(d)). In these cases, the relevant ministers' letters did not advise that full-compliance had not been achieved. This indicates that some ministers' letters did not meet the requirement of paragraph 3 of the Order which states that the letters 'indicate the extent of, and reasons for, non-compliance, and when full-compliance is expected to be achieved'.⁴⁹

Excluded contracts

3.25 The Senate Order allows for the details of certain contracts to be excluded from an agency's listing, with notification of any exclusions to be made through the minister's letter of compliance. FMG 8 sets out specific categories for agencies to consider when determining whether contracts should be excluded. For example, contracts can be excluded where disclosure would

⁴⁹ Clause 3 of the *Senate Order for Departmental and Agency Contracts*.

be contrary to the public interest or statutory secrecy provisions, or in order to safeguard national security.

3.26 An analysis of the ministers' letters identified that four agencies had excluded contracts⁵⁰ from their listings for reasons of national security, exemptions under the *Freedom of Information Act 1982* and in accordance with the *Privacy Act 1988*. None of the audited agencies' letters indicated that the agency had excluded contracts from their listing for any of the above reasons.

Audited agencies' Senate Order procedures

3.27 The ANAO examined the four audited agencies' Senate Order listings and their procedures for complying with the Order. The results of the ANAO review of the audited agencies' listings are summarised in Table 3.4.

Table 3.4

Summary of audited agencies' compliance with the Senate Order

Agency	Internet listing published by the due date	Compliance with paragraph:				Minister's letter tabled by the due date
		2(a) of the Order	2(b) of the Order	2(c) of the Order	2(d) of the Order	
ACMA	✓	✓	✓	✓	✓	✓
DCCEE	✓	Included 10 agency agreements	✓	✓	Did not include method used to calculate the cost of compliance	Minister's letter not tabled*
Finance	Published listing on 3 March 2011	Included eight agency agreements	✓	✓	✓	Tabled on 3 March 2011
MDBA	✓	✓	✓	One contract did not list whether or not it contained confidentiality provisions	✓	Portfolio agency tabled on 21 March 2011

*Note: During the audit, DCCEE was informed that its portfolio agency, the Office of the Renewable Energy Regulator, was yet to publish its Senate Order listing. Subsequently, the Office published a listing on 29 April 2011. However, the Climate Change and Energy Efficiency Portfolio has not tabled a Minister's letter for the 2010 calendar year. DCCEE has advised that it will table a letter of advice for future listings, commencing with 2010–11 financial year.

Source: ANAO analysis.

⁵⁰ Testing the agencies' decision-making processes in relation to these excluded contracts was outside the scope of the audit.

3.28 Separately, and as part of its analysis of the 110 contracts from the four audited agencies, the ANAO checked the accuracy of start and end dates and contract values specified in the agencies' listings, based on information contained in the contracts. Sixty-nine of the 110 contracts (63 per cent) had discrepancies in one or more of the three categories.⁵¹ This result indicates that the contract listings do not accurately represent some contract details for a significant proportion of contracts. Common errors included not accurately reflecting contract value variations, and recording start dates as listed in the contract, which were prior to date of contract execution.⁵²

3.29 Additionally, the ANAO contract analysis for the audited agencies noted duplicate entries for some contracts, and the listing of agency agreements (which are not required to be reported under the Senate Order). The findings from the review of the agencies' Senate Order listings, and the contract analysis, indicate there is a need for improved: guidance material; data capture and collation; and quality assurance by agencies.

Guidance materials

3.30 Appropriate guidance can help increase staff awareness of the requirements of the Order, including application of the Confidentiality Test, and consequently, improve the accuracy and completeness of contract listings.

3.31 The audited agencies' guidance material included information on contract reporting, including the preparation of the Senate Order listing and entering data into AusTender. ACMA formalised their guidance document during the course of the audit.

3.32 The guidance ranged from very prescriptive instructions on how to produce a Senate Order listing from the FMIS (at Finance) to high-level guidance which outlined the requirements of the Order and referred to FMG guidance (at DCCEE). Where step-by-step instructions are used it is important that agencies ensure that all elements of the Order, such as excluding agency agreements, are included.

⁵¹ Discrepancies in the 'amount of consideration' comparison ranged from \$1000 to over a million dollars. Variances in start and end date information ranged from two weeks to years.

⁵² The date of execution is the date a contract is signed by all parties to the contract.

3.33 The findings from Chapter 2 indicate there is a need to better communicate the key requirements of the Order and common areas of misinterpretation, such as the differences in reporting of general and specific confidentiality provisions. In this regard, there was scope for improvement in each of the agencies' guidance materials, through the development of brief explanatory material suitable for staff infrequently involved in procurement.

Capturing and collating Senate Order information

3.34 Sound practices to collect, record and amend data are integral to maintain high quality information for agency contract reporting. Typically, there are three main systems that agencies use to source contract details and information for the purpose of contract reporting. These systems are: the agency's contract register; the agency's FMIS; and/or AusTender.

3.35 The primary source of data for the Senate Order at Finance and DCCEE was their FMIS system. MBDA predominately used AusTender and ACMA used its previous Senate Order listing and its contract register. As discussed in paragraph 3.28, there was variability in the accuracy of contract details for a significant proportion of contracts listed across all of the agencies. This highlighted that regardless of the system used, each agency should improve their data capture and collation processes, as well as quality assurance of reported contract information.

Quality assurance of listings

3.36 Quality assuring contract information should help improve the accuracy of Senate Order reporting and has been a recurring theme in the ANAO audits on the Senate Order.⁵³

3.37 A range of additional processes aimed at ensuring the completeness and accuracy of Internet listings were implemented in the audited agencies. For example, at Finance, the compiled Internet listing was provided to relevant business areas to verify the accuracy and completeness of contract details. Further, all of the audited agencies advised that they reviewed their Senate

⁵³ ANAO Audit Report No.07 2007–08, *The Senate Order for Departmental and Agency Contracts (Calendar Year 2006 Compliance)*; ANAO Audit Report No.05 2006–07, *The Senate Order for Departmental and Agency Contracts (Calendar Year 2005 Compliance)*; and ANAO Audit Report No.11 2005–06 *The Senate Order for Departmental and Agency Contracts (Calendar Year 2004 Compliance)*.

Order listings against information in AusTender and performed internal reconciliation processes.⁵⁴

3.38 Nevertheless, the audit findings indicate that agencies would benefit from a greater focus on quality assurance of the contract information they include in their Internet listings. Quality assurance processes over listings should be designed to identify errors such as incorrect contract details, duplicate contracts, agency agreements, and instances of non-compliance with Senate Order requirements prior to agencies publishing information on the Internet.

3.39 As discussed in Chapter 2, an examination of a small, targeted sample of listed contracts can help to improve the accuracy of contract details listed, such as start and end dates and amounts of consideration. It can also inform feedback to line areas and improvement in data input.

Conclusion

3.40 The ANAO assessment of all FMA Act agencies' compliance with the Order found that the large majority (81 per cent) of contract listings were published on the Internet by the due date. Further, ministers' letters representing 65 agencies were tabled by the due date.

3.41 Thirty-three per cent of agencies' listings were consistent with all the information requirements (paragraphs 2(a)–2(d)) of the Senate Order. This was a result of:

- seven agencies not publishing a Senate Order listing;
- 15 agencies not meeting all the confidentiality reporting requirements;
- 17 agencies not including both the cost of compliance with the Order and its method of calculation; and
- 40 agencies including a small number of contracts that were not required by the Order.

3.42 A review of the audited agencies' Senate Order listings identified issues with respect to the timeliness of some listings and ministers' letters, reporting

⁵⁴ ANAO comparison of agencies' AusTender and Senate Order information found significant discrepancies indicating review processes were not thorough in this regard. This is discussed further in Chapter 4.

of a small number of contracts not required by the Order, and discrepancies in contract details. The accuracy of agency contract reporting would be supported by improved communication of key requirements, including through succinct guidance for involved staff, and by more rigorous quality assurance procedures.

4. The Senate Order and AusTender

This chapter compares the audited agencies' reporting of contract details in Senate Order listings and AusTender, including confidentiality details. Finance's progress in exploring opportunities to consolidate procurement reporting obligations and in progressing improvements in AusTender functionality is also examined.

Background

4.1 Agencies must comply with multiple contract reporting requirements, for the Order, Annual Reports⁵⁵ and AusTender.⁵⁶ Each of the requirements has different reporting criteria and some contracts need to be reported in multiple formats to meet the multiple requirements. For example, a consultancy contract with a value of \$100 000 or more should be reported in an agency's Senate Order contract listing, Annual Report and on AusTender.

4.2 Previous ANAO audits have examined the multiple procurement reporting requirements that agencies are required to meet, and their implications for the quality of data reported under different requirements. ANAO Audit Report No. 7 2010–11, *Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2009 Compliance)*, recommended that to assist agencies to provide more accurate, timely and complete procurement reporting, Finance should review opportunities to consolidate procurement reporting requirements, in conjunction with the department's continuing focus on improving AusTender functionality.

4.3 In relation to these issues, the ANAO:

- compared the audited agencies' reporting of contract details in Senate Order listings and AusTender reporting, including confidentiality information; and

⁵⁵ Department of the Prime Minister and Cabinet, *Requirements for Annual Reports for Departments, Executive Agencies and FMA Act Bodies* [Internet]. 2009, <http://www.dpmc.gov.au/guidelines/docs/annual_report_requirements.pdf> [accessed 10 May 2011].

⁵⁶ Department of Finance and Deregulation, *Guidance on Procurement Publishing Obligations* (FMG 15), July 2007.

- examined Finance's progress in exploring opportunities to consolidate procurement reporting requirements and implementing improvements in AusTender functionality.

Comparison of agency Senate Order listings and AusTender reporting

4.4 As previously discussed, AusTender is a system administered by Finance and accessible to the public through the Internet⁵⁷ in which agencies publish procurement and contract information. Although the criteria for reporting contracts in Senate Order contract listings and AusTender differ, both provide similar reporting and share the objective of ensuring accountability and transparency in Australian Government procurement activities.

4.5 To prepare procurement reports, agencies typically extract data from a contract register, FMIS, and/or AusTender. As the functionality of these systems does not always readily accommodate the multiple reporting needs, there is often a need to filter and quality assure data (from one or more data sources) and arrange it into an appropriate reporting format.

4.6 The ANAO's comparison of the audited agencies' Senate Order listings and AusTender reporting for the 2010 calendar year is shown in Table 4.1. To enable the comparison, multiple AusTender reports were combined and filtered to accord with contract reporting criteria used for the Senate Order.

⁵⁷ The AusTender Internet page is <<https://www.tenders.gov.au/>>

Table 4.1**Agency Senate Order listing and AusTender reporting comparison**

Total contracts	MDBA	Finance	DCCEE	ACMA
Total contracts in agency Senate Order listing	107	257	200	92
Total contracts in AusTender reports (combined and filtered to meet the requirements of the Order)	87	265	145	104
Total contracts identified in both Senate Order and AusTender as matching ¹	67	120	121	60
Number of contracts in Senate Order listing, but corresponding contract details not found in AusTender report ²	23	70	75	7
Number of contracts in AusTender report, but corresponding contract details not found in Senate Order listing ²	3	45	20	16
Of the matching contracts:				
Number of contracts reported in Senate Order as containing confidentiality provisions	58	17	11	3
Number of contracts reported in Senate Order listing as containing confidential provisions for which the confidentiality information reported in AusTender matched (including type of and reason for confidentiality)	54	6	11	2

Note 1: Contracts identified as matching in both the Senate Order listing and AusTender reports included the same: vendor name and subject, total contract value, and start and end dates.

Note 2: Contracts identified as corresponding in the Senate Order listing and AusTender reports had sufficiently similar details to determine that they were referring to the same contract.

Source: ANAO analysis of the audited agencies' Senate Order listings and AusTender reports for contracts greater than \$100 000 and entered into or not fully performed in the 2010 calendar year. The ANAO removed agency and revenue agreements from the comparison as these arrangements are treated differently in the Senate Order listing and AusTender. The ANAO also accounted for contract amendments (where contract details listed were sufficiently similar) and Machinery of Government changes when generating the AusTender reports.

4.7 Table 4.1 shows significant discrepancies in the reporting of contracts and the details attributed to those contracts for the two systems. Examples include contract entries:

- identified in the Senate Order listing that could not be identified in AusTender reporting, and vice versa;
- for the same vendor name and subject, but with different details in the two listings (including values and dates); and
- otherwise 'matching' but with different confidentiality information in the two listings (including whether or not the contracts were reported

as containing confidentiality provisions, and differences in reasons for confidentiality).

4.8 Table 4.1 shows there were 84 contracts across the four audited agencies, each valued at more than \$100 000 and from the relevant period, which were reported in AusTender but not the agencies' 2010 calendar year Senate Order listings. The absence of these contracts indicates that the agencies' listings are potentially incomplete.

4.9 The discrepancies evident in Table 4.1 reflect:

- shortfalls in contract data input and quality assurance by agencies;
- time differences of the two reports – Senate Order listings are derived based on contract information at a given point in time (in this case, by 28 February 2011 for 2010 calendar year contracts), whereas AusTender is updated as required (AusTender reports for the analysis above were from May 2011).⁵⁸ As such, AusTender reports should reflect any changes to contract details that arose since the due date of the Order listing; and
- a known limitation in AusTender functionality – currently, contract amendments that are automatically transferred by agencies to AusTender are not linked to original contracts.⁵⁹ Where amendments have not been linked to original contracts, multiple entries are created in the AusTender reporting, one for the original contract and an additional entry for every amendment. Given the above two points, it was not always possible to account for a contract and all of its amendments in AusTender for comparison with the Order listing.⁶⁰

4.10 In addition to the above analysis, the ANAO compared contract details, including confidentiality information, reported in Senate Order listings, and AusTender for the audit sample of contracts. Both Senate Order listings and

⁵⁸ Consistent with ANAO Audit Report No.11 2010–11, *Direct Source Procurement*, audit analysis found a number of contract notices were not published in AusTender within the required 42 days, and some of these contract notices were not published for several months.

⁵⁹ Finance and DCCEE automatically transfer contract amendments to AusTender.

⁶⁰ A technical solution to tightly link contract amendments to original contract entries has been developed by Finance and is currently being trialled with agencies. This will be discussed further in the next section (see paragraphs 4.15 and 4.16).

AusTender significantly overstated the number of audit sample contracts that actually contained confidentiality provisions. Further, examination of the audit sample of contracts also found that, consistent with Senate Order listings (see paragraph 3.28), contracts details (such as, values and start and end dates), were regularly misreported in AusTender.

4.11 Previous ANAO audits have considered that identified shortcomings in both Senate Order and AusTender contract reporting partly reflected multiple procurement reporting requirements, which has meant that agencies have been unable to focus attention on accurately fulfilling any single reporting requirement.⁶¹ The discrepancies and shortfalls in procurement data identified for the 2010 calendar year Senate Order listings and AusTender reporting add weight to the argument for the consolidation of procurement reporting obligations. Nonetheless, even under a single reporting system, the quality of procurement information reported remains dependent on sound agency-level data input and review.

Consolidation of procurement reporting and AusTender

4.12 As previously mentioned, Audit Report No. 7 2010–11 recommended that to assist agencies to provide more accurate, timely and complete procurement reporting, Finance review opportunities to consolidate procurement reporting requirements, in conjunction with the department’s continuing focus on improving AusTender functionality.⁶²

4.13 All four audited agencies agreed with the recommendation.⁶³ Further, Finance’s response to the recommendation was:

Agreed. AusTender provides searchable reports on all procurement contracts over \$10,000 within six weeks of contract signing. This enables superior

⁶¹ Recommendation No. 2 from ANAO Audit Report No. 27 2005-06, *Reporting of Expenditure on Consultants*, was: ‘aimed at addressing the overlaps and inefficiencies evident in the current approach of having three discrete reporting regimes for Government procurement, including the reporting of expenditure on consultants. If well implemented, the ANAO believes that this recommendation has potential to deliver cost savings to agencies while improving the quality of data reported.’ p. 18.

⁶² ANAO Audit Report No.7 2010–11, *Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2009 Compliance)*, p. 51.

⁶³ The four audited agencies in 2010–11 were the: Australian Agency for International Development; Department of Agriculture, Fisheries and Forestry, Department of Families, Housing, Community Services and Indigenous Affairs, and Federal Court of Australia.

timeliness, transparency, accountability and useability to the Senate Order's biannual report on procurement contracts over \$100,000. Finance will continue to work towards the rationalisation of reporting requirements through its work on improving compliance. Finance continues to improve AusTender functionality and work with agencies and the ANAO to improve data quality. Adopting AusTender as the sole Australian Government agency reporting requirement would also lessen the administrative burden on agencies and remove unintended complexities created by multiple reporting regimes.⁶⁴

4.14 As part of this audit, the ANAO sought advice from Finance about their progress in relation to Recommendation 1 of the ANAO's Audit Report No. 7 2010–11. Finance advised that:

Consolidating procurement reporting requires the agreement of a range of stakeholders, including the Senate, Parliamentary committees and agencies with policy responsibility. Consultations on the matter have been in progress, with action to initiate formal consideration expected to commence in the third quarter of 2011.

In relation to the AusTender component of the Recommendation, Finance has instituted a continuous improvement strategy for the system's functionality through its rolling enhancement program. This strategy facilitates more timely and effective response to new and evolving policy initiatives, and minimises the impact of AusTender changes on agency processes and input systems.⁶⁵

4.15 A key functionality limitation of AusTender with respect to contract reporting is linking contract amendments with original contracts, where contract amendments are automatically uploaded by agencies. This limitation inhibits the ability of users of AusTender to understand the full scope and value of some contracts. Finance advised that since January 2010, seven major functional changes had been implemented for AusTender. One of these functional changes is an 'AusTender-side technical solution to tightly link contract amendments to original contract notices when uploading from agency input systems', implemented in November 2010.

4.16 Finance further advised that of the 105 FMA Act agencies that report contracts on AusTender, 26 report their contract amendments via batch upload

⁶⁴ ANAO Audit Report No.7 2010–11, *Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2009 Compliance)*, p. 52.

⁶⁵ Department of Finance and Deregulation, 16 May 2011.

to AusTender and are consequently affected by this functional change.⁶⁶ Finance noted:

While the solution is now available for agency use, its implementation requires significant redevelopment of agency input systems and re-engineering of business processes. Agencies must also work with the AusTender team to ensure the thoroughness of their upfront testing and to establish the necessary governance to control the sequencing and therefore the quality of their contract record updates. By necessity, the rollout will be one agency at a time.

A pilot is currently underway with two agencies to test both a bespoke and a Finance One input system. The results are expected by the end of September 2011.⁶⁷

Implications of consolidation for guidance material

4.17 A potential benefit of the consolidation of procurement reporting requirements is the opportunity to revise and consolidate guidance materials. Previous ANAO Senate Order audits have identified a range of areas for improvement in Finance's current suite of guidance related to procurement reporting.⁶⁸ As part of this audit, the audited agencies also raised some issues concerning the guidance. In particular, there was some uncertainty around whether, and to which aspects of the Senate Order, FMG 3 – *Guidance on Confidentiality in Procurement* or FMG 8 – *Guidance on the Listing of Contract Details on the Internet (meeting the Senate Order on Departmental and Agency Contracts)* applied.⁶⁹ For example, while FMG 3 is useful in assisting agencies to determine which contracts meet the Confidentiality Test, FMG 3 contains no references to the Senate Order. Further, FMG 8 (published in January 2004) contains a number of now out-of-date references, such as to legislation and documents that are no longer current or that have been revised, and organisations that no longer exist.

⁶⁶ The remaining 79 agencies currently use processes that already offer the ability to tightly link amendments to original contracts.

⁶⁷ Department of Finance and Deregulation, 16 May 2011.

⁶⁸ See for example, ANAO Audit Report No.7 2010–11, *Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2009 Compliance)*, p. 48.

⁶⁹ As previously noted, in May 2011, FMG 3 and 15 were incorporated into the *Buying for the Australian Government Guide*, accessible via: <<http://www.finance.gov.au/procurement/procurement-policy-and-guidance/index.asp>> [accessed 20 June 2011].

Conclusion

4.18 A comparison of the audited agencies' AusTender reporting and 2010 calendar year Senate Order listings, found significant discrepancies in terms of the contracts reported and the details (including relating to confidentiality) attributed to those contracts. These discrepancies reflected shortfalls in contract data input and quality assurance by agencies, different report timing and currency, and a known limitation in the ability of AusTender to link some contract amendments with original contracts (for which a technical solution is currently being trialled).

4.19 Previous ANAO audits have considered that identified shortcomings in both Senate Order and AusTender contract reporting partly reflected multiple procurement reporting requirements, which has meant that agencies have been unable to focus attention on accurately fulfilling any single reporting requirement. The discrepancies and shortfalls in procurement data identified for the 2010 calendar year Senate Order listings and AusTender reporting add weight to the argument for the consolidation of procurement reporting obligations. Nonetheless, even under a single reporting system, the quality of procurement information reported remains dependent on sound agency-level data input and review.

4.20 Finance advised that it has commenced consultations with key stakeholders on consolidation of procurement reporting and is currently testing AusTender system enhancements. Finance further advised that action to formally consider consolidation of procurement reporting is expected to commence in the third quarter of 2011. The ANAO notes the importance of consulting with stakeholders about the impacts of changes stemming from the consolidation of procurement reporting requirements, and the importance of trialling AusTender system refinements before commencing a broad rollout.



Ian McPhee

Auditor-General

Canberra ACT

25 August 2011

Appendices

Appendix 1: Agencies' Responses

Australian Communications and Media Authority

The ACMA supports the audit findings. The ACMA notes the overcautious reporting on confidentiality and supports the need for agencies to improve accuracy and comprehensiveness of procurement information being captured, stored and reported.

The ACMA values the clarity provided by the ANAO staff in the conduct of this audit and has applied the appropriate definitions for future reporting of confidentiality in Commonwealth contracts. The ACMA has now aligned the reporting for both Senate Order and AusTender reporting. The ACMA is pleased to continue to report eligible contracts to satisfy the Senate Order including the timely tabling of the Minister's Letter of Advice and identifying and reporting the methodology and costs of compliance with the Senate Order. The ACMA also supports the proposed standardisation of reporting of confidentiality provisions in eligible contracts into a single reporting framework. The ACMA notes the recommendations from previous audits and supports the view from the Department of Finance and Deregulation to report relevant information on AusTender. This would streamline administration for compliance with the reporting requirements and eliminate the differences in reporting parameters between AusTender and the Senate Order listing.

Department of Climate Change and Energy Efficiency

The Department of Climate Change and Energy Efficiency (DCCEE) agrees with the findings in the ANAO audit report on Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2010 Compliance). DCCEE will continue to undertake ongoing improvements including, training, further quality assurance to improve data captured for reporting purposes and establishing processes to ensure reporting is undertaken in a timely manner.

DCCEE agrees with the recommendation⁷⁰ to harness opportunities to consolidate procurement reporting requirements, in conjunction with the

⁷⁰ ANAO Audit Report No.7 2010–11, *Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2009 Compliance)*, p. 51.

Department of Finance and Deregulation's continuing focus on improving AusTender functionality.

Following this audit, DCCEE has implemented a number of initiatives:

- commenced another series of procurement training for employees;
- engaged with the Department's internal Parliamentary Operations Unit to establish a formal process of tabling the Minister's letter; and
- undertaken further quality assurance of data for the Senate Order to ensure it meets the reporting requirements.

DCCEE's Central Procurement Unit (CPU) has closely consulted with the Department's portfolio agency, the Office of the Renewable Energy Regulator (ORER) to strengthen ORER's CPU's understanding of the Senate Order requirements and to ensure that reporting is undertaken in a timely manner. DCCEE's CPU has also assisted ORER with quality assuring contracts for confidentiality provisions.

DCCEE supports the suggestion that further guidance on determining confidentiality provisions in contracts would be beneficial. This feedback will be considered as part of DCCEE's CPU's process of guidance review.

Department of Finance and Deregulation

The audit identifies that the Senate Order has led to a significant decrease in the use of unnecessary confidentiality clauses in Australian Government contracts since its inception. This is evidence of an ongoing commitment by agencies, the ANAO and Finance to ensure confidentiality provisions in contracts are appropriate.

Importantly, when the Senate Order came into effect, there was no public reporting mechanism on such use. The use of confidentiality clauses in government contracts is now reported on AusTender, not only for contracts greater than \$100,000, but for all contracts reported (that is, at \$10,000 and above in value).

Finance notes that limited improvements have been achieved in reducing the over-reporting of contracts against the Senate Order. This includes contracts incorrectly classified as containing confidentiality provisions, inclusion of agency agreements, contracts valued below \$100,000 or outside the reporting timeframe. In part the inclusion of these contracts reflects the complexity for agencies in multiple procurement contract reporting requirements.

To improve the accuracy of reporting and to further enable appropriate scrutiny of procurement contracts, Finance considers that AusTender should be the sole procurement contract reporting requirement. AusTender provides continuous, 'real time' reporting of all procurement contracts valued at \$10,000 or above, in a searchable format. Currently, Finance, and we expect all agencies, divert resources for two to three months a year to prepare the Senate Order. By focussing attention on a single procurement reporting requirement, agencies will be able to give greater attention to improving the accuracy, completeness and timeliness of procurement contract information at the point of entry. This will improve the scrutiny available to the Parliament and ensure that agencies are accountable for their contracting decisions.

Finance will also continue to work with departments and agencies on the appropriate use of confidentiality clauses in Australian Government contracts.

The audit found a proportion of Finance's contracts were incorrectly identified as containing confidentiality clauses. With respect to this finding, Finance will review and improve its processes and place an increased focus on confirming that contracts identified as containing confidentiality clauses do indeed contain such clauses.

Murray-Darling Basin Authority

The Murray-Darling Basin Authority (MDBA) acknowledges the findings of the audit and has committed to, and is in the process of implementing, substantive improvements in internal control processes in order to rectify the matters of non-compliance with relevant Financial Management Guidelines.

In doing so, the MDBA also pointed to the significant and complex nature of transition from its predecessor, the Murray-Darling Basin Commission (MDBC) and the potential impact of this on the audit findings.

Appendix 2: The Confidentiality Test

The ANAO used the Confidentiality Test to determine if confidentiality provisions were used appropriately in the sample of contracts selected.

Criterion	
1	<p>The information to be protected must be specifically identified.</p> <p>Agencies are to consider what specific information, if any, is legitimately protected from disclosure. A request for inclusion of a provision in a contract that states that all information is confidential does not pass this test. Individual items of information, for example pricing, must be separately considered.</p>
2	<p>The information must be commercially 'sensitive'. This means that the information should not generally be known or ascertainable.</p> <p>The specific information must be commercially 'sensitive' and it must not already be in the public domain. A request by a potential supplier to maintain the confidentiality of commercial information would need to show that there is an objective basis for the request and demonstrate that the information is sensitive.</p>
3	<p>Disclosure would cause unreasonable detriment to the owner of the information or another party.</p> <p>A potential supplier seeking to maintain confidentiality would normally need to identify a real risk of damage to commercial interests flowing from disclosure which would cause unreasonable detriment. For example, disclosure of Internet price lists would not harm the owner, but disclosure of pricing information that reveals a potential supplier's profit margins may be detrimental.</p>
4	<p>The information was provided under an understanding that it would remain confidential.</p> <p>This criterion requires consideration of the circumstances in which the information was provided and a determination of whether there was a mutual, express or implied understanding that confidentiality would be maintained. The terms included in request documentation and in draft contracts will impact on this. For example, a request for tender and draft contract which included specific confidentiality provisions would support an assertion by a potential supplier that the agency has agreed to accept information on the understanding that it would remain confidential.</p>

Source: Department of Finance and Deregulation, *Guidance on Confidentiality in Procurement (FMG 3)*, July 2007, p. 10.

Appendix 3: Previous ANAO Audit Reports on the Senate Order

Audit Report	Recommendation(s)
Audit Report No.07 2010–11 (Calendar Year 2009 Compliance)	<p>Recommendation No.1 Paragraph 3.29</p> <p>To assist agencies to provide more accurate, timely and complete procurement reporting, the ANAO recommends that the Department of Finance and Deregulation review opportunities to consolidate procurement reporting requirements, in conjunction with the department's continuing focus on improving AusTender functionality.</p> <p>Recommendation No.2 Paragraph 4.40</p> <p>The ANAO recommends that agencies assess whether their contract preparation processes support adequate consideration of the appropriate use of confidentiality provisions in contracts.</p>
Audit Report No.06 2009–10 (Calendar Year 2008 Compliance)	<p>Recommendation No. 1 Paragraph 2.22</p> <p>To assist agencies to meet the requirements of the next and any subsequent Senate Orders, the ANAO recommends that they:</p> <ul style="list-style-type: none"> • embed in their relevant policies and practices, the guidance and instructions in Financial Management Guidance 3, including the details of the four criteria test for confidentiality; and • provide suitable training and guidance to staff on these policies and procedures.
Audit Report No.05 2008–09 (Calendar Year 2007 Compliance)	<p>Recommendation No. 1 Paragraph 2.25</p> <p>The ANAO recommends agencies implement review measures to assess the appropriateness of decisions to include confidentiality provisions in contracts and provide suitable feedback to staff involved in procurement.</p>
Audit Report No.07 2007–08 (Calendar Year 2006 Compliance)	<p>Recommendation No.1 Paragraph 4.23</p> <p>The ANAO recommends that agencies improve the accuracy and completeness of their Internet listings by:</p> <ul style="list-style-type: none"> • implementing controls to assist in confirming that Internet listings are complete and accurate. This could include, for example, reconciling the Internet listing details to AusTender and other relevant sources of information such as Financial Management Information System records; and • developing quality assurance processes to improve the accuracy of the Internet listing.

Audit Report	Recommendation(s)
<p>Audit Report No.05 2006–07 (Calendar Year 2005 Compliance)</p>	<p>Recommendation No.1 Paragraph 2.35</p> <p>The ANAO recommends that agencies improve the accuracy and completeness of their contract listings by:</p> <ul style="list-style-type: none"> • implementing controls to assist in confirming that contract listings are complete and accurate. This could include, for example, reconciling the contract listing details to other relevant sources of information, such as Financial Management Information System records or to AusTender; and • developing quality assurance processes to improve the accuracy of the contract listing. <p>Recommendation No.2 Paragraph 3.38</p> <p>The ANAO recommends that agencies provide guidance to those staff responsible for negotiating contracts and completing the Senate Order contract listing, to improve the level of understanding of the Senate Order, particularly relating to the use of confidentiality provisions.</p>
<p>Audit Report No. 11 2005-06 (Calendar Year 2004 Compliance)</p>	<p>Recommendation No. 1 Paragraph 2.35</p> <p>The ANAO recommends that agencies, that have not already done so, implement additional controls designed to ensure the completeness and accuracy of their Internet listings. These controls could include reconciling the Senate Order listing to AusTender information and/ or contract details include in their Financial Management Information System.</p> <p>Recommendation No. 2 Paragraph 3.20</p> <p>The ANAO recommends that agencies provide further guidance, together with training and/ or awareness raising sessions on the requirements of the Senate Order to all staff responsible for negotiating contracts.</p> <p>Recommendation No. 3 Paragraph 3.58</p> <p>The ANAO recommends that agencies ensure adequate documentation of the reasons for agreeing to identify specified information in contracts as being confidential.</p>
<p>Audit Report No. 10 2004-05 (Calendar Year 2003 Compliance)</p>	<p>The Report did not contain any recommendations.</p>
<p>Audit Report No. 31 2003-04 (Financial Year 2002-03 Compliance)</p>	<p>The Report did not contain any recommendations.</p>
<p>Audit Report No. 5 2003-04 (Autumn 2003 Compliance)</p>	<p>The Report did not contain any recommendations.</p>
<p>Audit Report No. 32 2002-03 (Spring 2002 Compliance)</p>	<p>The Report did not contain any recommendations.</p>

Source: ANAO Audit Report.

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