

The Auditor-General
Audit Report No.11 2005–06
Business Support Process Audit

**The Senate Order for Departmental and
Agency Contracts
(Calendar Year 2004 Compliance)**

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of Australia 2005

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Canberra ACT
29 September 2005

Dear Mr President
Dear Mr Speaker

The Australian National Audit Office has undertaken a business support process audit across agencies in accordance with the authority contained in the *Auditor-General Act 1997*. Pursuant to Senate Standing Order 166 relating to the presentation of documents when the Senate is not sitting, I present the report of this audit and the accompanying brochure. The report is titled *The Senate Order for Agency and Departmental Contracts (Calendar Year 2004 Compliance)*.

Following its presentation and receipt, 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. 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 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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Audit Team

Ben Matthes
Russell Coleman

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Abbreviations/Glossary

AEC	Australian Electoral Commission
AusTender	A service that provides the public with information about the Australian Government's procurement activities.
CAC Act	<i>Commonwealth Authorities and Companies Act 1997</i>
CEIs	Chief Executive's Instructions
Customs	Australian Customs Service
confidential information	Information that is subject to an obligation of confidence – either under the contract or under general law principles.
confidential/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 (for example, in a schedule). For the purposes of the audit, the terms 'confidential provisions' and 'confidentiality provisions' are synonymous.
contractual information	Information in, or relating to, the contract.
CPGs	Commonwealth Procurement Guidelines
DIMIA	Department of Immigration and Multicultural and Indigenous Affairs
DoTARS	Department of Transport and Regional Services
DVA	Department of Veterans' Affairs
FaCS	Department of Family and Community Services
Finance	Department of Finance and Administration

Finance Guidance on Confidentiality	Department of Finance and Administration. <i>Guidance on Confidentiality of Contractors' Commercial Information</i> , February 2003.
Finance Guidance on Internet listings	Department of Finance and Administration. <i>Guidance on the Listing of Contract Details on the Internet</i> , January 2004.
FMA Act	<i>Financial Management and Accountability Act 1997</i>
FMIS	Financial Management Information System
FOI Act	<i>Freedom of Information Act 1982</i>
Necessary qualities of confidentiality	Tests to ascertain whether particular information has the necessary qualities of confidentiality are whether the information is both 'sufficiently secret' and 'significant': secret in the sense that the information is generally not known, and significant in the sense that the owner of the information would be likely to suffer some detriment if the information were made public.
PM&C	Department of the Prime Minister and Cabinet
Senate FPA Committee	Senate Finance and Public Administration References Committee
Senate Order/Order	The Senate Order for Departmental and Agency Contracts

Summary and Recommendations

Summary

Introduction

1. This report outlines the results of the seventh audit of *Financial Management and Accountability Act 1997* (FMA Act) agencies' compliance with the Senate Order for departmental and agency contracts (the Senate Order), to list contract details for the 2004 calendar year reporting period on the Internet.

2. The audit was conducted in accordance with the Senate Order request for the Auditor-General to undertake an annual examination of agency contracts listed on the Internet, and report whether there had been any inappropriate use of confidentiality provisions.

Audit scope and objectives

3. The objectives of the audit were to assess agency performance in relation to compiling their Internet listings as required by the Senate Order and the appropriateness of the use of confidentiality provisions in Commonwealth contracts.

4. The audit involved a detailed examination in seven agencies of the processes used to compile their Internet listings and the use of confidentiality provisions in contracts.

Selected agencies

5. The seven agencies selected for review were:

- Australian Customs Service;
- Australian Electoral Commission;
- Department of Family and Community Services;
- Department of Immigration and Multicultural and Indigenous Affairs;
- Department of the Prime Minister and Cabinet;
- Department of Transport and Regional Services; and
- Department of Veterans' Affairs.

Key findings

6. The audit found that each of the audited agencies had placed a list of contracts on their website that were, with one minor exception, in accordance with requirements in the Senate Order. In two instances, Ministerial letters had not been tabled in the Senate by the due date of 28 February 2005. The letters were tabled on 4 April and 14 June 2005 respectively.
7. The audit concluded that the controls and processes for compiling the Internet listing were generally adequate and provided reasonable assurance that the number of contracts reported on the Internet was correct. However, the ANAO considered that these controls could be strengthened by some agencies implementing additional controls such as undertaking a reconciliation between the Senate Order listing and contract information contained in their Financial Management Information Systems (FMIS) and/or their AusTender¹ information.
8. The audit also found that all of the selected agencies had included in their standard Request For Tender documentation and contract templates satisfactory information on the Australian Government's accountability framework, including its policy in relation to confidential information and disclosure to the Parliament and its Committees.
9. However, guidance to staff with responsibilities for contract negotiations that outlined the requirements of the Senate Order was an area that needed improvement in some agencies, as was the extent and timing of training and/or awareness sessions on the Senate Order requirements.
10. The ANAO reviewed 53 contracts that were listed on the Internet as containing confidential provisions or 'other requirements of confidentiality' to determine whether they had been appropriately listed. The ANAO considered that only 14, or 27 per cent, of these contracts satisfied the criteria for protection as confidential information. This low level of compliance is consistent with the overall result for the previous six audits, suggesting that some agencies need to give higher priority to complying with this important requirement of the Senate Order.

¹ All agencies subject to the *Financial Management and Accountability Act 1997* are required by the Commonwealth Procurement Guidelines to publish on AusTender contracts and standing offers with a value of \$10,000 or more.

11. The ANAO found that no contract details had been excluded from the Internet listings of the selected agencies for reasons of national security or commercial sensitivity.

Overall conclusion

12. Overall, the ANAO concluded that although agencies' Internet listings generally complied with the Senate Order, the percentage of contracts listed as containing confidential information, that were considered by the ANAO as being appropriately listed, was low. This situation could be attributed to inadequate guidance being provided in some agencies to staff with contract negotiation responsibilities, as well as a lack of training and/or the provision of awareness-raising sessions to these staff.

13. Importantly, the audit found that all the agencies reviewed had included in their templates contract, and the majority of contracts, a clause providing for the disclosure of information to the Parliament and its Committees.

14. The results of the ANAO's audits over the last three years indicate a need, at least in some agencies, to improve their awareness of, and compliance with, the Senate Order. The need for agencies to revise their procurement and related guidance material in the light of revisions to the Commonwealth Procurement Guidelines (CPGs) that took effect from 1 January 2005 represents a good opportunity for agencies, that have not already done so, to review and as necessary improve their guidance material relating to the Senate Order. Agencies should also reinforce the importance of compliance with the Order in procurement-related training and awareness sessions undertaken. This is particularly important in circumstances where agencies have a devolved procurement environment where line managers are responsible for the negotiation and management of contracts, including making judgements about the confidentiality of contract provisions.

Agencies' responses

15. All agencies agreed with the recommendations. Where provided, agencies' additional responses to each recommendation are provided in the body of the report, and agency responses relating to the report in general are provided at Appendix 3.

Recommendations

- Recommendation No.1**
Para.3.35
- 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 included in their FMIS.
- Recommendation No.2**
Para.3.20
- 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.
- Recommendation No.3**
Para.3.58
- The ANAO *recommends* that agencies ensure adequate documentation of the reasons for agreeing to identify specified information in contracts as being confidential.

Audit Findings and Conclusions

1. Introduction

This chapter of the report provides background information about the audit and details of the objectives and scope of this audit.

Background

1.1 The Senate Order on Departmental and Agency Contracts was originally made in June 2001 and has been amended several times, most recently on 4 December 2003. The Order is directed to underlining the principle that information in government contracts should not be protected as ‘commercial in confidence’ unless there is a sound reason to do so. The text of the current Senate Order is reproduced at Appendix 1.

1.2 Government policy for the listing of contract details on the Internet is now set out in the Department of Finance and Administration (Finance) *Guidance on the Listing of Contract Details on the Internet*² and *Confidentiality of Contractors’ Commercial Information*.³ In addition, the *Commonwealth Procurement Guidelines* have been amended to reflect the requirements of the Senate Order. In January 2005 Finance issued *Guidance on the Mandatory Procurement Procedures*,⁴ which stipulates that confidentiality arrangements should be clearly articulated in Request For Tender (RFT) documentation, and the draft contract made available at tender stage should identify relevant Australian Government policies relating to confidentiality and accountability requirements for disclosure of information.

1.3 Agency compliance with these requirements is subject to the following terms (as set out in the June 2003 Government response to the Order):

- agencies will use the Department of the Prime Minister and Cabinet guidelines on the scope of public interest immunity in [Government Guidelines for Official Witnesses before Parliamentary Committees and](#)

² Department of Finance and Administration. *Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)*, January 2004. Referred to as *Finance Guidance on Internet Listings*, in this report. This guidance was drawn from the criteria contained in Audit Report No.38, 2000–2001 *The Use of Confidentiality Provisions in Commonwealth Contracts*.

³ Department of Finance and Administration, *Guidance on Confidentiality of Contractors’ Commercial Information*, February 2003. Referred to as *Finance Guidance on Confidentiality* in this report.

⁴ Department of Finance and Administration, *Guidance on the Mandatory Procurement Procedures*, January 2005.

[*Related Matters*](#) to determine whether information regarding individual contracts will be provided;

- agencies will not disclose information if disclosure would be contrary to the [*Privacy Act 1988*](#), or to other statutory secrecy provisions, or if the Commonwealth has given an undertaking to another party that the information will not be disclosed; and
- compliance with the Senate Order will be progressive as agencies covered by the [*Financial Management and Accountability Act 1997*](#) refine arrangements and processes to meet the requirements.

1.4 Chief Executives are also required to advise portfolio Ministers of any sensitivity in relation to disclosure before publishing information on contracts entered into by their agency.

1.5 Clause 5 of the Order requests (and the Auditor-General has agreed) that the Auditor-General report on agency compliance with the requirements of the Order.

Audit requirements

Senate Order request for audit of agency compliance

1.6 The initial Senate Order had requested the Auditor-General to undertake twice-yearly examinations of agency contracts required to be listed on the Internet, and report whether there had been any inappropriate use of confidentiality provisions and whether contracts not included in agency lists should have been listed. The Auditor-General tabled reports on the twice-yearly audits in February and September 2002, March and September 2003, and February and September 2004.

1.7 On 4 December 2003, the Order was amended to request the Auditor-General to provide a report to the Senate annually (not later than 30 September each year), rather than twice yearly. The Auditor-General agreed to this request on 22 December 2003.

This audit report

1.8 This audit is the seventh in a series of audits fulfilling the Senate's request. This report details the findings and conclusions of the audit in response to the Senate Order, namely, the audit of the contract information associated with the tabling of letters by Ministers, by no later than two months

after the last day of the 2004 calendar year, that is 28 February 2005, and contracts entered into or not fully performed in the twelve months beginning 1 January 2004 and ending 31 December 2004.⁵

Audit Objectives

1.9 The objectives were, in the seven selected agencies, to examine:

- whether all the details as required by the Senate Order were included in the agency's Internet contract listing;
- the process by which the agency's Internet listing was prepared, and assess whether the process was likely to lead to the list of contracts placed on the Internet being complete;
- the process by which the agency determined which contracts placed on the Internet contained confidential provisions or were considered to be confidential, and assess whether the process was likely to be appropriate;
- a selection of contracts listed as confidential and determine whether the use of such provisions was appropriate; and
- a selection of contracts which have been excluded from the Internet listing because the whole contract was deemed to be confidential and assess whether the contract should have been listed.

Audit scope and criteria

Scope

1.10 In the agencies subject to audit, the ANAO reviewed the processes used to compile the Internet listings and the use of confidentiality provisions in contracts. In relation to confidentiality provisions, the audit focussed on commercial information that could reasonably be protected as confidential.⁶ However, the ANAO recognises that agencies may have agreed to protect other types of information, for example, information with a national security classification and/or personal information, as confidential information.

⁵ When the Senate Order refers to contracts entered into in the previous 12 months it 'means the period of 12 months ending on either 30 June or 31 December in any year, as the case may be'.

⁶ The actual wording of the Senate Order does not specifically refer to commercial information. However, the basis for the original Senate Motion and the holding of the Senate Finance and Public Administration (FPA) References Committee's inquiry was the Senate's concern that information was being withheld from the Parliament for reasons of commercial confidentiality.

Audit criteria

1.11 Audit criteria were developed for each of the audit objectives using the relevant Finance guidance referred to in paragraph 1.2 above. In summary, the criteria represent the management environment and internal controls that an agency would be expected to have in place to comply with the relevant legislative requirements, government policies and accepted management principles applicable to each objective.

Audit coverage and methodology

Selected agencies

1.12 The selection of agencies was based on an analysis of the previous six audit reports tabled under the Senate Order, particularly where the ANAO had identified that the agency required improvement in the following areas:

- the process for listing relevant contracts on the Internet;
- the appropriate use of confidential provisions; and
- the adoption of Australian Government reforms relating to confidentiality in contracts in policies, procedures, requests for tenders, contract templates and contract negotiation practices.

1.13 The seven agencies selected for detailed review were:

- Australian Customs Service (Customs);
- Australian Electoral Commission (AEC);
- Department of Family and Community Services (FaCS)
- Department of Immigration and Multicultural and Indigenous Affairs (DIMIA);
- Department of the Prime Minister and Cabinet (PM&C)
- Department of Transport and Regional Services (DOTARS); and
- Department of Veterans' Affairs (DVA).

Audit methodology

1.14 The audit methodology involved:

- for the agencies selected, accessing their Internet sites and downloading relevant information from the contract listings;

- conducting interviews, examining files, records and contracts relating to the contract listings at each of the selected agencies, and
- providing management reports on the detailed audit findings to the selected agencies.

1.15 Where considered appropriate, legal advice was sought on the appropriateness of identifying contract information as confidential.

Previous audit coverage of agency compliance with the Senate Order

1.16 In the seven Senate Order audits undertaken to date, the ANAO has examined 35 agencies' Senate Order listing processes in detail, and reviewed 281 contracts listed as containing confidential provisions to establish whether the contracts were appropriately listed.

1.17 The audits have covered agencies that comprise the majority of contracts and the majority of contracts listed as containing confidential provisions. The 35 agencies audited accounted for approximately 94 per cent of contracts entered into by Australian Government agencies and 97 per cent of all contracts listed as containing confidential provisions.

2. Content of Internet Listings and Processes For Preparing Listings

This chapter reports on whether agencies' listings met the requirements of the Senate Order and the adequacy of agencies' processes for preparing the listing.

Content of Internet listings

2.1 This element of the audit assessed whether agencies contract listings, as published on the Internet, met the requirements of the Senate Order.

Audit evaluation criteria

2.2 Agencies were expected to have:

- laid on the table in the Senate, by their relevant Minister, no later than 28 February 2005, a letter of advice that a list of contracts has been placed on the Internet, with access to the list available through the agency's home page;
- made the list available on the Internet by 28 February 2005;
- listed all the details as required by the Senate Order; and
- established a clear and readily accessible path to the listing on its home page.

Findings

2.3 The ANAO found that, with one minor exception, all agencies had published their listing by the due date 28 February 2005, and in accordance with Finance guidance *Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)*. The minor exception was DVA that did not include a column for 'other requirements of confidentiality'. DVA advised that this would be corrected in the next listing. Over the series of Senate Order audits, the ANAO notes that agencies have steadily improved both the timeliness and completeness of their Internet listings.

2.4 Two Ministers did not table in the Senate letters of advice for their respective agencies by 28 February 2005. The Minister for Department of Transport and Regional Services letter was tabled on 4 April 2005 and a letter from the Acting Minister for Department of Immigration and Multicultural and Indigenous Affairs was tabled on 14 June 2005.

2.5 DoTARS and DIMIA both advised the ANAO that procedural difficulties had resulted in the delay in the tabling of the letters by their respective Ministers and that processes would be improved to ensure compliance for future listings.

2.6 The audit found that the home page of each agency provided ready access to their Internet listing.

Conclusion

2.7 Consistent with recent audits, the ANAO found that agencies had published on their Internet website the listing by the time required by the Senate Order, and that the presentation of listings was compliant with the requirements of the Senate Order. Procedural breakdowns resulted in two Minister's not tabling letters of advice for their respective Departments' Internet listings by the required date.

Process for compiling Internet listings

2.8 This element of the audit involved a review of the processes by which agencies Internet listings were made, and assessed whether the processes were likely to lead to the listing being complete.

Audit criteria

2.9 Agencies were expected to have:

- developed appropriate policies and procedures for the preparation of the Internet listings consistent with Finance guidance;
- allocated responsibility for preparing and posting the contract listing on the agency's website;
- implemented appropriate controls designed to ensure that the Internet listing is complete in terms of the number of contracts and the details provided; and
- presented the list in a way that enables a clear and complete presentation of contracts for the purposes of compliance with the Senate Order.

Audit findings

Policies and procedures for preparing the Internet listing

2.10 The majority of the agencies audited had included the requirement to complete the Internet listing in their Chief Executive's Instructions (CEIs). The CEIs were also supplemented in some cases with more detailed procedures that were incorporated into general procurement documentation. PM&C advised relevant staff of the Senate Order requirements via email at the time the Internet listing was due to be compiled. PM&C advised it has amended its contract templates and will enhance its guidance to staff on the Senate Order. Although DVA's CEIs did not refer to the Senate Order, DVA had developed a comprehensive better practice guide that included reference to the Senate Order requirements. DVA advised that the relevant CEI was in the process of being updated to reflect the Senate Order.

Responsibility for collating the Internet listing

2.11 All agencies had allocated responsibility for the publication of the listing to their central procurement or coordination units, or in the case of DoTARS, its legal services unit. Responsibility for negotiating the terms and conditions of contracts, agreeing to maintain confidential information, and on-going contract management was generally devolved to line areas, with the central procurement unit having a policy and advising role.

2.12 The ANAO observed that in all agencies the degree to which procurement was centralised or devolved varied, but all had devolved procurement and contract management responsibilities to some extent, and as such the collation of information to compile the Internet listing required the input of relevant line areas.

Training

2.13 While the majority of agencies provided general procurement training, in the case of FaCS, DoTARS and PM&C this training did not specifically address the Senate Order requirements. The ANAO considers that training and/or the conduct of staff awareness sessions on general procurement should incorporate a segment on complying with the Senate Order. The above agencies advised that steps had been taken to enhance the level of training in respect of the Senate Order.

Processes and controls for compiling the Internet listing

2.14 The ANAO found that all of the agencies audited had established processes for compiling the Internet listing. In six of the seven agencies, documentation of the process consisted of an e-mail sent by the central procurement unit to staff in line areas advising them of the requirements for preparing the Internet listing. In the other agency, Customs, the collation of relevant information was undertaken progressively by a central procurement unit during the contract negotiation and signing process, stored in databases, and accessed by the central unit when compiling the Senate Order listing. The processes followed were documented in Customs procurement procedures.

2.15 While the use of email can be a useful means of drawing to the attention of relevant staff existing policies and procedures, the ANAO suggests it is better practice to incorporate instructions such as these into existing approved procurement procedures to increase the visibility and status of such material.

2.16 The audit identified that agencies had implemented one or more of a number of controls designed to ensure the completeness and accuracy of their respective listings.

2.17 All agencies, except DoTARS, maintained a central contracts register and this was used to prepare a draft listing that was then provided to relevant line areas for verification. While these processes provided a reasonable level of assurance about the veracity of the listings, the ANAO considers that, consistent with the conclusion made in the previous Senate Order report,⁷ existing procedures should be enhanced by implementing additional controls such as reconciling their Internet listings with contract details in their FMIS and/or their AusTender listings. The decision about the most appropriate additional controls to introduce will, in part, be dependent on the configuration of agency FMISs and the manner in which details of contracts and related payments are included in AusTender listings.

2.18 The processes and associated controls used by each agency to compile the Internet listing, are summarised below. The results of ANAO testing is reported on an exception basis.

⁷ Audit Report No.10 2004–2005 *The Senate Order for Departmental and Agency Contracts (Calendar Year 2003 Compliance)*, paragraph 3.41.

Australian Customs Service

2.19 Customs Internet listing is generated by the central procurement unit from the information contained in the agency's contracts database, payment listings included in the FMIS and a database of contracts gazetted. The approach adopted by Customs, that involved the compilation of its listing from two independent sources, was considered to be better practice.

Australian Electoral Commission

2.20 The central procurement unit maintained a contracts database, from which a draft Internet listing was produced. The draft listing was disseminated to relevant staff requesting them to verify the accuracy of existing contract information, and to provide details of any new contracts that were required to be reported. This information was used to update the contracts register, and produce the final listing.

Department of Family and Community Services

2.21 The central procurement unit produced a draft listing from information held in the contracts register. The draft listing was distributed to line managers to verify its accuracy and to identify any changes or new contracts that should be included in the listing. The updated draft listings were then checked by the procurement unit and used to compile the final listing.

Department of Immigration and Multicultural and Indigenous Affairs

2.22 The central procurement unit compiled a draft Internet listing from information held in the Department's contract register, and this was compared to a listing produced from the FMIS to identify contracts that may not be included in the current listing. The central unit distributed the draft listings to each division, accompanied by detailed instructions to verify the accuracy of their respective listings.

2.23 Division heads were required to sign-off the listing for their respective division as being accurate and complete. Divisional listings were then collated by the central procurement unit to produce the final Internet listing.

2.24 ANAO testing identified two contracts that had been omitted from the Internet listing. The Department agreed these would be included in the next listing.

Department of the Prime Minister and Cabinet

2.25 The central coordination unit distributed a template Internet listing to all divisions and branches within the Department, requesting it be updated

with contract details relevant for the respective work area. Each work area was responsible for ensuring the completeness and accuracy of its respective listings. Approved listings were returned to the central procurement unit, where they were collated into a single final listing.

2.26 ANAO testing identified details of a number of contracts that had been omitted from the Internet listing. The Department advised these contracts would be included in the next listing.

Department of Transport and Regional Services

2.27 The Department's legal services unit requested each division to provide details of contracts entered into and remaining to be completed for the reporting period. The draft listing compiled by each division was checked by their respective business managers for completeness. The legal services unit then collated the divisional listing into a final listing for the Department.

2.28 ANAO testing identified a number of contracts, details of which were included in the Department's FMIS, that had not been included in the Internet listing.

Department of Veterans' Affairs

2.29 The Department's central procurement unit produced a draft Internet listing from its contract database and the previous listing. This was distributed to procurement staff in line areas to verify the listing for completeness and accuracy.

2.30 The head of each business unit was required to approve their respective listing before returning it to the central procurement unit which was responsible for producing the final listing.

2.31 The central procurement unit used an online contract registration form that contained mandatory fields that required line area procurement staff and contract managers to identify confidential provisions contained within each contract during the contract registration process.

Conclusion

2.32 The ANAO concluded that, each of the seven agencies subject to audit had controls in place designed to ensure the completeness and accuracy of their respective Internet listings. Nevertheless, with the exception of Customs that had comprehensive controls in place, the ANAO considered that the other agencies should enhance their existing procedures by implementing additional

controls such as reconciling their Internet listings with contract details in their FMIS, and/or their AusTender listing. The inclusion into existing procedural documents of agency processes for preparing the Internet listing would also enhance agency compliance with the Senate Order. The agencies involved advised the ANAO that processes for compiling future listings would be improved.

2.33 The ANAO found that each agency, except DoTARS, maintained a central contracts register, albeit in various forms, and the use of these registers in compiling the listing played an important role in agencies producing an Internet listing that was complete and accurate. For the contracts register to be a reliable source of information for the listing process it needed to be up-to-date with relevant information for Senate Order reporting.

2.34 Central procurement units also played an important role in collating relevant contract details, and providing guidance to line area staff, on complying with the requirements of the Senate Order.

Recommendation No.1

2.35 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 included in their FMIS.

Agencies' responses

2.36 All agencies agreed with the recommendation. Specific comments provided were:

Department of Family and Community Services

Agree. In recognition of the need for additional controls, enhancements have already been made to the Department's FMIS. Introduced on 1 July 2005, the enhancements enable improved reconciliation between FaCS' Contracts Database, the FMIS and AusTender reporting.

Department of Prime Minister and Cabinet

Agreed. Additional training of staff involved in procurement and contracting and providing guidance will assist in a more accurate and complete Senate Order report.

3. Confidential Provisions in Contracts

This chapter reports on the accountability environment relating to the use of confidential provisions in contracts by the seven agencies audited, reports on the adequacy of processes used by agencies in deciding which contracts should be listed as containing confidentiality provisions, and details the results of an assessment of whether a selection of contracts listed on the Internet as containing confidential provisions had been listed appropriately.

Determining confidential provisions

3.1 In assessing whether agencies had appropriately identified contracts as containing confidential information, the ANAO used, as the basis for analysis, the contracting governance and accountability environment articulated in the CPGs, the Senate Finance and Public Administration (FPA) References Committee in its final report and relevant Finance guidance.

Audit evaluation criteria

3.2 The ANAO expected that agencies would have in place, a contracting framework that:

- advised potential contractors at the time of tendering, or if no tender process is undertaken, at the beginning of contract negotiations, that:
 - the Australian Government's position is that contractual information is not to be protected as confidential unless there is a good reason for confidentiality;
 - contractual information may be required to be disclosed by law even though the contractor and the Australian Government have agreed that the information is confidential;
 - accountability requirements of the Australian Government should be met, including disclosure to Parliament and its committees and the requirements of the *Freedom of Information Act 1982* (FOI Act);
 - they are required to indicate if they consider any information in the tender or the contract to be confidential, and provide supporting reasons; and
 - the Australian Government will treat as confidential any information provided by tenderers/prospective suppliers prior to

the award of a contract and, in respect of unsuccessful tenderers, after the contract is awarded;

- provided agency officers with confidentiality criteria (based on, or consistent with, Finance Guidance on Confidentiality) to assist them assess, on a case-by-case basis, normally in conjunction with the contractor, the merits or otherwise of the contractor's claim that particular contractual information is confidential and should be protected;
- ensured that information agreed by the agency to be protected as confidential information is identified as such in the contract; and
- established for relevant staff appropriate staff training on, and activities to raise awareness of, the Australian Government's accountability environment, including the Senate Order requirements.

Contracts identified as containing confidential provisions

3.3 One of the main objectives of the Senate Order is to require agencies to adopt a considered decision in relation to the inclusion of confidential information in Australian Government contracts, and an integral aspect of the Order is to require agencies' Internet listings to identify contracts that contain confidential provisions.

3.4 Table 3.1 sets out, in respect of each of the agencies audited, the number of contracts listed on their respective Internet listing, the number and percentage of these that contained confidential provisions and 'other requirements of confidentiality'.

Table 3.1**Contracts listed on the Internet—selected agencies**

Agency	Number of contracts	Contracts listed as containing confidential provisions	% of total	Contracts listed as containing 'other requirements of confidentiality'	% of total
Australian Customs Service	281	29	10%	4	1%
Australian Electoral Commission	148	28	19%	NIL	0%
Family and Community Services	165	15	9%	16	10%
Immigration and Multicultural and Indigenous Affairs	755	85	11%	477	63%
Prime Minister and Cabinet	19	15	79%	3	16%
Transport and Regional Services	290	16	5%	8	3%
Veterans' Affairs	1066	320	30%	NIL	0%
TOTAL	2724	508	18%	508	18%

Source: ANAO analysis of agency Internet listings for 2004 Calendar Year reporting period.

Factors affecting decisions about confidential provisions

3.5 Apart from the nature of the goods or services to be delivered in each case, the three main factors that influence decisions about the number of contracts containing confidential information are:

- the adequacy of guidance to agency staff in respect of confidentiality provisions and the Australian Government's policy and accountability framework;
- the adequacy of tender and contract documentation in addressing the Australian Government's policy in relation to the inclusion of confidential provisions in contracts; and
- the extent to which relevant agency staff had been provided with training and/or have attended awareness raising sessions.

Guidance to agency staff

3.6 All of the agencies subject to audit had CEIs or some other form of formal guidance or procedures on procurement. The extent that this material specifically included information relating to the Australian Government's policy on confidential information in contracts varied. In four of the agencies, Customs, FaCS, DIMIA and DVA, such information had been included in their procurement policies and procedures. In the other agencies, AEC, DoTARS and PM&C, guidance to relevant agency staff consisted of an email sent from their respective procurement units at the time the Senate Order was due to be compiled. These emails generally outlined, as noted earlier, procedures for preparing the Internet listing and to varying degrees, included guidance to staff on how to assess whether information in contracts should be regarded as confidential. The ANAO considers that use of email to provide guidance on the detailed requirements of the Senate Order has the following inherent limitations:

- providing guidance at a point in time via email is unlikely to ensure that contract managers responsible for negotiating contracts have ready access to the comprehensive guidance on the Australian Government's accountability framework, including the policy on the identification of information as confidential and, importantly, the accountability regime relating to the disclosure of information to the Parliament and its committees; and
- email-based procedures and instructions generally lose visibility quickly and often are seen as less permanent or authoritative than instructions that are incorporated into existing procurement policy and procedural documentation.

3.7 As indicated at paragraph 2.15 above, the ANAO considers that while the use of email can be a useful means of drawing attention to existing policies and procedures, such guidance material should be incorporated into agency procurement procedures.

3.8 The audit also identified the following matters in two of the agencies audited.

Australian Electoral Commission

3.9 The audit identified that the Commission's CEIs, specifically relating to compliance with the Senate Order, included the following definition of confidential information:

'confidential information, that is information that can be withheld from disclosure to Parliament and all committees of Parliament includes:

- a company's internal costing information or information about its profit margins;
- intellectual property;
- information that if made public could damage the company's competitive advantage; and
- trade secrets.'

3.10 The ANAO considered that this definition is contrary to the Government's policy on accountability and transparency, particularly as it relates to the provision of information to the Parliament and its committees. The AEC advised that it would update its CEIs to more accurately reflect the Australian Government's position on confidential information in contracts.

Department of Veterans' Affairs

3.11 DVA had developed a better practice guide on classifying confidentiality in DVA tender and contract documentation that was available to all staff on the Department's Intranet and provided guidance on how to decide whether information in contracts should be classified as confidential. While the ANAO considered that generally the guide provided useful and appropriate guidance to staff including references to Finance guidance, the guide included the following paragraph:

'There may be individual circumstances in which DVA may wish to have information kept confidential for example, discounts where the market is very limited. Information should be classified as confidential if disclosure would not be in the public interest, for example national security reasons or where the ordinary business of government would be prejudiced. In the absence of any concerns about disclosure by the other party, the onus is on DVA to justify that the information is confidential information due to reasons of public interest. For example disclosure of discount information would prejudice the ordinary business of government, and in the case of DVA, impair its capacity to obtain value for money in purchasing services.'

3.12 The ANAO considered that the test of ‘the ordinary business of government would be prejudiced’ is not one of the categories of public interest as outlined in the *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters* which is used to define the scope of public interest. The ANAO also considered that the better practice guidance was inconsistent with the Finance guidance relating to the confidentiality of information in contracts. The Finance guidance, in particular, refers to circumstances where a prospective provider can establish that it would suffer detriment if the level of discount offered was disclosed and indicates that officials should consider requests to maintain confidentiality of such information on a case-by-case basis.

3.13 DVA advised that it had reviewed its guidance and had issued the revised guidance to staff preparing the Spring 2005 Senate Order.

Tender and contract documentation

3.14 The audit identified that the standard RFT and contract templates developed by each of the agencies subject to audit contained satisfactory information and instructions relating to confidentiality of information in contracts. In some instances the ANAO suggested that existing documentation could be enhanced by, for example, explaining in more detail the procedures which the agency would use in determining whether information was considered confidential.

3.15 A key aspect of the Australian Government’s accountability environment is that agencies’ contracts provide for disclosure of information, including confidential information, in response to a request by a House or Committee of the Parliament. The audit found that each of the audited agencies had a provision in their existing contract templates and in the majority of contracts reviewed that provided for such disclosure.

3.16 The ANAO notes that the above situation is a considerable improvement on the position found in relation to agencies that were subject to audit as part of the ANAO’s sixth audit relating to calendar year 2003 compliance. That audit found that all the agencies in question needed to improve their tender documentation and contract templates to better reflect the Government’s accountability environment.

Staff training and awareness

3.17 The audit identified that in four of the audited agencies, Customs, AEC, DIMIA and DVA, procurement-related training material included relevant information about the inclusion of confidential information in contracts. In the remaining agencies, FaCS, DoTARS and PM&C, no specific training and/or awareness sessions had been conducted for relevant staff to assist them in appropriately identifying whether information in contracts could be considered to be confidential.

3.18 The ANAO found that, generally, staff in central procurement units, who were available to provide guidance on the requirements of the Senate Order, had a good working knowledge of the Australian Government's accountability framework, including the policy relating to the inclusion of confidential information in contracts. In a number of agencies, the ANAO found that the need for agencies to update their procurement frameworks in the context of the revised procurement guidelines, that took effect on 1 January 2005, and the need to provide training and/or awareness sessions on the revised framework, also provided an opportunity for agencies to reinforce these Senate Order requirements with relevant staff. In these agencies, the overall extent of compliance with the Senate Order was greater than for those agencies that did not adopt this approach.

Conclusion

3.19 The ANAO concluded that, at the time of the audit, all of the agencies audited had included in their standard RFT documentation and contract templates information on the Australian Government's accountability framework, including its policy in relation to confidential information and disclosure to the Parliament and its Committees. The ANAO found, however, that the adequacy of guidance material to staff was an area that needed improvement in some agencies. The audit also identified that the extent and timeliness of training and/or awareness sessions provided to staff, particularly staff in line areas with procurement responsibilities, needed further attention in a number of agencies.

Recommendation No.2

3.20 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.

Agencies' responses

3.21 All agencies agreed with the recommendation. Specific comments provided were:

Department of Family and Community Services

Agree. Additional guidance information on the Senate Order requirements is being included in the Department's procurement guides and training materials. Further guidance and training will be provided to staff with contract assessment and reporting responsibilities to ensure that contracts are reported appropriately.

The use of confidential provisions in contracts

3.22 This section of the chapter reports on the results of the ANAO's examination, in the seven audited agencies, of a sample of contracts that were listed on the Internet as containing confidential information, or 'other requirements confidentiality', to assess whether the contract had been listed appropriately.

3.23 In selecting the contracts for detailed examination, the ANAO concentrated on recent contracts, recognising that agencies had access to Finance guidance from February 2003 and that older contracts may have been negotiated in circumstances where the Australian Government accountability framework was still evolving.

3.24 Consistent with the approach adopted in previous audits, the ANAO in making its assessments on whether information had been appropriately identified as confidential, examined individual contracts, conducted interviews with relevant agency staff and reviewed documentation available to support the agencies' decisions. The ANAO did not discuss with the supplier or contractor whether there were any particular circumstances, not obvious from reading the contract and related documentation, that might have made the information confidential.

Audit evaluation criteria

3.25 The ANAO assessed each of the contracts selected for examination against the criteria for determining whether information in contracts could properly be protected as confidential. The criteria for evaluation, as presented in the *Finance Guidance on Confidentiality* and also in the *Finance Guidance on Internet Listings* are described in full in Appendix 1 and are summarised in Table 3.2.

Table 3.2

Department of Finance and Administration confidentiality criteria

Confidentiality Criteria	
Criterion 1	The information to be protected must be identified in specific rather than global terms
Criterion 2	The information must have the necessary quality of confidentiality*
Criterion 3	The disclosure of information would cause detriment to the contractor or other third party
Criterion 4	The information was provided under an understanding that it would remain confidential

* Useful tests to ascertain whether particular information has this quality are whether the information is both 'sufficiently secret' and 'significant': secret in the sense that the information is generally not known, and significant in the sense that the owner of the information would be likely to suffer some detriment if the information were made public.

Source: Department of Finance and Administration. *Guidance on Confidentiality of Contractors' Commercial Information*. February 2003. Section 3, 'The Tests'.

3.26 All the criteria must be met for the information to be treated as confidential. In previous audits the ANAO focussed on whether criteria 2 and 3 had been met. In view of the time the Senate Order has been in place and the availability of Finance guidance, in this audit the ANAO assessed whether all four criteria had been met.

Examples of what would, or would not, be considered confidential

3.27 The *Finance Guidance on Confidentiality* provides examples of commercial information in a contract that may be considered confidential and examples of information that would not generally be considered to be confidential.

3.28 This Guidance suggests that the types of commercial information that may be legitimately protected by a confidentiality clause are:

- trade secrets;
- proprietary information, for example, information about how a particular technical or business solution is to be provided;
- contractor's internal costing information or information about its profit margin;
- pricing structures (where this information would reveal whether a contractor was making a profit or loss on the supply of a particular good or service); and
- intellectual property matters where these relate to a contractor's competitive position.⁸

3.29 The types of commercial information that would not generally be considered to be legitimately confidential are:

- performance and financial guarantees;
- indemnities;
- the price of an individual item or group of items of goods or services;
- rebate, liquidated damages and service credit clauses;
- performance measures that are to apply to the contract;
- clauses that describe how intellectual property rights are to be dealt with; and
- payment arrangements.⁹

General audit findings

3.30 Table 3.3 provides a summary of the contracts listed as containing confidential information that were reviewed by the ANAO, and the number that the ANAO considered met the four tests of confidentiality.

⁸ Department of Finance and Administration. *Guidance on Confidentiality of Contractors' Commercial Information*. February 2003 p. 11.

⁹ *ibid.*, p. 12.

Table 3.3**Summary of assessment against the four confidentiality tests ¹⁰ – selected contracts**

	Met test 1	Met test 2	Met test 3	Met test 4	Met all 4 tests
Number of contracts reviewed ¹¹	44	44	44	44	44
Contracts that met each test	24	15	14	23	11 ¹²
% of total contracts that met each test	55%	34%	32%	52%	25% ¹²

Source: ANAO analysis of contracts reviewed.

3.31 Overall, the analysis suggests that some agencies need to pay further attention to assessing whether each of the four tests that must be met in determining whether any contract information should be identified as confidential.

3.32 In respect of each of the individual tests, it is considered reasonable to conclude that tests 1 and 4, being procedural in nature, should be able to be met with minimal difficulty. Tests 2 and 3, by contrast, require judgements to be made about the information contained in contracts. Nevertheless, the ANAO expected that a much larger percentage of the contracts would also have met these two tests.

Audit findings by agency

3.33 Table 3.4 provides details by agency of the number of contracts reviewed that contained confidential provisions, and the number and percentage considered by the ANAO to be appropriately listed. This table should be read in conjunction with the comments that follow in respect of each agency. These comments outline the reasons for the ANAO's assessment of the contracts reviewed.

¹⁰ These tests are outlined at Appendix 1.

¹¹ The ANAO also reviewed nine contracts that were listed as containing 'other requirements of confidentiality'. Of these, three were considered to be appropriately listed.

¹² When combined with the three contracts that contained 'other requirements of confidentiality', the number of contracts considered to be appropriately listed totalled 14, or 27 per cent of the 53 contracts reviewed.

Table 3.4**ANAO assessment of confidential provisions for selected agency contracts**

Agency	Number of contracts reviewed for each Agency ¹³	Number of contracts ANAO considered appropriately listed	Percentage of contracts considered appropriately listed	Paragraph references to explanations of assessments
Australian Customs Service	6	3	50%	3.35 to 3.36
Australian Electoral Commission	8	6	75%	3.37 to 3.39
Family and Community Services	8	2	25%	3.40
Immigration and Multicultural and Indigenous Affairs	8	1	13%	3.41
Prime Minister and Cabinet	8	0	0%	3.42 to 3.44
Transport and Regional Services	7	2	29%	3.45 to 3.46
Veterans' Affairs	8	0*	0%	3.47 to 3.51
TOTAL	53	14	27%	

Source: ANAO analysis

* As explained in paragraphs 3.47 to 3.51, one of the contracts assessed was a hospital services contract that contains confidential provisions consistent with DVA's policy position relating to these contracts. Nevertheless, the ANAO did not consider the contract met the four tests of confidentiality.

3.34 The results of the ANAO's assessment of the individual contracts, by each agency, are discussed below.

Australian Customs Service

3.35 The ANAO selected six contracts for detailed assessment. Of these, the ANAO considered that three had been appropriately classified as containing confidential information. Of the remaining three, the ANAO considered that two contained information that should be not protected as confidential. Although the information concerned consisted of hourly or daily rates, it did not reveal the profit margins of the contractor. However, the audit identified that these two contracts had been subject to considerable negotiations in an attempt to reach agreement on the extent of information that should be treated as confidential. The remaining contract was identified as having been

¹³ The number of contracts reviewed in each agency was dependent, in part, on the number listed as containing confidential provisions.

incorrectly listed as containing confidential information. Customs advised that this would be corrected in the next Senate Order listing.

3.36 The ANAO noted that, since the last audit at Customs, in relation to the reporting period August 2001 to August 2002, there had been a marked reduction in the number of contracts listed as containing confidential information, and at the same time, a substantial increase in the percentage of contracts that were considered to be appropriately listed. This outcome can be directly attributed to the improvements made by Customs to their contract policies and procedures and training regime.

Australian Electoral Commission

3.37 Of the eight contracts selected for examination, the ANAO agreed that six of the contracts had been appropriately classified as containing confidential information. The ANAO's assessment was made on the basis that pricing and proprietary information included in the contracts, together with information publicly available via the RFT process, could legitimately cause detriment to the contractor if made publicly available. Of the remaining two contracts reviewed, the AEC agreed that one of the contracts had been incorrectly listed as containing confidential provisions and the ANAO considered that the remaining contract should not have been identified as containing confidential provisions.

3.38 While the ANAO agreed with the AEC's assessment in the majority of instances, the ANAO found that the AEC had generally not documented the basis on which decisions had been made to identify certain information as being confidential.

3.39 In relation to the contract the ANAO considered did not meet the tests of confidentiality, the AEC advised the ANAO of the reasons why the contractor was insistent that the pricing schedules should be treated as confidential. The AEC also advised that in future it would obtain written documentation from suppliers when accepting claims of confidentiality.

Department of Family and Community Services

3.40 The ANAO selected eight contracts listed on the Department's Internet listing as containing confidential provisions. Of these, the ANAO considered that six did not meet the four tests of confidentiality. The ANAO considered that it would have been more appropriate for these contracts to have been identified as containing 'other provisions of confidentiality' as these contracts

contained standard clauses on confidentiality and in all but one instance did not identify specific information that was regarded as confidential. This assessment illustrated that there may have been some confusion about the difference between provisions of a contract that could be considered to be confidential, and contracts that contained standard requirements of confidentiality. It is the existence of these latter provisions that identify contracts as containing 'other requirements of confidentiality'. FaCS advised that further guidance and training would be provided to staff with assessment responsibilities to ensure contracts are appropriately classified.

Department of Immigration and Multicultural and Indigenous Affairs

3.41 Of the eight contracts selected for examination, the ANAO considered that only one was appropriately listed as containing confidential information. The ANAO also considered that the remaining seven contracts should have been listed as containing 'other requirements of confidentiality'. This situation again illustrated some confusion existed about the difference between confidential provisions and standard requirements of confidentiality referred to above. DIMIA agreed to revise its guidance and training material with a view to clarifying this distinction.

Department of the Prime Minister and Cabinet

3.42 Of the eight contracts selected for detailed examination, the ANAO considered that none met the four tests of confidentiality and, therefore were incorrectly listed as containing confidential provisions.

3.43 The ANAO considered that this situation demonstrates a need for staff with contract management responsibilities to have an increased understanding of the Senate Order reporting requirements, particularly the appropriate use of confidential information provisions in contracts.

3.44 The Department advised that guidance material on template contracts had been revised to provide additional information on the identification of contractors confidential information, and that relevant Finance guidance had been reissued to line managers.

Department of Transport and Regional Services

3.45 The ANAO selected seven contracts for detailed examination. The ANAO considered that five of the contracts were inappropriately listed as

containing confidential information. In addition, one contract had been listed as containing 'other requirements of confidentiality', although the ANAO considered it contained information that could be considered to be confidential and therefore should have been listed accordingly.

3.46 The ANAO considered that the above situation resulted from the inadequacy of guidance material provided to contract managers who were responsible for identifying whether any information in contracts should be regarded as confidential. The Department acknowledged there was scope for improving its processes for the preparation of the Senate Order contract listing and advised that it had initiated a number of enhancements to its procurement and reporting arrangements, including the establishment of a procurement advisory unit that, amongst other things, would take responsibility for preparing future Senate Order listings.

Department of Veterans' Affairs

3.47 The ANAO selected eight contracts for detailed examination. Of these contracts, the ANAO agreed with DVA's revised assessment, undertaken during the course of the audit, that two contracts did not contain confidential provisions. The ANAO considered that the remaining six contracts were not appropriately identified as containing confidential provisions. In the ANAO's view the information identified as being confidential did not meet the four tests of confidentiality. One of these contracts is a hospital services contract. Further commentary in relation to this type of contract is outlined in paragraphs 3.48 to 3.51 below.

3.48 The ANAO noted that approximately 30 per cent of contracts listed had pricing information listed as being confidential, with the majority being for hospital services. DVA provided the following explanation of its policy position:

DVA advised the ANAO that it classifies pricing information in contracts for hospital services as confidential at the request of the hospital provider and is consistent with the industry norms. The Department indicated that, given the nature of the market for hospital services, it is reasonable to apply a decision about confidentiality to this group of like contracts to achieve the requirements of the FMA Act to ensure a value for money outcome for the provision of hospital services for entitled veterans.

DVA procures \$900m of private hospital services per year. There is considerable variation in current pricing schedules between hospital

providers, both between regional, rural and remote providers and metropolitan providers; and between different metropolitan providers. Each Hospital is basically providing unique services in a discrete market and we are seeking to place them into a competitive environment to achieve competitive pricing. Further, the differences in payment are due to such things as reflecting the complexity of the infrastructure used by each provider in providing the hospital services and having regard to whether the providers were for profit and not for profit and to remove monopolistic type approaches. Pricing for hospital contracts is vigorously negotiated, irrespective of the geographic location of the provider.

Unlike many markets where suppliers will attempt to undercut a competitor's pricing, there is evidence in the hospital sector that suppliers will attempt to seek the same price as a competitor, where that pricing information is known to maximise revenue and use this Government program as a funder rather than a competitively priced purchaser.

DVA would not generally approach the market and seek to negotiate contracts in all states and territories simultaneously. Transparency of pricing information in hospital contracts following an approach to the market in one state or territory would severely undermine DVA's negotiating position, (and therefore our ability to maximise outcomes from available resources) in subsequent approaches to the market.

Further, transparency of our pricing information may adversely influence our relationships with other key stakeholders in the marketplace, i.e. Medibank Private and the private health funds whose agreements with private hospitals contain similar confidentially clauses.

DVA argues that we appropriately balance our classification of hospital contracts as containing provisions that should be protected as confidential by listing the contract on the Internet, listing the total estimated value of the contract, and including a clause within the agreement stating that DVA may need to disclose any information upon request from parliament.

3.49 The ANAO acknowledges the complexity of the market in which DVA is procuring hospital services, and notes that DVA has reached a considered position that the market conditions in which hospital services contracts are negotiated are such that the disclosure of pricing information in these contracts could cause detriment to contractors and could, potentially, also impact the Department's ability to obtain value for money outcomes. The ANAO also noted that these contracts included a clause that in effect provided for the disclosure of confidential information to Parliamentary Committees.

3.50 No documentation was, however, available that clearly demonstrated that, at the time contracts were negotiated, the pricing information contained in hospital contracts met the four tests of confidentiality.

3.51 DVA advised that it would prepare a separate document detailing the rationale for its position on confidentiality of pricing information in private hospital contracts and seek Executive management approval by the end of September 2005.

ANAO assessment over time

3.52 Table 3.5 details, for the seven audits undertaken, the number of contracts reviewed that were listed as containing confidential provisions, and the number, and percentage of contracts considered by the ANAO to be appropriately listed.

Table 3.5

Summary of contracts reviewed and the percentage of contracts considered to be appropriately listed in accordance with the Senate Order, for each of the seven audits undertaken

Senate Order Audit Report (Tabling month)	Number of contracts reviewed and considered appropriately listed as containing confidential provisions	Percentage considered appropriately listed
February 2002 (Report No.33)	24 of 64	38%
September 2002 (Report No.8)	9 of 56	16%
March 2003 (Report No.32)	5 of 33	15%
September 2003 (Report No.5)	6 of 20	30%
February 2004 (Report No.31)	5 of 30	17%
September 2004 (Report No.10)	11 of 26	42%
September 2005 (Report No.11)	14 of 53	27%
Summary (total of all seven audits)	74 of 282	26%

Source: ANAO analysis

3.53 The ANAO acknowledges that direct comparisons cannot be made between reporting periods. This is because of the varying nature of the individual contracts reviewed over time and the different circumstances in which agencies manage their contractual obligations. Overall, however, the percentage of contracts, listed as containing confidential provisions and

considered by the ANAO to be appropriately listed, is low, suggesting that some agencies need to give higher priority to complying with this important requirement of the Senate Order.

Conclusion

3.54 In applying the Finance tests for determining whether information should be protected as confidential information, the ANAO considered that 14 of the 53 contracts examined, were appropriately listed.

3.55 As can be seen from Table 3.5, this result is consistent with the low overall percentage for the last six audits. This situation again highlights the need, in contract negotiations, for a more rigorous application of the principle that, in order to provide greater transparency in government contracting, contractors' information should not be protected unless there is a good reason to do so.

3.56 One of the reasons why the ANAO considered agency's assessments about the inclusion of confidential provisions to be inappropriate was reporting errors made by agencies in compiling the Internet listings. However, a number of the inappropriate listings were the result of judgements made by agencies at the time contracts were negotiated. In many of these cases there was insufficient documentation of the reasons why agencies had made an assessment that certain contract information should be treated as confidential.

3.57 As indicated in previous audit reports the contractor must put a case to the agency for protecting information as confidential based on sound reasons, and the agency must be able to justify the use of a confidentiality clause. The fact that contractors wish to protect information as confidential is not, by itself, a sufficient reason for it to be protected. The same rigour must be applied in relation to information that agencies wish to protect as confidential.

Recommendation No.3

3.58 The ANAO *recommends* that agencies ensure adequate documentation of the reasons for agreeing to identify specified information in contracts as being confidential.

Agencies' responses

3.59 All agencies agreed with the recommendation. Specific comments provided were:

Department of Family and Community Services

Agree. While the need to ensure adequate documentation is already addressed in the Department's guidance documentation, specific mention will be made of the need to document reasons in relation to confidentiality assessments.

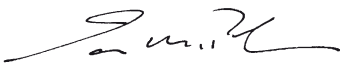
Contracts excluded from Internet listings

3.60 One element of the Senate Order requires that the Minister's letter of advice indicate the extent of, and reasons for, non-compliance with the Senate Order. Examples of non-compliance may include:

- the list not being up-to-date;
- not all relevant agencies being included; and
- contracts all of which are confidential not being included.

3.61 The Senate Order requested that the Auditor-General indicate that he has examined a number of selected contracts that have not been included in the Internet list, and to indicate whether the contracts should have been listed.¹⁴

3.62 The ANAO examined all Ministers' letters and found that no contracts had been excluded from agencies' Internet listings due to commercial sensitivity or national security reasons. The ANAO confirmed with the selected agencies that none of their contracts had been intentionally excluded from their listings.



Ian McPhee
Auditor-General

Canberra ACT
29 September 2005

¹⁴ Senate Order for Departmental and Agency Contracts (as amended December 2003), paragraph 3(6).

Appendices

Appendix 1: Senate Order (December 2003)

The Senate Order on Departmental and Agency Contracts

The Senate Order for Departmental and Agency Contracts, as at December 2003, is shown below.

The Senate Order on Departmental and Agency Contracts

- (1) There be laid on the table, by each minister in the Senate, in respect of each agency administered by that minister, or by a minister in the House of Representatives represented by that minister, by not later than 2 calendar months after the last day of the financial and calendar year, a letter of advice that a list of contracts in accordance with paragraph (2) has been placed on the Internet, with access to the list through the department's or agency's home page.
- (2) The list of contracts referred to in paragraph (1) 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, 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.
- (3) If a list under paragraph (1) does not fully comply with the requirements of paragraph (2), the letter under paragraph (1) indicate the extent of, and reasons for, non-compliance, and when full compliance is expected to be achieved. Examples of non-compliance may include:

- (a) the list is not up to date;
 - (b) not all relevant agencies are included; and
 - (c) contracts all of which are confidential are not included.
- (4) Where no contracts have been entered into by a department or agency, the letter under paragraph (1) is to advise accordingly.
 - (5) In respect of contracts identified as containing provisions of the kind referred to in paragraph (2)(c), the Auditor-General be requested to provide to the Senate, by not later than 30 September each year, a report indicating that the Auditor-General has examined a number of such contracts selected by the Auditor-General, and indicating whether any inappropriate use of such provisions was detected in that examination.
 - (6) In respect of letters including matter under paragraph (3), the Auditor-General be requested to indicate in a report under paragraph (5) that the Auditor-General has examined a number of contracts, selected by the Auditor-General, which have not been included in a list, and to indicate whether the contracts should be listed.
 - (7) The Finance and Public Administration References Committee consider and report on the first and second years of operation of this order.
 - (8) This order has effect on and after 1 July 2001.
 - (9) In this order:
 - "agency" means an agency within the meaning of the Financial Management and Accountability Act 1997; and
 - "previous 12 months" means the period of 12 months ending on either 31 December or 30 June, as the case may be.

Appendix 2: Confidentiality criteria

Department of Finance and Administration (February 2003) Criteria for the determination of whether commercial information should be protected as confidential

Criterion 1:

That the information to be protected must be identified in specific rather than global terms

Commonwealth officials are required to identify and consider what specific information, if any, is legitimately protected from disclosure. A request for inclusion of a clause in a contract that states that all information is confidential does not pass this test. Individual items of information, for example pricing or intellectual property, must be separately considered.

Criterion 2:

That the information must have the necessary quality of confidentiality

The specific information must in fact be commercially 'sensitive', that is, it must not already be in the public domain (such as price lists available on the Internet) and its continuing non-disclosure must provide an ongoing commercial benefit to the 'owner' of the information. Parties requesting that the confidentiality of such information be maintained would need to show that there was an objective basis for their request, and not that they simply wished to protect the information.

Criterion 3:

That disclosure would cause detriment to the contractor or other third party

The information must be such that the disclosure of which would cause harm to the 'owner' of the information, also needs to be established on an objective basis. For example, disclosure of Internet price lists could not harm the owner, but disclosure of pricing information that reveals the contractor's margins may have this effect. The party seeking to maintain confidentiality would normally need to identify some real risk of commercial damage to its interests flowing from the disclosure.

Criterion 4:

That the information was provided under an understanding that it would remain confidential

That the information was provided on an understanding that it remains confidential 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 is to be maintained. The circumstances include such matters as tendering documentation and contract negotiations. For example, a tender condition and draft contract which included specific confidentiality provisions would support an assertion of such an understanding with respect to the information specified.

Appendix 3: Agencies' responses to the audit report

This Appendix contains any general comments received on the audit report that are not shown in the body of the report.

Each of the agencies selected for audit and Finance were provided with the opportunity to comment on the proposed audit report (or extracts of the proposed report, where applicable) in accordance with the provisions of section 19 of the *Auditor-General Act 1997*.

Agencies' responses to the recommendations have been included in the main body of the report under the subheading "Agencies' responses" directly following each recommendation.

General responses are reproduced below.

Australian Electoral Commission

The Commission advised as follows:

The AEC will amend its relevant Chief Executive Instruction and policy and procedures to incorporate the specific recommendations in relation to the AEC. In addition, the AEC will also incorporate any other appropriate suggestions or recommendations in the whole report with a view to improving its Chief Executive Instruction and policy and procedures.

Department of Finance and Administration

Finance advised as follows:

The Department supports the recommendations contained in the report. As is our usual practice, Finance will promote these recommendations in its discussions with agencies on procurement issues.

Department of Veterans' Affairs

The Department of Veterans' Affairs advised as follows:

DVA notes that in determining the appropriateness of the use of confidentiality provisions in contracts, ANAO appears to have stringently applied the Department of Finance and Administration confidentiality criteria. Notwithstanding the ANAO findings detailed in Table 3.4 that none of the eight DVA contracts reviewed were appropriately listed as containing confidential provisions, ANAO has acknowledged that DVA has reached a considered position with respect to one of these contracts – a hospital contract. ANAO acknowledge that the market conditions in which hospital services

contracts are negotiated are such that the disclosure of pricing information in these contracts could cause detriment to contractors and could, potentially, also impact the Department's ability to obtain value for money outcomes. The ANAO also notes that the contracts included a clause that in effect provided for the disclosure of confidential information to Parliamentary Committees. DVA is of the view that a strict application of the confidentiality criteria, as applied by the ANAO in the conduct of the audit, potentially limits the capacity of the Commonwealth to maximise value for money outcomes in some circumstances.

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