

The Auditor-General  
Audit Report No.7 2007–08  
Performance Audit

## **The Senate Order for Departmental and Agency Contracts (Calendar Year 2006 Compliance)**

Australian National Audit Office

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of Australia 2007

ISSN 1036-7632

ISBN 0 642 80983 6

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Canberra ACT  
27 September 2007

Dear Mr President  
Dear Mr Speaker

The Australian National Audit Office has undertaken a performance 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 Departmental and Agency Contracts (Calendar Year 2006 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, which appears to read 'Steve Chapman', is positioned above the printed name.

Steve Chapman  
Acting/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 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](mailto:webmaster@anao.gov.au)

ANAO audit reports and information about the ANAO are available at our Internet address:

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### Audit Team

Russell Eade  
Andrew Morris

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# Abbreviations and Glossary

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|  |   |
|--|---|
| ANAO                                       | Australian National Audit Office  |
| AusTender                                  | A service that provides the public with information about the Australian Government's procurement activities.   |
| AUSTRAC                                    | Australian Transaction Reports and Analysis Centre  |
| AIFS                                       | Australian Institute of Family Studies  |
| CEIs                                       | Chief Executive Instructions  |
| confidential information                   | Information that is subject to an obligation of confidence—either under the contract or under general law principles.   |
| 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 the schedule of legal fees). 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   |
| DCITA                                      | Department of Communications, Information Technology and the Arts   |
| Defence                                    | Department of Defence   |
| Finance                                    | Department of Finance and Administration  |
| DOTARS                                     | Department of Transport and Regional Services   |
| Finance <i>Guidance on Confidentiality</i> | Department of Finance and Administration <i>Guidance on Confidentiality of Contractors' Commercial Information</i> , February 2003  |

|  |  |
|--|--|
| Finance Guidance on Internet listing   | 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  |
| GA                                     | Geoscience Australia   |
| NBA                                    | National Blood Authority   |
| Necessary qualities of confidentiality | Tests to ascertain whether particular information has the necessary qualities of confidentiality, determining 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.   |
| Senate Committee                       | Senate Standing Committee on Finance and Public Administration   |
| Senate Committee report                | Senate Standing Committee on Finance and Public Administration <i>Departmental and agency contracts: Second report on the operation of the Senate order for the production of lists of departmental and agency contracts (2003–06)</i> , February 2007.  |
| Senate Order                           | The Senate Order for Departmental and Agency Contracts. The Senate Order requires Ministers to table letters of advice that all agencies that they administer have placed on the Internet lists of contracts of \$100 000 or more, disclosing certain information about the contracts, including the use of confidentiality provisions. The letters of advice are to be tabled by no later than two calendar months after the last day of the financial and calendar year. |





# **Summary and Recommendations**



# Summary

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## Introduction

1. This report outlines the results of the ninth audit of *Financial Management and Accountability Act 1997* (FMA Act) agencies' compliance with the reporting requirements of the Senate Order for Departmental and Agency Contracts (the Senate Order). In brief, the Senate Order requires Ministers to table letters of advice that all agencies that they administer have placed on the Internet lists of contracts of \$100 000 or more, disclosing certain information about the contracts, including the use of confidentiality provisions. The letters of advice are to be tabled by no later than two calendar months after the last day of the financial and calendar year. The Senate Order is set out in full in Appendix 1.

2. This audit examined contract details for the calendar year 2006 Senate Order Internet listing (2006 Internet listing). It was conducted in accordance with the Senate Order request for the Auditor-General to undertake an annual review of agency contracts listed on the Internet, and report whether there had been any inappropriate use of confidentiality provisions.<sup>1</sup>

3. The Senate Standing Committee on Finance and Public Administration issued its second report on the operation of the Senate Order in February 2007 (the Senate Committee report).<sup>2</sup> Drawing on the ANAO's series of audits, the report summarised progress in agency compliance with the Senate Order over its five years of operation as follows:<sup>3</sup>

- most agencies are complying with the reporting requirements and have established appropriate systems and processes to meet the order's requirements;
- the number of confidentiality provisions in contracts has generally declined;

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<sup>1</sup> In this regard: specific confidentiality provisions can protect all or part of the contract itself by making specific information contained in the contract confidential; while other requirements of confidentiality provisions refer to information obtained or generated in performing the contract, and are often in the form of standard confidentiality provisions of a general nature.

<sup>2</sup> Senate Standing Committee on Finance and Public Administration, February 2007 *Departmental and agency contracts: Second report on the operation of the Senate order for the production of lists of departmental and agency contracts (2003–06)*.

<sup>3</sup> *ibid.*, p. 10.

- the misuse of confidentiality provisions in contracts has also started to fall but still remains at a level for concern about the extent to which line staff understand the new accountability framework surrounding government contracting; and
- doubts hang over the completeness and accuracy of the information agencies are reporting to the Senate.

4. The Senate Committee report contained 13 recommendations to improve the operations of the Senate Order, and relating to its future direction. The Senate Committee recognised that the Department of Finance and Administration (Finance) was enhancing its AusTender<sup>4</sup> system (AusTender 2) to provide better data, search and reporting capacity. Finance proposed that the system be used as a single procurement reporting mechanism. If this were the case, it could supersede both the Senate Order and the existing requirement for consultancies to be recorded in annual reports. In considering this option, the Senate Committee concluded:<sup>5</sup>

It (is) premature at this point to revoke the order. Compliance problems with the inappropriate use of confidentiality provisions in contracts, albeit declining but still significant, have continued. These indicate the need to retain an external oversight and scrutiny mechanism, reinforced with regular ANAO auditing, which the order provides.

The proposed new AusTender system promises to improve the completeness and accuracy of the information available on government contracts. But the history of large scale information projects, like the AusTender upgrade, cautions against sweeping change until new systems have proven themselves.

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<sup>4</sup> AusTender is the Australian Government's central location for the publication and reporting of information relating to procurement activity. It is mandatory for all Australian Government agencies under the *Financial Management and Accountability Act 1997* to advertise publicly available business opportunities on AusTender. The AusTender 2 project is a comprehensive redevelopment of AusTender to improve reporting functionality and contract disclosure coverage, and will be progressively implemented from September 2007.

<sup>5</sup> Senate Standing Committee on Finance and Public Administration, op. cit., p. 42.

## Audit objective and scope

5. The audit objectives were to assess the appropriateness of the use of confidentiality provisions in Australian Government contracts and whether selected agencies had compiled Internet listings of contracts as required by the Senate Order and agreed to by the Government.

6. The audit involved a detailed examination in seven agencies of the processes used to compile Internet listings of contracts, and the use of confidentiality provisions. It also involved a desktop review of the existence and timing of contract reporting for all agencies covered by the Senate Order.

7. The seven agencies selected for review were: the Australian Institute of Family Studies (AIFS); Australian Transaction Reports and Analysis Centre (AUSTRAC); Department of Communications, Information Technology and the Arts (DCITA); Department of Defence (Defence); Department of Transport and Regional Services (DOTARS); Geoscience Australia (GA); and the National Blood Authority (NBA).

## Audit conclusion

8. The results of the audit for 2006 Internet listings show that agencies are continuing to better assess when to use confidentiality provisions in contracts. The ANAO identified only three per cent of contracts on the Internet listings of the audited agencies as containing specific confidentiality provisions, of which one per cent of contracts correctly included these provisions and two per cent incorrectly included these provisions. The audited agencies, therefore, had generally implemented the Government's policy to not treat contracting information as confidential, unless there was a sound reason for doing so.

9. Unfortunately, the Internet listings of the audited agencies did not reflect this standard of performance. Their listings typically over-reported specific confidentiality provisions, with 13 per cent of contracts reported as having specific confidentiality provisions.

10. Timing and coverage were also issues, as:

- Minister's letters were tabled in the Senate by the due date of 28 February 2007 for only 34 of the 94 agencies covered by the Senate Order, although a further 25 were tabled the following day; and

- Internet listings contained significant shortcomings, with three of the seven audited agencies incorrectly omitting 25 per cent or more of their eligible contracts.

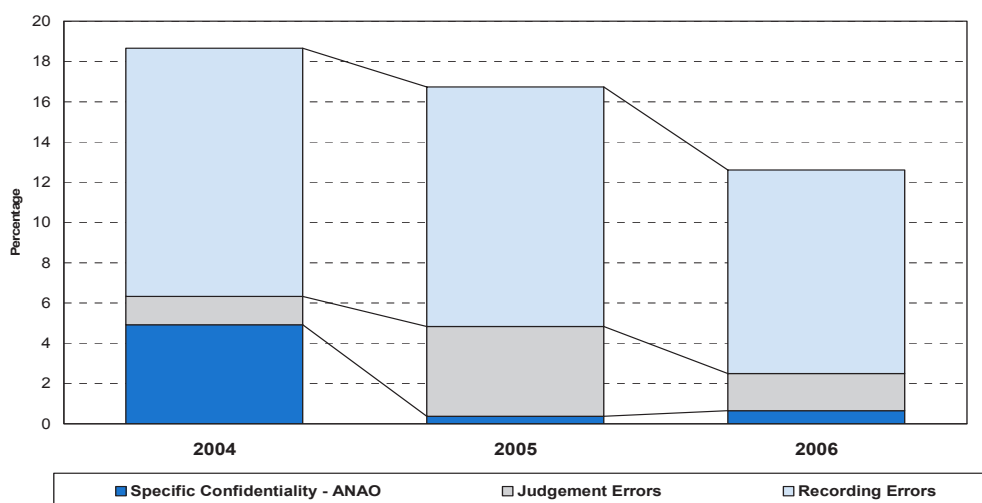
11. The lack of compliance with key Senate Order reporting requirements is consistent with the findings from many previous ANAO audits on the Senate Order, which has been in operation since 2001. The results indicated a lack of training, quality control and general care. Agencies had not sufficiently utilised information available from Finance guidance, direct contact with Finance, and previous ANAO audit findings to assist in meeting the requirements of the Senate Order.

12. It is important that agencies provide accurate and complete Internet listings so that Parliament and others can draw correct inferences about the use of confidentiality provisions in contracts, and make informed recommendations about the ongoing nature of Senate Order reporting.

## Key findings

### Confidential Provisions in Contracts (Chapter 2)

13. Audited agencies reported, on average, that 13 per cent of contracts had specific confidentiality provisions for 2006 Internet listings, compared to 17 and 18 per cent for the two previous years (see Figure 1).

**Figure 1****Trends in contracts listed as containing specific confidential provisions**

Sources: ANAO testing of contracts in 2006 Internet listings for selected agencies, and previous ANAO Senate Order reports.

14. Figure 1 also shows the continuation of substantial over-reporting of confidentiality in contracts in agencies' Internet listings, whereby agencies have reported a contract as having specific confidentiality provisions, but the contract contains no such provisions. ANAO testing indicated that reporting errors represented 12, 12 and 10 per cent of sampled contracts in 2004, 2005 and 2006 respectively. In comparison, agency judgement errors, in which specific confidentiality provisions were incorrectly included in contracts, represented 1, 4 and 2 per cent of sampled contracts in 2004, 2005 and 2006 respectively.

15. The results of this audit also indicated that agencies had some confusion about the difference between the provisions in a contract that specifically identify confidential information and contracts containing other requirements of confidentiality, such as privacy. This finding was reflected in the recent Senate Committee report. Associated with changes to the AusTender reporting regime, Finance is currently enhancing its guidance about the use of confidentiality provisions in contracts, and compliance with the Senate Order.

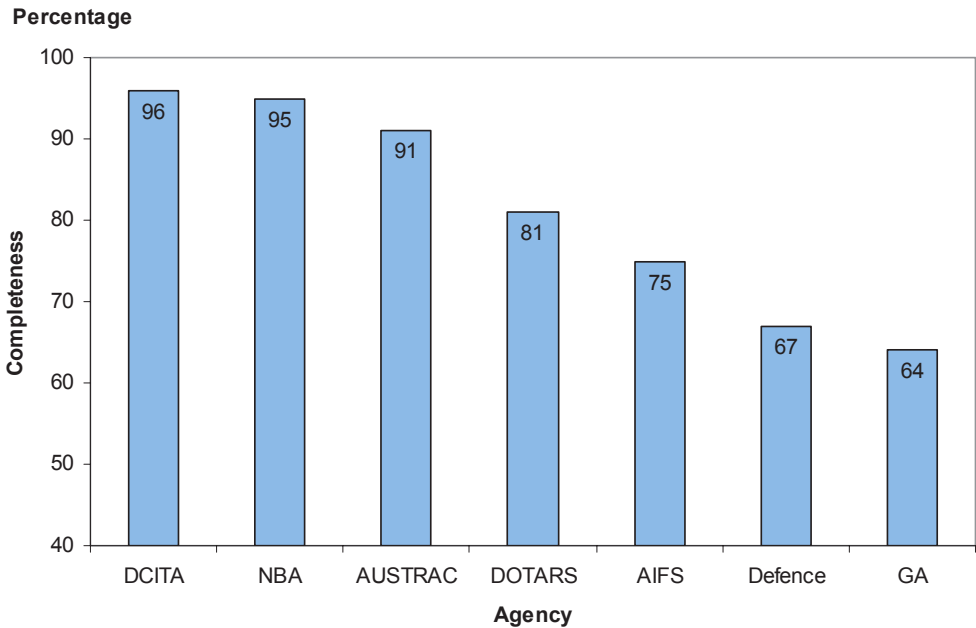
### **Compliance with Senate Order Requirements (Chapter 3)**

16. For the 2006 reporting period, 94 FMA Act agencies were covered by the Senate Order. The ANAO's desktop review of these agencies' Internet sites

found that 88 of the 94 agencies had posted a listing of contracts. This review also showed that Ministers had tabled letters in the Senate by the due date of 28 February 2007 for only 34 of 94 agencies for 2006, although a further 25 were tabled the following day. As of 1 August 2007, letters relating to 17 agencies within two portfolios had not been tabled in the Senate for 2006 reporting. These two portfolios subsequently tabled these letters.

17. The Senate Order requires FMA Act agencies to list all contracts valued at \$100 000 or more on their Internet listing. ANAO testing found that none of the seven agencies had complete 2006 Internet listings, and the level of completeness ranged from 64 to 96 per cent (see Figure 2). This situation is consistent with the problem noted in the Senate Committee report, of significant under-reporting of contracts on Internet listings.

**Figure 2**  
**Completeness<sup>a</sup> of audited agencies' 2006 Internet listings**



Note: (a) Completeness refers to the 'number of contracts included in Internet listings' as a percentage of (the 'number of contracts included in Internet listings' plus the 'number of contracts incorrectly omitted from Internet listings'). Findings for Defence are discussed below.

Source: ANAO testing of contracts in 2006 Internet listings for selected agencies.



18. Defence, as a large user of contracts, has not been able to assure the completeness of its Internet listing. Indications are that it is two-thirds or more complete, thus also affecting the completeness of its disclosures in relation to confidentiality provisions in contracts. Defence advised the ANAO that it 'will fully comply with Finance guidelines for reporting contracts according to the Senate Order by 30 September 2007'.

19. There was no evidence to indicate that those contracts excluded from agencies' Internet listings were more (or less) likely to include confidential provisions. Rather, they were generally omitted because they were types of contracts that agencies were not aware should have been included, or, in the case of Defence, not supported by existing information technology infrastructure to enable them to be cost-effectively included in the Internet listing.

20. The total estimated cost of all agencies complying with the Senate Order, as derived from agencies' 2006 Internet listings, was approximately \$900 000, which included Defence costs of \$632 500.

## **Processes for Compiling Internet Listings (Chapter 4)**

21. The many errors identified by the ANAO, relating to the identification and reporting of confidentiality in contracts and the completeness of Internet listings, suggest that there was a lack of effective staff training, quality control, and overall care in the compilation of all audited agencies' 2006 Internet listings.

22. Consistent with previous audits, the ANAO considered that reporting processes and quality controls could be strengthened in some agencies by reconciling the Senate Order Internet listing with contract information contained in Financial Management Information Systems (FMIS) and reported in AusTender.<sup>6</sup>

23. AusTender 2 has the potential to better support agencies to compile future Senate Order listings. However, the effectiveness of the system will largely depend on the quality of information input to it.

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<sup>6</sup> 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.

24. Examples of better practice for compiling Internet listings identified as part of the audit were:

- DOTARS supplied each departmental officer with two A4 laminated sheets which provide an overview of procurement, delegate responsibilities, confidentiality of contractor's information and a confidentiality decision-making flowchart;
- DCITA established a formal linkage between its contract register and FMIS; and
- DCITA included the Senate Order as a topic within the department's intranet guidance on reporting requirements. This guidance included proforma documents and links to Finance's procurement guidance.

### **Agencies' responses**

25. All agencies agreed with the recommendation. Where provided, agencies' additional responses to the recommendation are included in the body of the report, and agencies' general comments are included at Appendix 4.

# Recommendation

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## Recommendation No.1

The ANAO **recommends** that agencies improve the accuracy and completeness of their Internet listings by:

### Para 4.23

- 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 Findings and Conclusions**



# 1. Introduction

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

## Background

**1.1** The Senate Order for Departmental and Agency Contracts was originally made in June 2001 and has been amended several times, most recently on 4 December 2003. The Senate Order emphasises the principle that ‘information regarding government expenditure should be available for public scrutiny unless there is a sound reason for it not to be’.<sup>7</sup>

**1.2** In brief, the Senate Order requires Ministers to table letters of advice that all agencies that they administer have placed on the Internet lists of contracts of \$100 000 or more, disclosing certain information about the contracts, including the use of confidentiality provisions. The letters of advice are to be tabled by no later than two calendar months after the last day of the financial and calendar year. The text of the current Senate Order is reproduced at Appendix 1. Clause 5 of the Senate Order requests that the Auditor-General report annually on agency compliance with the requirements of the Senate Order. The Auditor-General has agreed to this request.

**1.3** Policy relating to the listing of contract details on the Internet is set out in the Department of Finance and Administration’s (Finance’s) *Guidance on the Listing of Contract Details on the Internet*<sup>8</sup> and *Guidance on Confidentiality of Contractors’ Commercial Information*.<sup>9</sup> In addition the *Commonwealth Procurement Guidelines* have been amended to reflect the requirements of the Senate Order. In January 2005, Finance also issued *Guidance on the Mandatory Procurement Procedures*,<sup>10</sup> which indicates that confidentiality arrangements should be

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<sup>7</sup> As explained in Senate Standing Committee on Finance and Public Administration, February 2007 *Departmental and agency contracts: Second report on the operation of the Senate order for the production of lists of departmental and agency contracts (2003–06)*, p. 1.

<sup>8</sup> Department of Finance and Administration, January 2004 *Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)*, Financial Management Guidance No. 8.

<sup>9</sup> Department of Finance and Administration, February 2003, *Guidance on Confidentiality of Contractors’ Commercial Information*. This was the guidance current at the time agencies compiled the Internet listing for calendar year 2006. In July 2007, Finance replaced this publication with *Guidance on Confidentiality in Procurement*.

<sup>10</sup> Department of Finance and Administration, January 2005, *Guidance on the Mandatory Procurement Procedures*.

clearly articulated in Request for Tender 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.

**1.4** Paragraph 2c of the Senate Order requires agencies to indicate on their Internet listing whether each contract contains provisions requiring the parties to maintain confidentiality of any of its provisions, or whether there are any other requirements of confidentiality. Finance guidance to agencies about these issues are as follows:<sup>11</sup>

- specific confidentiality provisions can protect all or part of the contract itself by making specific information contained in the contract confidential; while
- other requirements of confidentiality provisions refer to information obtained or generated in performing the contract, and are often in the form of standard confidentiality provisions of a general nature.

**1.5** It is important that agencies manage confidential information during the procurement process. This includes protecting the Australian Government's confidentiality interests and carefully assessing, on a case by case basis, all claims by potential suppliers for the protection of information. Equally, agencies must maintain accurate records of the use of confidentiality provisions in contracts and ensure these are reported correctly.

## **Audit approach**

**1.6** This audit is the ninth in a series of audits fulfilling the Senate's request. The audit encompassed information reported for contracts entered into: during the twelve months ending 31 December 2006; or before 2006, that were not fully performed at 31 December 2006.

## **Audit objectives and criteria**

**1.7** The audit objectives were to assess the appropriateness of the use of confidentiality provisions in Australian Government contracts and whether selected agencies had compiled Internet listings as required by the Senate Order and agreed to by the Government.

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<sup>11</sup> Department of Finance and Administration, January 2004, op. cit., p. 25.



**1.8** To achieve these objectives, the Australian National Audit Office (ANAO) examined whether each of the audited agencies:

- used appropriate confidentiality provisions in the listed contracts;
- addressed, in their Internet listing, all the details required by the Senate Order;
- reported a complete and accurate listing of contracts; and
- had processes in place that were likely to lead to a complete and accurate list of contracts, including the accurate identification and reporting of confidentiality in contracts.

**1.9** A series of audit criteria were developed for each of these matters, using the relevant guidance material referred to at paragraph 1.3. These audit criteria represent the management environment and internal controls that an agency should have in place to comply with the Senate Order. The audit criteria for each component of the audit are outlined in Chapters 2, 3 and 4.

## **Audit methodology**

**1.10** In respect of each of the audited agencies, the audit methodology involved:

- reviewing Senate Order listings on agencies' Internet sites (as of 28 February 2007);
- conducting interviews and examining files and records relating to the compilation of the Internet listing and the individual contracts selected for testing;
- discussing major audit findings with the agencies; and
- issuing a management report detailing the audit findings.

**1.11** The following agencies were selected for audit:

- Australian Institute of Family Studies (AIFS);
- Australian Transaction Reports and Analysis Centre (AUSTRAC);
- Department of Communications, Information Technology and the Arts (DCITA);
- Department of Defence (Defence);
- Department of Transport and Regional Services (DOTARS);

- Geoscience Australia (GA); and
- National Blood Authority (NBA).

**1.12** The audit also examined the Internet listings for the other 87 of the 94 agencies subject to the Senate Order,<sup>12</sup> to determine whether they had posted a listing on the Internet for calendar year 2006, and that individual Ministers had tabled letters of compliance by 28 February 2007.

## **Relevant audits and inquiries**

**1.13** The ANAO has undertaken eight previous audits of compliance with the Senate Order for Departmental and Agency Contracts. Many of the findings and recommendations of these reports were emphasised by the Senate Standing Committee on Finance and Public Administration, which issued its second report on the operation of the Senate Order in February 2007 (the Senate Committee report). In particular:

- Recommendation No. 3 of the Senate Committee report was that:<sup>13</sup> ‘agencies, if they have not already done so, implement ANAO recommendations to improve the accuracy and completeness of contract information with stronger internal controls and quality assurance for checking data’; and
- Recommendation No. 6 was that: ‘all agencies provide adequate training and education to staff responsible for managing contracts and complying with the order, either through internal training or programs provided externally’.<sup>14</sup>

**1.14** The Senate Committee report noted that the Senate Order had been in operation for five years, and summarised progress in agency compliance with the Senate Order as follows:<sup>15</sup>

- most agencies are complying with the reporting requirements and have established appropriate systems and processes to meet the order’s requirements;
- the number of confidentiality provisions in contracts has generally declined;

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<sup>12</sup> Under the Senate Order, Australian government agencies required to comply are those agencies within the meaning of the *Financial Management and Accountability Act 1997*.

<sup>13</sup> Senate Standing Committee on Finance and Public Administration, op. cit., p. 43.

<sup>14</sup> *ibid.*, p. 44.

<sup>15</sup> *Ibid.*, p. 10.

- the misuse of confidentiality provisions in contracts has also started to fall but still remains at a level for concern about the extent to which line staff understand the new accountability framework surrounding government contracting; and
- doubts hang over the completeness and accuracy of the information agencies are reporting to the Senate.

**1.15** The Senate Committee report contained 13 recommendations to improve the operations of the Senate Order, and relating to its future direction. The Senate Committee recognised that Finance is currently enhancing its AusTender<sup>16</sup> system (AusTender 2), to provide better data, search and reporting capacity. Finance proposed that the system be used as a single procurement reporting mechanism. If this were the case, it could supersede both the Senate Order and the existing requirement for consultancies to be recorded in annual reports. In considering this option, the Senate Committee concluded:<sup>17</sup>

It (is) premature at this point to revoke the order. Compliance problems with the inappropriate use of confidentiality provisions in contracts, albeit declining but still significant, have continued. These indicate the need to retain an external oversight and scrutiny mechanism, reinforced with regular ANAO auditing, which the order provides.

The proposed new AusTender system promises to improve the completeness and accuracy of the information available on government contracts. But the history of large scale information projects, like the AusTender upgrade, cautions against sweeping change until new systems have proven themselves.

**1.16** As at August 2007, the Government had not responded to the Senate Committee report.

## Auditing standards

**1.17** The audit was conducted under Section 18 of the *Auditor-General Act 1997*. The cost of the audit to the ANAO was approximately \$280 000.

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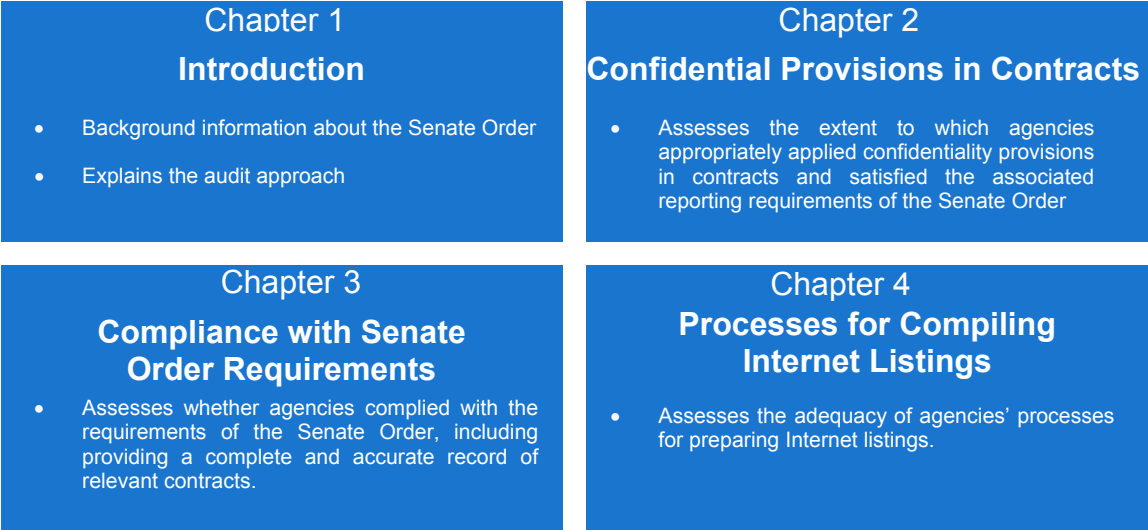
<sup>16</sup> AusTender is the Australian Government's central location for the publication and reporting of information relating to procurement activity. It is mandatory for all Australian Government agencies under the *Financial Management and Accountability Act 1997* to advertise publicly available business opportunities on AusTender. The AusTender 2 project is a comprehensive redevelopment of AusTender to improve reporting functionality and contract disclosure coverage, and will be progressively implemented from September 2007.

<sup>17</sup> Senate Standing Committee on Finance and Public Administration, op. cit., p. 42.

# Report structure

1.18 Figure 1.1 outlines the structure of each of the chapters in the report.

**Figure 1.1**  
**Outline of the report**



## 2. Confidential Provisions in Contracts

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*This chapter contains an assessment of the extent to which agencies appropriately applied confidentiality provisions in contracts and satisfied the associated reporting requirements of the Senate Order in their calendar year 2006 Internet listing.*

### Background

**2.1** One of the main objectives of the Senate Order is to require agencies to make considered decisions in relation to the inclusion of confidential provisions in Government contracts. In particular, the Senate Order requires agencies' Internet listings to identify those contracts that contain such provisions.

**2.2** At each of the audited agencies, the ANAO examined a selection of contracts that were listed as containing specific confidential provisions and/or other requirements of confidentiality to assess whether:

- confidentiality provisions were applied to contracts in accordance with Finance guidance;<sup>18</sup> and
- contracts were reported in agencies' calendar year 2006 Senate Order Internet listing (2006 Internet listing) consistent with their confidentiality provisions.

**2.3** Across the audited agencies, the ANAO's selection of contracts for 2006 Internet listings comprised:

- 80 contracts from the Department of Defence (excluding the Defence Materiel Organisation) of the 628 contracts recorded as having specific confidentiality provisions,<sup>19</sup> from the 4 695 listed contracts;
- 30 contracts from Geoscience Australia, DCITA, DOTARS and AUSTRAC, including all those reported as having specific confidentiality provisions, representing 24, 13, 4 and 0 contracts respectively; and

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<sup>18</sup> Paragraphs 2.6 to 2.11 discuss Finance guidance on confidentiality in contracts.

<sup>19</sup> The audit sample was stratified to include all 16 contracts with a value of over \$10 million. These 16 contracts had a total value of \$5.7 billion, which comprised 93 per cent of the total value of listed contracts. An additional 64 contracts were randomly selected to ensure that the audit sample would have 95 per cent confidence intervals of around 10 percentage points or less.

- 21 contracts from NBA and 15 contracts from AIFS, representing all their listed contracts.

**2.4** In six agencies, the examined contracts included some that were listed as not containing either specific confidential provisions or other requirements of confidentiality, to determine whether this treatment was appropriate, and whether they were appropriately listed. In Defence, the ANAO only examined contracts listed as containing specific confidential provisions, 74 of which also were reported as containing other requirements of confidentiality.

**2.5** Consistent with the approach adopted in previous audits, the ANAO's assessment of the use of confidentiality provisions was based on the review of the individual contracts selected for testing, a review of associated documentation relating to the procurement and, where necessary, interviews with relevant staff. The ANAO did not discuss its assessments with the respective suppliers or contractors.

## **Finance guidance on confidentiality in contracts**

**2.6** The ANAO assessed each of the contracts selected for examination against Finance guidance on confidentiality in contracts. Finance provides a number of documents to assist agencies to:

- determine whether information in contracts should be treated as confidential; and
- report on confidentiality in contracts for the purposes of the Senate Order.

**2.7** Finance issued guidance to determine whether information in contracts should be protected as confidential in the document *Guidance on Confidentiality of Contractors' Commercial Information*, February 2003. Guidance about Senate Order reporting is set out in Finance's document *Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)*, issued in January 2004. The two documents have a consistent approach to determining both specific confidentiality provisions and other requirements of confidentiality. Both these documents interpret:

- confidential provisions as those that make specific information contained in the contract confidential (specific confidentiality clauses); and
- other requirements of confidentiality as those that protect confidential information of the parties that may be obtained or generated in

carrying out the contract. *Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)* indicates that these other requirements of confidentiality are ‘generally in the form of standard confidentiality provisions of a general nature’.<sup>20</sup>

**2.8** The ANAO’s criteria for auditing agencies’ treatment of confidentiality in contracts was drawn mainly from guidance in these two documents (see Figure 2.1). All of the confidentiality criteria set out in the Finance guidance<sup>21</sup> generally must be met for the information to be properly treated as confidential. The main exception is that an agency can agree a confidentiality clause that does not satisfy all four criteria, weighing the need to ensure adequate transparency, taking into account the nature of the contract and the information concerned, and considering the value for money in doing business with the prospective contractor.

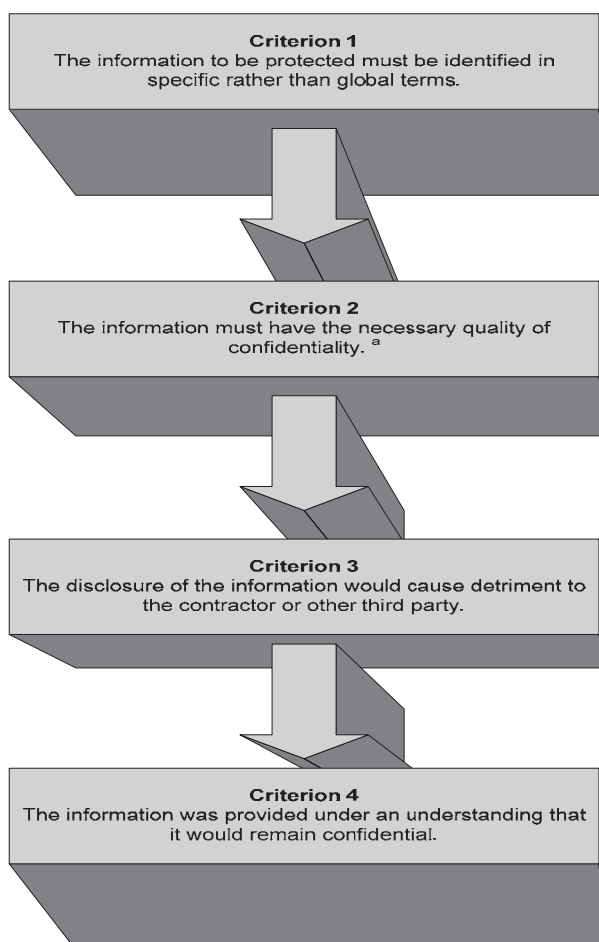
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<sup>20</sup> Department of Finance and Administration, January 2004, op. cit., p. 25.

<sup>21</sup> Appendix 3 describes these criteria in detail.

**Figure 2.1**

**Department of Finance and Administration confidentiality criteria**



Note: (a) 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 was made public.

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

**2.9** Finance's guidelines on confidentiality also provide examples of the type of information that could be considered confidential, and examples of information that would not generally be considered to be confidential (see Figure 2.2).



**Figure 2.2****Examples of information that could be considered confidential and information that could be considered not confidential**

Types of commercial information that could be legitimately protected by confidentiality clauses:

- trade secrets;
- proprietary information, for example, information about how a particular technical or business solution was to be provided;
- internal costing information or details of the contractor's profit margins;
- 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.

Types of commercial information that would not generally be considered to be legitimately confidential:

- performance and financial guarantees;
- indemnities;
- the price of goods or services (except in the circumstances noted above);
- rebate, liquated damages and service credit clauses;
- performance measures;
- clauses that describe how intellectual property rights were to be dealt with; and
- payment arrangements.

Source: Department of Finance and Administration, February 2003 *Guidance on Confidentiality of Contractors' Commercial Information*, pp. 11–12.

***Updated Finance guidance on confidentiality in contracts***

**2.10** In July 2007, Finance updated guidance on determining confidentiality in contracts provided in the document *Guidance on Confidentiality of Contractors' Commercial Information* (February 2003) with the documents *Guidance on Confidentiality in Procurement*, and *Guidance on Procurement Publishing Obligations*. These documents revised guidance about the confidentiality of information obtained or generated in performing a contract.<sup>22</sup>

**2.11** When compiling future Senate Order listings, agencies will need to be aware of this updated guidance on determining and reporting confidentiality in procurement. Finance advised the ANAO that it intends to revise the document *Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)*, January 2004, to support agencies to meet the Senate Order reporting requirements incorporated in AusTender 2.

<sup>22</sup> For example, Department of Finance and Administration, July 2007 *Guidance on Confidentiality in Procurement*, p. 16.

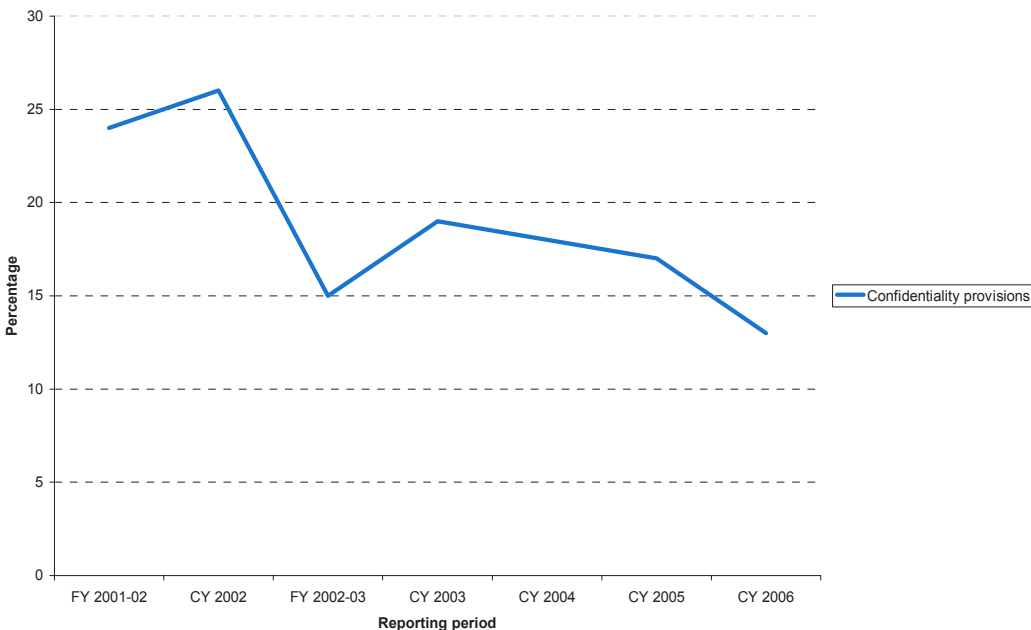
# Trends in the use of confidentiality provisions in contracts

**2.12** In commenting on trends in compliance, the recent Senate Committee report<sup>23</sup> noted that the number of contracts listed by agencies as containing specific confidentiality provisions has generally declined. Noting that the Senate Order was a response to a perceived expansion in confidentiality provisions in contracting, the report considered the reversal of that trend to be significant.

**2.13** Based on the sample of contracts the ANAO reviewed from the audited agencies for 2006, Figure 2.3 shows that the latest Senate Order listing continued the general decline in the proportion of contracts reported as containing specific confidentiality provisions.

**Figure 2.3**

## Trends in the use of specific confidentiality provisions in contracts



Sources: ANAO analysis of contracts in 2006 Internet listings for selected agencies, and previous ANAO Senate Order audits.

**2.14** The continued decline in the reported use of specific confidentiality provisions in contracts is important, as it reflects the Government’s policy that contracting information should not be treated as confidential, unless there is a strong reason to do so. However, as discussed in the next section, there has continued to be considerable errors in the reporting of specific confidentiality in

<sup>23</sup> Senate Standing Committee on Finance and Public Administration, op. cit., p. 23.

contracts for the Senate Order and, to a lesser extent, decisions to include confidentiality provisions in contracts.

## Use of confidentiality provisions by the audited agencies for 2006 Internet listings

**2.15** Table 2.1 sets out, for each of the audited agencies, the total number of contracts listed, the number of contracts listed as containing confidential information and the number of contracts listed as containing other requirements of confidentiality.

**Table 2.1**

**Contracts reported as containing specific confidentiality provisions and other requirements of confidentiality, audited agencies, 2006**

| Agency               | Number of contracts listed by the agency | Contracts listed as containing specific confidentiality provisions |           | Contracts listed as containing other requirements of confidentiality |           |
|----------------------|--|--|-----------|--|-----------|
|                      |  | Number   | (%)       | Number   | (%)       |
| Geoscience Australia | 79                                       | 24   | 30        | 0  | 0         |
| AIFS                 | 15                                       | 4  | 27        | 5  | 33        |
| Defence              | 4 695                                    | 628  | 13        | 791  | 17        |
| DCITA                | 305                                      | 13   | 4         | 287  | 94        |
| DOTARS               | 190                                      | 5  | 3         | 2  | 1         |
| AUSTRAC              | 42                                       | 0  | 0         | 0  | 0         |
| NBA                  | 21                                       | 0  | 0         | 1  | 5         |
| <b>Total</b>         | <b>5 347</b>                             | <b>674</b>   | <b>13</b> | <b>1 086</b>   | <b>20</b> |

Source: ANAO analysis of 2006 Internet listings for selected agencies.

**2.16** Due the large number of contracts entered into by Defence, its use of confidentiality provisions in contracts has a significant influence on the average performance result across the seven audited agencies.

**2.17** While four agencies reported that four per cent or less of their contracts contained specific confidentiality provisions, the other three agencies (Geoscience Australia, AIFS and Defence) reported 30, 27 and 13 per cent of such contracts respectively.

## **Appropriateness of agencies' listings of confidentiality of contracts**

**2.18** The ANAO assessed the appropriateness of agencies' listings of confidentiality of contracts by testing the incidence of:

- recording errors, whereby contracts with no confidentiality terms were reported as having such terms; and
- judgement errors, where contracts incorrectly included confidentiality provisions.

**2.19** Errors in determining and reporting confidentiality in contracts relate to listings associated with both specific confidentiality provisions and other requirements of confidentiality. However, the most significant problem applies to contracts involving specific confidentiality provisions.

### **Appropriateness of agencies' listings of specific confidentiality provisions**

**2.20** Table 2.2 provides a summary by agency of the 116 contracts the ANAO reviewed that were listed by the audited agencies in 2006 as containing specific confidentiality provisions. It shows that six of these contracts (five per cent) correctly included these provisions.

**Table 2.2****ANAO assessment of specific confidentiality provisions for agency contracts**

| Agency                   | Number of reviewed contracts listed as containing specific confidentiality provisions | Number of reviewed contracts that correctly included specific confidentiality provisions | Errors due to the incorrect application of the criteria relating to the use of confidentiality provisions <sup>a</sup> |           | Errors due to the incorrect recording of the use of confidentiality provisions <sup>b</sup> |           |
|--------------------------|---|--|--|-----------|---|-----------|
|                          |   |  | Number   | (%)       | Number  | (%)       |
| AIFS                     | 4 of 15   | 0  | 0  | 0         | 4   | 100       |
| AUSTRAC                  | 0 of 30   | 0  | 0  | NA        | 0   | NA        |
| DCITA                    | 13 of 30  | 5  | 3  | 38        | 5   | 62        |
| Defence                  | 72 of 80  | 0  | 7  | 10        | 65  | 90        |
| DOTARS                   | 5 of 30   | 1  | 4  | 100       | 0   | 0         |
| Geoscience Australia     | 22 of 30  | 0  | 3  | 14        | 19  | 86        |
| NBA                      | 0 of 21   | 0  | 0  | 0         | 0   | NA        |
| <b>Total<sup>c</sup></b> | <b>116 of 236</b>   | <b>6 of 116</b>  | <b>17</b>  | <b>15</b> | <b>93</b>   | <b>85</b> |

- Notes: (a) These were contracts assessed as being incorrectly listed as the ANAO did not consider the information specified as confidential met the required criteria of confidentiality.
- (b) These were contracts assessed by the ANAO to be incorrectly listed as the contracts did not identify any specific information that was confidential.

Source: ANAO analysis of contracts in 2006 Internet listings of selected agencies.

**Recording errors**

**2.21** As Table 2.2 indicates, the ANAO assessed that 93 of the 116 contracts (80 per cent) were incorrectly listed as containing specific confidentiality provisions because of errors made at the time agencies were preparing the Internet listings. The contracts did not specifically identify any information as confidential. Rather, the contracts only contained general confidentiality provisions. The confidentiality guidelines promulgated by Finance indicate that the existence of general confidentiality provisions in contracts is not sufficient, on its own, to make the contracting information confidential.

**2.22** The ANAO considered the errors indicated that, in several agencies, there was some confusion about the difference between the provisions in a contract that specifically identify confidential information and those confidentiality provisions that are of a standard or general nature, as required for reporting under the Senate Order.

### *Incorrect application of the confidentiality criteria*

**2.23** The ANAO considered that agencies had incorrectly applied the confidentiality criteria in 17 of the 116 (15 per cent) reviewed contracts listed as containing confidential information (see Table 2.2).

**2.24** The ANAO identified two types of errors in the application of the confidentiality criteria. Firstly, a number of contracts contained only a reference to, or a description of, the information identified as confidential. The ANAO considered that this was insufficient, on its own, to give the information the necessary qualities of confidentiality. Secondly, in several of the contracts, the ANAO considered that the nature of the information identified as confidential, for example, hourly rates charged by the contracted service provider, did not have the necessary qualities of confidentiality.

### *Summary of use of specific confidentiality provisions*

**2.25** In summary, of the 116 reviewed contracts containing specific confidentiality provisions, the ANAO considered that five per cent correctly included these provisions, 15 per cent incorrectly included these provisions and 80 per cent were incorrectly recorded as containing these provisions. Applying these proportions to the population of contracts on the Internet listings of the audited agencies (674 of 5 347 contracts, or 13 per cent, as outlined in Figure 2.1) indicated that one per cent of all contracts correctly included specific confidentiality provisions, two per cent incorrectly included these provisions and 10 per cent were incorrectly recorded as containing these provisions.

**2.26** These results highlighted that in some agencies there continues to be a misunderstanding of the application of the confidentiality criteria for determining whether information should be protected as confidential.

## **Appropriateness of agencies' listing of other requirements of confidentiality**

**2.27** For the purposes of 2006 Senate Order reporting, the listing of a contract as containing other requirements of confidentiality indicates that the contract contained a clause(s) requiring the agency and/or the contractor to keep information obtained or produced in carrying-out the contract confidential. Fifteen per cent of contracts were listed in the seven audited agencies as containing other requirements of confidentiality in 2006 Internet listings.

**2.28** Recognising that many agencies have standard contract templates containing confidentiality clauses of a general nature, Finance guidance<sup>24</sup> allows agencies to include an overarching statement that reports the existence of, and reasons for, such clauses. Three of the seven audited agencies included a general statement about the use of general confidentiality provisions in contracts.

**2.29** Irrespective of whether agencies used an overarching statement, there was considerable under-reporting of other requirements of confidentiality across the seven audited agencies. This highlights a lack of understanding by agencies about reporting other requirements of confidentiality.

### **Opportunity to improve the use of confidentiality provisions in contracts**

**2.30** As described in the preceding two sections, the ANAO identified confusion and misunderstanding within agencies over the correct application of confidentiality criteria and reporting of confidentiality in contracts. This is consistent with the findings of previous ANAO audits (see Table 2.3) on the Senate Order, which has been in operation since 2001. Extensive information is available to assist agencies meet the requirements of the Senate Order, particularly through Finance guidance, direct contact with Finance, and ANAO audit findings. Continued non-compliance with Senate Order requirements indicates that agencies have not sufficiently utilised these sources of information.

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<sup>24</sup> Department of Finance and Administration, January 2004, op. cit. p. 30.

**Table 2.3****Previous ANAO recommendations to improve the understanding of the Senate Order, and the use of confidentiality provisions**

| Audit report                              | Recommendation  |
|---|---|
| No. 5 2006–07<br>Recommendation<br>No. 2  | 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.  |
| No. 11 2005–06<br>Recommendation<br>No. 3 | The ANAO recommends that agencies ensure adequate documentation of the reasons for agreeing to identify specific information in contracts as being confidential.  |
| No. 8 2002–03<br>Recommendation<br>No. 2  | <p>The ANAO recommends that all FMA Act agencies, as appropriate:</p> <ul style="list-style-type: none"> <li>• review the standard forms of request for tender and contract to ensure contractors are made fully aware of the Commonwealth's governance and accountability requirements; and</li> <li>• implement procedures which require a case-by-case consideration of requests for information in, or associated with, contracts to be treated as confidential.</li> </ul> |

Sources: ANAO Audit Report No. 5 2006–07, *The Senate Order for the Departmental and Agency Contracts (Calendar Year 2005 Compliance)*, ANAO Audit Report No. 11 2005–06, *The Senate Order for Departmental and Agency Contracts (Calendar Year 2004 Compliance)*, ANAO Audit Report No. 8 2002–03, *The Senate Order for Department and Agency Contracts* (September 2002).

**2.31** The Senate Committee report noted that ‘confusion about the application of confidentiality criteria points to a need for more training and guidance. The omission of required information and data quality concerns suggests that internal checks and controls are inadequate.’<sup>25</sup>

**2.32** Associated with changes to the AusTender reporting regime (see paragraph 1.15), Finance is currently enhancing its guidance about the use of confidentiality provisions in contracts, and compliance with the Senate Order.

### **Audit findings by agency**

**2.33** The results of the ANAO’s assessment of the use of confidentiality provisions in individual contracts by each agency are reported in this section.

#### ***Australian Institute of Family Studies (AIFS)***

**2.34** The ANAO assessed all 15 contracts listed on the AIFS’ Internet listing. Four contracts were listed as containing specific confidentiality provisions. In all four cases, the ANAO assessed this to be incorrect, as the contracts did not identify any information as specifically confidential. AIFS agreed with this

<sup>25</sup> Senate Standing Committee on Finance and Public Administration, op. cit., p. 25.



assessment and has subsequently corrected its Internet listing. The other 11 contracts were correctly listed as not containing specific confidentiality provisions. While five contracts were listed as containing other requirements of confidentiality, the ANAO assessed that all of the 15 contracts should have been listed as containing other requirements of confidentiality.

### *Australian Transaction Reports and Analysis Centre (AUSTRAC)*

**2.35** None of AUSTRAC's 42 contracts in its Internet listing were categorised as containing specific confidentiality provisions. The ANAO examined 30 contracts and found that as none identified specific information as confidential, they had been appropriately listed. Most of the 30 contracts examined by the ANAO included general confidentiality provisions. Therefore these contracts should have been listed as containing other requirements of confidentiality.

### *Department of Communications, Information Technology and the Arts (DCITA)*

**2.36** The ANAO selected 30 of the 305 contracts on DCITA's Internet listing for assessment, which included all 13 contracts listed as containing specific confidentiality provisions. Of the 13 contracts, five were appropriately listed, five were recorded incorrectly as they did not identify any specific information as confidential, and the other three incorrectly included specific confidentiality provisions. Twenty-eight of the 30 sampled contracts contained other requirements of confidentiality.<sup>26</sup>

### *Department of Defence (Defence)*

**2.37** Defence (excluding the Defence Materiel Organisation) reported 4 695 contracts, of which 628 contracts were recorded as having specific confidentiality provisions. The ANAO selected 80 contracts listed as containing specific confidentiality provisions, but only 72 were available and suitable for assessment.<sup>27</sup> Of the 72 contracts, 65 were misreported, as they did not contain any specific confidentiality information, while the remaining seven contracts had judgement errors, in that the specific confidentiality provisions did not meet the confidentiality criteria. Defence had listed 74 of the 80 sampled contracts as having other requirements of confidentiality. Of the 72 contracts able to be assessed, Defence had correctly reported 66 as having other requirements of

<sup>26</sup> DCITA presented its Senate Order listing in a three column format, and for consistency with other agencies the ANAO summed DCITA's columns (1) and (3) to indicate all contracts with provisions that protected the confidential information of the parties that may be obtained or generated in carrying out the contract, be they specifically identified when the contract is entered into, or of a general nature.

<sup>27</sup> Of these eight contracts: one could not be located by Defence; four were duplicates; two were ineligible for listing; and one did not exist.

confidentiality, but incorrectly reported the other six contracts in this regard. Six of the 80 contracts were listed as not containing other requirements of confidentiality were not available or suitable for assessment.

#### ***Department of Transport and Regional Services (DOTARS)***

**2.38** The ANAO examined 30 of the 190 contracts on DOTARS' Internet listing, including the five contracts listed as containing confidentiality provisions. Of these five contracts, one was appropriately listed as the contractor had requested that certain commercially sensitive profit margin information in the contract be confidential. Of the other four contracts, the ANAO assessed that three contracts did not specify any confidential information and the remaining contract was not considered to have met the confidentiality criteria. Of the 30 contracts sampled, 23 should have been listed as containing other requirements of confidentiality, however DOTARS listed only two contracts in this way.

#### ***Geoscience Australia (GA)***

**2.39** The ANAO examined 30 of the 79 contracts on GA's Internet listing, including 22 of the 24 listed as containing specific confidentiality provisions. Of the 22 contracts, 19 were recorded incorrectly as they did not identify any specific information as confidential, and the other three did not have the necessary qualities of confidentiality. All but three of the 30 contracts sampled should have been listed as containing other requirements of confidentiality as they contained general confidentiality provisions.

#### ***National Blood Authority (NBA)***

**2.40** The ANAO selected all 21 contracts on the NBA's Internet listing for detailed examination. All 21 contracts were appropriately listed as not containing specific confidentiality provisions. NBA listed only one of these contracts as containing general confidentiality provisions, whereas the ANAO considers that all 21 contracts should have been listed in this way.

#### ***Agencies' responses to audit findings***

**2.41** The ANAO made a number of recommendations in the respective management reports. Each agency agreed with the recommendations and advised of a range of actions to address the audit findings.

### **Disclosure of information to Parliament and ANAO access**

**2.42** As well as dealing with confidentiality provisions, Commonwealth contracts should contain clauses that provide, regardless of issues of confidentiality, for:

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

**2.43** Table 2.4 shows that most of the contracts for five agencies contained appropriately worded clauses providing for the disclosure of contract-related information to the Parliament and its committees and also ANAO access. This largely reflected the fact that the standard contract templates developed by the audited agencies contained such clauses.

**Table 2.4**

**Extent to which audited agency contracts contained clauses that provided for disclosure to the Parliament and the ANAO**

| Agency               | Number of contracts reviewed | Percentage of contracts containing disclosure for Parliament | Percentage of contracts dealing with ANAO access |
|----------------------|------------------------------|--|--|
| NBA                  | 21                           | 81   | 76   |
| DCITA                | 30                           | 97   | 90   |
| AIFS                 | 15                           | 67   | 67   |
| Geoscience Australia | 30                           | 63   | 80   |
| DOTARS               | 30                           | 53   | 57   |
| Defence              | 80                           | 14   | 11   |
| AUSTRAC              | 30                           | 10   | 7  |
| <b>Total</b>         | <b>236</b>                   | <b>55</b>  | <b>56</b>  |

Source: ANAO analysis of agency contracts in 2006 Internet listings of selected agencies.

**2.44** The exceptions were AUSTRAC and Defence, which have a range of standard contract templates designed for use when contracting for different services. However, some standard contracts did not contain clauses providing for the disclosure of contract-related information to the Parliament and its committees or ANAO access. Both AUSTRAC and Defence have advised that changes to their contract templates would address this issue.

**2.45** Other instances of non-compliance arose from the use of non-standard contracts. While there are legitimate reasons for using non-standard contract terms and conditions, care is required to ensure that the appropriate clauses are included to inform contractors of these requirements.

### 3. Compliance with Senate Order Requirements

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*This chapter reports the ANAO's assessment of the extent to which agencies complied with the requirements of the Senate Order for 2006, including listing on the Internet on-time, and providing complete and accurate records of relevant contracts.*

**3.1** The Senate Committee report noted that the majority of agency Internet listings generally comply with the Senate Order's reporting requirements. The report also noted that agencies have significantly under-reported contracts on their Internet listings, and that: 'doubts hang over the completeness and accuracy of the information agencies are reporting to the Senate'.<sup>28</sup>

**3.2** The ANAO undertook a desktop review of the existence and timing of reporting for all agencies covered by the Senate Order, and also assessed the timing, accessibility, content, completeness and accuracy of Internet listings for the audited agencies, for 2006.

#### Timing, accessibility and content of Internet listings

##### Existence and timing of Senate Order reporting by all relevant FMA Act agencies

**3.3** To obtain broad assurance about the timing of 2006 Internet listings, the ANAO reviewed whether:

- all agencies covered by the Senate Order had placed a list of contracts on the Internet; and
- the relevant Minister's letter of compliance with the Senate Order reporting requirements had been made available by the due date, 28 February 2007.

**3.4** For the 2006 reporting period, 94 FMA Act agencies were covered by the Senate Order.<sup>29</sup> The ANAO's review of these agencies' Internet listings found that 88 of the 94 agencies had listed their contracts on the Internet. Three of the six agencies that had not listed on the Internet did so when contacted by the ANAO.

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<sup>28</sup> Senate Standing Committee on Finance and Public Administration, op. cit., p. 10.

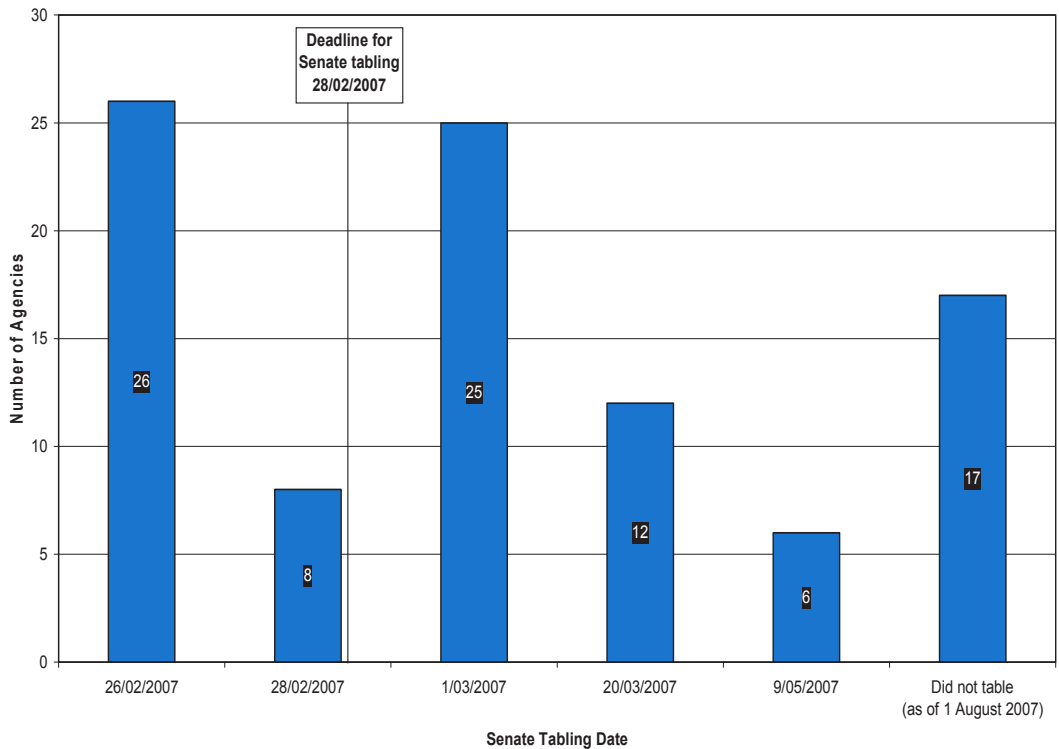
<sup>29</sup> Agency means an agency within the meaning of the *Financial Management and Accountability Act 1997*. FMA Act agencies were identified by reference to the FMA Act list on the Finance website: <[http://www.finance.gov.au/publications/docs/FMA\\_CACFlipchart.pdf](http://www.finance.gov.au/publications/docs/FMA_CACFlipchart.pdf)>.

The remaining three agencies advised they had no contracts within the scope of the Senate Order, but had not indicated this on their website.<sup>30</sup>

**3.5** Figure 3.1 shows that Ministers had tabled letters in the Senate by the due date of 28 February 2007 for only 34 of 94 agencies for 2006, however an additional 25 letters were tabled the following day. As of 1 August 2007, letters relating to 17 agencies within two portfolios had not been tabled in the Senate for 2006 reporting. These two portfolios subsequently tabled these letters.

**Figure 3.1**

**Tabling in the Senate by all agencies of Minister's letters regarding compliance with Senate Order requirements for 2006**



Source: ANAO analysis of 2006 reporting of all agencies covered by the Senate Order.

<sup>30</sup> If an agency did not place a list of contracts on its website then it was required to place a note on its website advising that it had no contracts to report.

## Timing and accessibility of Internet listings for the audited agencies

3.6 The ANAO assessed whether the audited agencies' Internet listings met the reporting requirements of the Senate Order. The Senate Order required each agency to have:

- arranged for their Minister to table in Parliament, by no later than two calendar months after the last day of the calendar year, a letter of advice that a list of contracts has been placed on the Internet by the due date;
- listed all the details specified in paragraph 2 of the Senate Order; and
- established an accessible path to the listing on its Internet home-page.

3.7 The ANAO's testing found all audited agencies had published their Internet listings by the due date of 28 February 2007 (see Table 3.1).

**Table 3.1**

### Timing and accessibility of audited agencies' 2006 Internet listings

| Agency               | Senate Order listing placed on the Internet by due date | Minister's letter tabled in Parliament by due date | Agency contract list readily accessible from the agency homepage |
|----------------------|---|--|--|
| AIFS                 | ✓   | X <sup>a</sup>                                     | ✓  |
| Defence              | ✓   | X <sup>b</sup>                                     | ✓  |
| DOTARS               | ✓   | X <sup>c</sup>                                     | ✓  |
| NBA                  | ✓   | X <sup>d</sup>                                     | ✓  |
| AUSTRAC              | ✓   | ✓  | ✓  |
| DCITA                | ✓   | ✓  | ✓  |
| Geoscience Australia | ✓   | ✓  | ✓  |

Notes: (a) The Minister's letter was tabled on 27 March 2007.  
(b) The Minister's letter was tabled on 1 March 2007.  
(c) The Minister's letter was tabled on 1 March 2007.  
(d) The Minister's letter was tabled on 16 April 2007.

Source: ANAO analysis of 2006 Senate Order reporting of selected agencies.

3.8 The audit also found that the home page of each of the audited agencies provided ready access to their Internet listing

### *Letters of advice not tabled in time*

3.9 Ministers for four of the audited agencies did not table in the Senate letters of advice for their respective agencies by 28 February 2007. However, both the

Minister for Defence and the Minister for Transport and Regional Services tabled letters on 1 March 2007. The Minister for Families, Community Services and Indigenous Affairs tabled the letter for AIFS on 27 March 2007. The Minister for Health and Ageing's letter was tabled on 16 April 2007.

**3.10** The AIFS advised the ANAO that the Minister's letter was delayed due to an administrative oversight on the AIFS' behalf, partly due to it moving premises and encountering difficulties with its information technology systems. NBA advised that the tabling of the letter by the Minister for Health and Ageing was delayed by the co-ordinating portfolio department. The Department of Health and Ageing advised that it was 'exploring options to improve administrative procedures for tabling the letter'. DOTARS and Defence both advised 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 letters.

### **Content of Internet listings for the audited agencies**

**3.11** Table 3.2 shows that the Internet listings of the audited agencies generally complied with the information requirements of the Senate Order. ANAO testing found that all but two of the audited agencies' Internet listings fully complied with these requirements.

**Table 3.2****ANAO assessment of audited agencies' 2006 Internet listings compliance with the information requirements of the Senate Order**

| Information required                                  | AIFS | GA | AUSTRAC | DCITA | Defence | DOTARS | NBA |
|---|------|----|---------|-------|---------|--------|-----|
| Name of contractor                                    | ✓    | ✓  | ✓       | ✓     | ✓       | ✓      | ✓   |
| Amount of consideration                               | ✓    | ✓  | ✓       | ✓     | ✓       | ✓      | ✓   |
| Subject matter  | ✓    | ✓  | ✓       | ✓     | ✓       | ✓      | ✓   |
| Commencement date of contract                         | ✓    | ✓  | ✓       | ✓     | ✓       | ✓      | ✓   |
| Anticipated end-date of contract                      | ✓    | ✓  | ✓       | ✓     | ✓       | ✓      | ✓   |
| Relevant reporting period                             | x    | x  | ✓       | ✓     | ✓       | ✓      | ✓   |
| Twelve month period relating to Internet listing      | x    | ✓  | ✓       | ✓     | ✓       | ✓      | ✓   |
| Provisions requiring contract to be kept confidential | ✓    | ✓  | ✓       | ✓     | ✓       | ✓      | ✓   |
| Other requirements of confidentiality                 | ✓    | x  | ✓       | ✓     | ✓       | ✓      | ✓   |
| Statement of reasons for confidentiality              | ✓    | ✓  | ✓       | ✓     | ✓       | ✓      | ✓   |
| Cost of compliance                                    | x    | x  | ✓       | ✓     | ✓       | ✓      | ✓   |
| Method of calculating cost of compliance              | x    | x  | ✓       | ✓     | ✓       | ✓      | ✓   |

Source: ANAO analysis of 2006 Senate Order reporting of selected agencies.

**3.12** AIFS became a FMA Act agency on 1 July 2006, and therefore became subject to the reporting requirements of the Senate Order. AIFS needed to revise its financial and reporting systems to meet these compliance requirements, and encountered some initiation problems in the process. During the course of the audit, the AIFS modified its Internet listing to fully comply with the requirements of the Senate Order for reporting for 2006.

**3.13** Geoscience Australia advised the ANAO it would modify procedures to ensure that future Internet listings are fully compliant with the Senate Order.



## Completeness and accuracy of Internet listings

### Contracts eligible for exclusion from Internet listings

**3.14** The Senate Order requires agencies to report all contracts valued at \$100 000 or more.<sup>31</sup> However, agencies are allowed to exclude contracts from the Internet listing for certain reasons, for example, to safeguard national security. In such instances, each agency is required to:

- assess each contract against the criteria of non-disclosure, including claims to confidentiality, and any specific legislative, security or other requirements; and
- advise the Minister of details for inclusion in the Minister's letter to the Senate.<sup>32</sup>

**3.15** In Ministers' letters to the President of the Senate, six of the seven audited agencies reported that no contracts were excluded from the Internet listing. ANAO testing confirmed that none of these six agencies had excluded any contracts from the Internet listing for the above reasons.

**3.16** The Minister for Defence's letter to the President of the Senate, dated 28 February 2007, noted that contracts that were confidential for national security reasons were excluded from the Internet listing. However, the letter (including the link to Defence's Internet site), did not indicate the number of contracts excluded, as required under paragraph (3) of the Senate Order.<sup>33</sup>

### Completeness of Internet listings

**3.17** The ANAO undertook a series of tests of the completeness of the agencies' Internet listing. This testing comprised checking the Internet listing with:

- entries over \$100 000 listed in AusTender in 2006;
- details of all transactions over \$100 000 in the agencies' Financial Management Information System (FMIS) in 2006; and
- contracts recorded in the agencies' contracts register.

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<sup>31</sup> Department of Finance and Administration, January 2004, op. cit. p. 15.

<sup>32</sup> *ibid.*, p. 33.

<sup>33</sup> Paragraph (3) of the Senate Order states that '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'. Defence advised the ANAO that 86 contracts were intentionally excluded from the Internet listing because publication could cause damage to national security, defence or international relations of the Commonwealth.

**3.18** Table 3.3 shows the completeness of 2006 Internet listings of each of the audited agencies. None of the seven agencies had complete Internet listings, and the level of completeness ranged from 64 to 96 per cent. Three of the seven audited agencies incorrectly omitted 25 per cent or more of their eligible contracts. This confirmed the problem identified in the Senate Committee report, of significant under-reporting of contracts on Internet listings.

**Table 3.3**

**Completeness of audited agencies' 2006 Internet listings**

| Agency               | Number of contracts listed | Number of contracts incorrectly omitted | Percentage completeness of Internet listing <sup>a</sup> |
|----------------------|----------------------------|---|--|
| GA                   | 79                         | 45                                      | 64   |
| Defence <sup>b</sup> | 4 695                      | 2 298                                   | 67   |
| AIFS                 | 15                         | 5                                       | 75   |
| DOTARS               | 190                        | 46                                      | 81   |
| AUSTRAC              | 42                         | 4                                       | 91   |
| NBA                  | 21                         | 1                                       | 95   |
| DCITA                | 305                        | 14                                      | 96   |
| <b>Total</b>         | <b>5 347</b>               | <b>2 413</b>                            |  |

Notes: (a) The percentage completeness figure refers to the 'number of contracts listed' as a proportion of (the 'number of contracts listed' plus the 'number of contracts incorrectly omitted').  
(b) 2 298 eligible entries in Defence's FMIS did not have corresponding contracts in the Internet listing. Some of these FMIS entries represented multiple payments on individual contracts. As such, Defence's Internet listing was two-thirds or more complete. Defence was unable to identify or quantify the contracts that were excluded from the Internet listing.

Source: ANAO analysis of 2006 Internet listings of selected agencies.

**3.19** This low level of completeness reinforces agencies' lack of understanding of the requirements of the Senate Order. For example:

- 29 contracts were not included in Geoscience Australia's Internet listing because the agency only listed contracts entered into during the reporting period, not ongoing contracts; and
- 14 errors identified in DOTARS' Internet listing involved payments to other levels of government and non-government organisations that fell within the Internet listing criteria in the Finance guidance.

**3.20** Defence is important because of the large number and value of contracts involved. Defence (excluding the Defence Materiel Organisation) reported 4 695 contracts in its 2006 Internet listing, which represented around one sixth of the 29 143 contracts reported by all agencies. The ANAO found that 2 298 contract

payments recorded in Defence's Financial Management Information System (FMIS), with a total value of \$5.5 billion, did not have corresponding contracts in the Internet listing. Defence advised that one reason for this disparity was that its definition of reportable contracts for the Senate Order was narrower than that required by Finance's guidance. Another reason was that some FMIS records relate to multiple payments on individual contracts.

**3.21** Defence was unable to quantify the contracts that were excluded from the Internet listing on the basis of the narrower definition, or the extent to which the FMIS entries represented multiple payments for individual contracts. As such, Defence's Internet listing was estimated to be two-thirds or more complete. Defence advised the ANAO in August 2007 that:

it has upgraded its Interim Defence Contracts Register (IDCR) to enable it to more effectively comply with the Senate Order requirements. Defence will fully comply with Finance guidelines for reporting contracts according to the Senate Order by 30 September 2007.

**3.22** There was no evidence to indicate that those contracts excluded from agencies' Internet listings were more (or less) likely to include confidentiality provisions. Rather, they were generally omitted because they were types of contracts that agencies were not aware should have been included, or, in the case of Defence, not supported by existing information technology infrastructure to enable them to be cost-effectively included in the Internet listing.

## Accuracy of Internet listings

**3.23** The ANAO analysed whether agencies' Internet listings contained double-counting of contracts<sup>34</sup> or included contracts that did not fall within the appropriate reporting dates. Table 3.4 reports the number of contracts identified at each agency that were incorrectly included in the Senate Order listing. It shows there were minimal errors of these types.

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<sup>34</sup> This often occurs because contracts are identified by using more than one name.

**Table 3.4****Contracts incorrectly included in 2006 Internet listings**

| Agency       | Number of contracts | Number of contracts incorrectly included | Percentage of contracts incorrectly included <sup>a</sup> |
|--------------|---------------------|--|---|
| NBA          | 21                  | 1  | 5   |
| AUSTRAC      | 42                  | 0  | 0   |
| DOTARS       | 190                 | 2  | 1   |
| GA           | 79                  | 1  | 1   |
| Defence      | 4 695               | 4  | 0.1   |
| DCITA        | 305                 | 0  | 0   |
| AIFS         | 15                  | 0  | 0   |
| <b>Total</b> | <b>5 347</b>        | <b>8</b>                                 | <b>0.1</b>  |

Note: (a) This column refers to the 'number of contracts incorrectly included' as a proportion of the 'number of contracts' included on the Internet listing.

Source: ANAO analysis of contracts in 2006 Internet listings of selected agencies.

## Cost of complying with the Senate Order across all FMA Act agencies

**3.24** The Senate Order requires agencies to report the cost of complying with the Senate Order and the methodology for determining the cost of compliance. Most agencies that had reported costs of complying with the Senate Order had used a method based on the time spent and the cost of labour to estimate the cost. In addition, most had reported the cost of complying with the Senate Order for the current reporting period.

**3.25** However, Defence reported cumulative costs, which included the costs of establishing a contracts register, data verification and the development and delivery of commercial-in-confidence training for Contracting and System Project Office staff.<sup>35</sup> To estimate Defence's compliance cost for 2006, the ANAO apportioned the reported cumulative cost, assuming constant costs per year.

**3.26** The total of the estimated cost of all agencies complying with the Senate Order, as derived from agencies' 2006 Internet listing, was approximately \$900 000, which included Defence costs of \$632 500. This represented an average cost of compliance per agency of approximately \$14 000, and an average cost per contract of \$60.

<sup>35</sup> Defence reported on its website (accessed on 5 August 2007) that since 1 January 2003 the estimated cost of compliance to date was approximately \$2.53 million.

## 4. Processes for Compiling Internet Listings

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*The chapter reports the results of the ANAO's assessment of the adequacy of agencies' processes for preparing Internet listings.*

### Introduction

**4.1** The ANAO examined whether processes in place at the audited agencies were likely to lead to the development of a complete and accurate list of contracts, including the accurate identification and reporting of confidentiality in contracts. In this regard, the ANAO expected that each agency would have:

- developed policies, guidance or training on the requirements of the Senate Order to assist staff in the preparation of the Internet listings and also determine whether information included in the contracts should be treated as confidential;
- implemented a system for recording and reporting the relevant information of all contracts;
- allocated responsibility for preparing and posting the Senate Order listing on the agency's website;
- implemented appropriate controls to ensure that the list is accurate and complete; and
- developed tendering and contracting processes that inform potential contractors about the Australian Government's accountability and disclosure requirements in relation to contracts, including the use of confidentiality provisions. Specifically, prospective contractors should be informed about:
  - the conditions by which agencies will consider requests for information in a contract to be considered confidential; and
  - circumstances where information will be disclosed even if confidentiality is agreed, for example, by law to the Parliament and its committees, and the Auditor-General.

## Policy and guidance material

**4.2** Four agencies included the requirement to complete the Internet listing in their Chief Executive's Instructions (CEIs). The other three agencies advised the ANAO that they were either currently updating, or would be updating, their CEIs in the near future to reflect the requirements of the Senate Order.

**4.3** The CEIs were supplemented in all cases with more detailed procurement-related policy and guidance material, which included information on the requirements of the Senate Order, and the use of confidentiality provisions in contracts. Most of the audited agencies had included references to relevant procurement guidance published by Finance in procurement policy and procedural documents.

**4.4** In an example of better practice, DOTARS supplied each departmental officer with two A4 laminated sheets which provide an overview of procurement, delegate responsibilities, confidentiality of contractor's information and a confidentiality decision-making flowchart. DCITA includes the Senate Order as a topic within the department's intranet guidance on reporting requirements. This guidance includes proforma documents and links to Finance's procurement guidance.

**4.5** Notwithstanding the existence of considerable policy and guidance material, the ANAO found that the requirements of the Senate Order in relation to confidentiality were, in the main, not well understood. In particular, the audit found a low level of awareness and understanding about the use of confidentiality provisions in contracts and Finance's confidentiality criteria amongst staff interviewed during the audit. However, as indicated in paragraph 2.26, there was a moderate level of error in the application of confidentiality criteria for determining whether information should be protected as confidential. The more significant errors involved the reporting of confidentiality in contracts for the purposes of the Internet listings.

## Training

**4.6** As mentioned in previous reports, the ANAO considers that the provision of regular targeted procurement training assists in improving the level of understanding of the requirements of the Senate Order. This in turn facilitates the production of more accurate and complete Internet listings. The Senate Committee report recommended:

all agencies provide adequate training and education to staff responsible for managing contracts and complying with the Order, either through internal training or programs provided externally.<sup>36</sup>

**4.7** DOTARS has conducted procurement training for relevant staff to highlight the importance and purpose of the Senate Order listing. In an example of better practice, DCITA has developed a PowerPoint presentation on *Instructions for Completing the Senate Order on Departmental and Agency Contracts*. This was provided to co-ordinators in DCITA's line areas. The presentation included references to Finance's Financial Management Guidance No.3 and No.8. The training material explained 'confidentiality by provision' and 'confidentiality by other requirements'. It included references to Finance's tests of confidentiality.

**4.8** During 2006–07, Defence, Geoscience Australia and AIFS provided sessions to staff on the use, recording and reporting of confidentiality provisions in contracts. These agencies also encouraged staff to attend Finance's various procurement and AusTender seminars.

**4.9** For future Senate Order reporting, it is important that relevant agency staff are aware of updated Finance guidance regarding confidentiality in procurement. In this regard, agencies should undertake sufficient training to ensure staff are aware of Finance's *Guidance on Confidentiality in Procurement*, July 2007 and any associated revisions to Finance's *Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)*, January 2004. Finance advised the ANAO that it plans to revise this guide, subject to any changes arising from the recent Senate Committee report.

## Processes for compiling the Internet listing

### Contract registers

**4.10** Each of the agencies had established a contract register for the purpose of recording details of their contracts. In each case, overall responsibility for the management of the contract register was allocated to a centralised procurement unit.

**4.11** At the time of the audit, only DCITA had established a formal linkage between its contract register and Financial Management Information System (FMIS). In DCITA, contract payment transactions could be processed through the

<sup>36</sup> Senate Standing Committee on Finance and Public Administration, op. cit., p. ix.

FMIS only when a contract number, which was obtained from the contract register, was recorded. The audit found that this requirement assisted DCITA to maintain the accuracy and completeness of its contract registers.

**4.12** During the audit, Geoscience Australia and DOTARS advised the ANAO that they planned to link the information in their contract register with their FMIS. The ANAO considered that these enhancements would assist these agencies to maintain more accurate and complete contract registers, as well as improve the management of procurement processes and associated expenditure.

**4.13** Defence utilised a centralised contracts register, the Interim Defence Contracts Register (IDCR), which was accessible to line area staff, to compile the Senate Order listing. While the IDCR was not linked to Defence's FMIS (ROMAN), regular reconciliations were conducted between the two systems to promote completeness of the IDCR. However, the ANAO found that this process had not been fully effective in creating an accurate, centralised contracts register.

**4.14** Improving linkages between an agency's contract register and its FMIS should improve an agency's ability to capture all relevant contract details for Senate Order reporting. Each agency should assess the nature of linkages that are the most appropriate to their circumstances. For example, creating an interface between the two systems may require considerable investment and therefore may not be cost effective in all cases. An alternative approach is to require a unique identifier, such as a contract number, to be recorded in the FMIS, before contract payments can be processed. As discussed in paragraph 3.21, Defence advised the ANAO in August 2007 that it was upgrading its IDCR to enable it fully comply with Finance guidelines for reporting contracts under the Senate Order by 30 September 2007.

## **Processes for ensuring the completeness and accuracy of Internet listings**

**4.15** In each of the audited agencies, the Internet listing was compiled by the central procurement unit responsible for the contracts register. In each case, the contracts register was the primary source of information for the production of the Internet listing.

**4.16** In Defence, DOTARS, and DCITA, individual business areas were responsible for entering the details of new contracts into the contract register. Each of these agencies had a range of controls in place to limit the ability of business areas to amend existing contract records to ensure completeness and accuracy of the contract register. In the remaining agencies, business areas were



required to provide details of new contracts to a central procurement unit that was responsible for entering contract details into the register.

**4.17** The audited agencies had a range of additional processes aimed at ensuring the completeness of their Internet listings. For example, four of the agencies provided the Internet listing to relevant business areas and requested verification of the accuracy and completeness of the contracts listed, together with details of any amendments or deletions.

**4.18** AUSTRAC, NBA and DCITA performed manual reconciliations between their Internet listing, contract payment information in the FMIS and contract details published in AusTender. DOTARS advised that although it did not undertake a formal reconciliation, it has a number of processes for ensuring that information in its Internet listing was consistent with information in AusTender. DOTARS advised the ANAO that following the introduction of enhancements to its FMIS, it had commenced regular reconciliations between its FMIS and its contract register. Geoscience Australia and AIFS advised that reconciliation processes have been put in place to ensure the accuracy of the future Internet listings. Defence advised that the department was making a number of changes to the IDCR (see paragraphs 4.13 and 4.14).

*Need for improved quality control*

**4.19** Despite these processes, the many errors identified by the ANAO relating to the identification and reporting of confidentiality in contracts and the completeness of Internet listings suggest that there was a lack of effective quality control in the compilation of agencies' 2006 Internet listings. For example:

- a number of errors identified at DOTARS related to contracts included in the Internet listing following advice from business areas, which were not entered into or current in 2006; and
- a number of the errors in DCITA's Internet listing were the result of changes to the information previously recorded in the contracts register.

**4.20** The need for improved quality control is a recurring theme in the ANAO's compliance audits on the Senate Order (see Table 4.1).

**Table 4.1**

**Previous ANAO recommendations to improve quality control when compiling Internet listings**

| Audit report                              | Recommendation  |
|---|---|
| No. 5 2006–07<br>Recommendation<br>No. 1  | The ANAO recommends that agencies improve the accuracy and completeness of their contract listings by: <ul style="list-style-type: none"> <li>• 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 FMIS records or to AusTender; and</li> <li>• developing quality assurance processes to improve the accuracy of the contract listing.</li> </ul> |
| No. 11 2005–06<br>Recommendation<br>No. 1 | 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.   |
| No. 8 2002–03<br>Recommendation<br>No. 1  | To assist with the compilation of the Internet listing, the ANAO recommends that all FMA agencies, as appropriate: <ul style="list-style-type: none"> <li>• implement quality assurance processes, as necessary, to ensure the completeness and accuracy of the contract information listed on the Internet.</li> </ul>   |

Sources: ANAO Audit Report No. 5 2006–07, *The Senate Order for the Departmental and Agency Contracts (Calendar Year 2005 Compliance)*, ANAO Audit Report No. 11 2005–06, *The Senate Order for Departmental and Agency Contracts (Calendar Year 2004 Compliance)*, ANAO Audit Report No. 8 2002–03, *The Senate Order for Department and Agency Contracts (September 2002)*.

**4.21** Following the previous ANAO audit on the Senate Order,<sup>37</sup> the Auditor-General wrote to agency heads to encourage them to address audit findings, which included that controls and associated processes for preparing Internet listings could be improved.

**4.22** The Senate Committee report supported ANAO recommendations that agencies improve the accuracy and completeness of the contract information they report with stronger internal controls for checking that information. Recommendation No. 3 of the Senate Committee report was that:

agencies, if they have not done so already, implement ANAO recommendations to improve the accuracy and completeness of contract information with stronger

<sup>37</sup> ANAO Audit Report No. 5 2006–07, *The Senate Order for the Departmental and Agency Contracts (Calendar Year 2005 Compliance)*.

internal controls and quality assurance for checking data, and report that they have done so through their Ministers' tabling statements made under paragraph (1) of the order.<sup>38</sup>

## Recommendation No.1

**4.23** The ANAO **recommends** that agencies improve the accuracy and completeness of their Internet listings by:

- 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 designed to improve the accuracy of the Internet listing.

### *Agencies' responses*

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

#### *Department of Defence*

The Defence Materiel Organisation's Procurement Services (PS) has already updated the Interim Defence Contract Register (IDCR) to significantly increase the accuracy and completeness of future Internet listings. PS will further improve the accuracy and completeness of the Internet listing by:

- undertaking a reconciliation of the Internet listing with information from the Financial Management Information System (ROMAN). PS will also investigate the possibility of a reconciliation of the Internet listing with information from AusTender 2; and
- updating the guidance on the IDCR website.

#### *Department of Transport and Regional Services*

Issues raised in this report have been addressed in the preparation of the Department's Senate Order for Departmental and Agency Contracts (Financial Year 2006–07). This included increased quality assurance reviews and reconciliation of contract details between the Department's Financial Management Information System (FMIS), contract register and AusTender. In addition, the Department initiated agency-wide training specifically focussed on Australian Government contract reporting obligations.

<sup>38</sup> Senate Standing Committee on Finance and Public Administration, op. cit., p. ix.

The Department is currently implementing a new procurement and contract registration system that will be fully integrated with the FMIS. This will ensure that all contracts and variations can be captured in a single system and will therefore improve the accuracy of reporting.

## Implementation of AusTender 2

**4.25** As discussed in paragraph 1.15, Finance is enhancing the AusTender system (AusTender 2) to provide better data, search and reporting capacity relating to procurements by Australian Government agencies. The system will be progressively implemented from September 2007. The capacity to use AusTender 2 promises to improve the completeness and accuracy of information that agencies report for the Senate Order in the future. However, the effectiveness of the system will largely depend on the quality of information input to it.

## Tender and contract documentation

**4.26** Each of the audited agencies had appropriately worded tendering and contracting documents to inform potential contractors about the Government's procurement policies, including its accountability and disclosure requirements. The ANAO considers that it is better practice for Request for Tender (RFT) documentation to include or reference the confidentiality criteria contained in the relevant Finance guidance.<sup>39</sup> DCITA, DOTARS, AIFS and AUSTRAC clearly stated, in their standard RFT documentation, that requests for confidentiality would be assessed against the confidentiality requirements promulgated by Finance. The standard tendering documents of Geoscience Australia, NBA and Defence did not specifically refer to the use of the contract confidentiality criteria promulgated by Finance in assessing requests for treating contracting information as confidential.

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<sup>39</sup> At the time agencies compiled calendar year 2006 Internet listings, the relevant Finance guide was *Confidentiality of Contractors' Commercial Information*, February 2003. This guidance has subsequently been replaced by *Guidance on Confidentiality in Procurement—July 2007*. The model RFT clauses promulgated by Finance are at <[www.finance.gov.au/ctc/toolkits/procurement\\_guidance.html](http://www.finance.gov.au/ctc/toolkits/procurement_guidance.html)>.

**4.27** In an example of better practice, the NBA states in its RFT that: 'the NBA does not consider the overall Contract price included in a Tender or the Contract for the supply of the Solution to be confidential and reserves the right to publish such information including on its website' [Clause 35.8]. The NBA also indicated that it includes in its standard contracts a clause on confidential information which notes that: 'The parties agree that the terms and conditions of the Deed (including the Payment amounts in Schedule 3 Price, Invoicing and Payment) are not Confidential Information.'

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Steve Chapman  
Acting/Auditor-General

Canberra ACT  
27 September 2007



# Appendices





## Appendix 1: The Senate Order for 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.

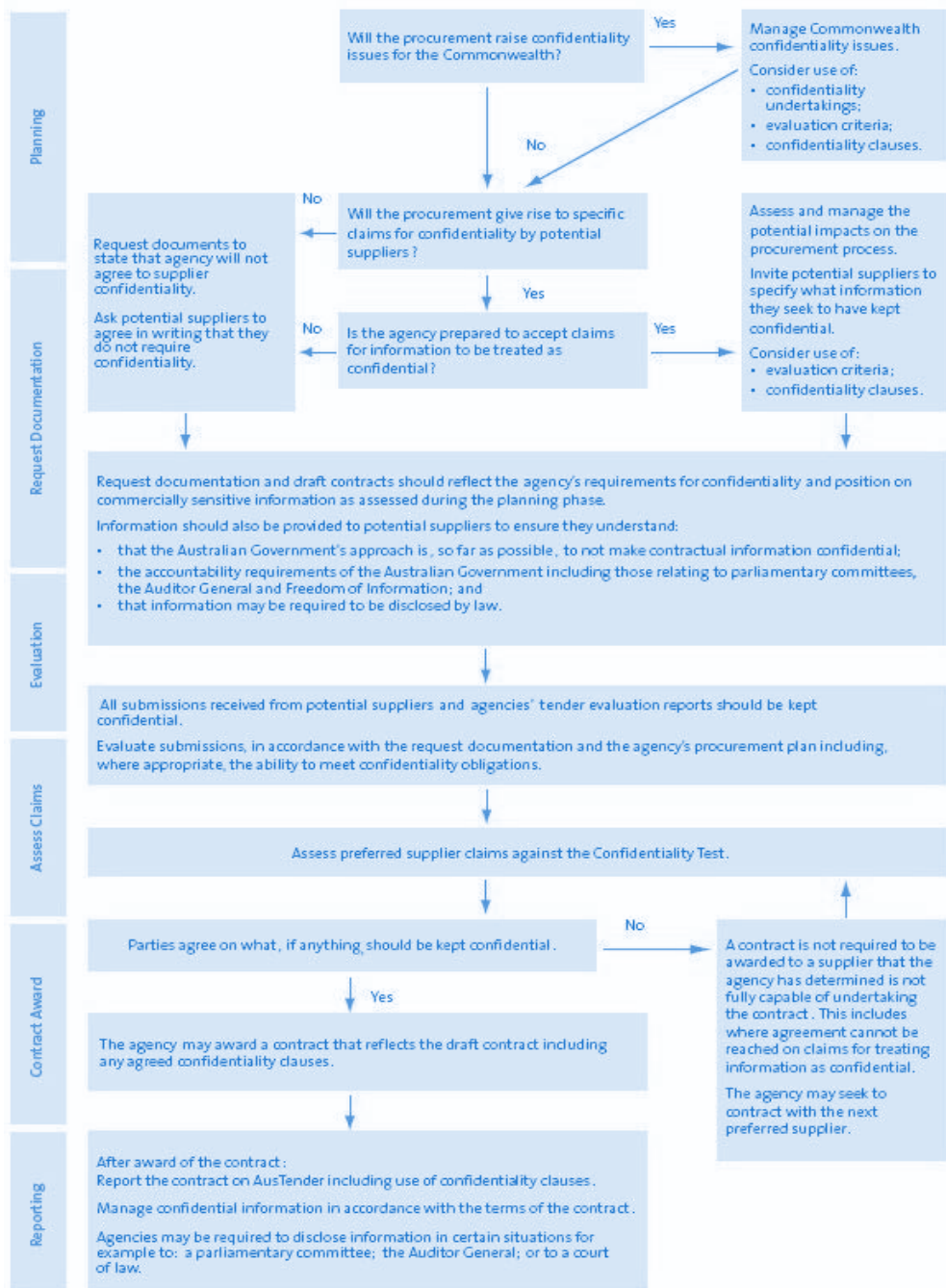
(6) In respect of letters including matter under paragraph (3), the Auditor-General be requested to indicate in a report under paragraph (5) that the Auditor-General has examined a number of contracts, selected by the Auditor-General, which have not been included in a list, and to indicate whether the 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: Flowchart – Dealing with Confidentiality in a Procurement



Source: Department of Finance and Administration, 2007, *Guidance on Confidentiality in Procurement*.

## Appendix 3: Confidentiality Criteria

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 disclosures.

### 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.

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

## Appendix 4: Comments From the Audited Agencies

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

Each of the agencies selected for the 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 recommendation have been included in the main body of the report under the subheading "Agencies' responses" directly following the recommendation.

General responses are reproduced below.

### **Australian Institute of Family Studies**

The Australian Institute of Family Studies (the Institute) advised that:

Overall, the Institute found the audit process a beneficial one, with many useful and constructive learning opportunities. The Institute is sure that the 'best practice' suggestions offered by the ANAO's team of auditors will stand the Institute in good stead in the future.

### **Department of Communications, Information Technology and the Arts**

The Department of Communications, Information Technology and the Arts (DCITA) advised that:

The Department of Communications, Information Technology and the Arts supports the recommendation as measures to improve the accuracy of the Internet listing. The recent changes to AusTender will change the process for collection of information in relation to the Senate Order in the Department. The timing of these changes and this audit have provided an opportunity to review our training and procedures in this regard. In addition, we are benefiting from improved Department of Finance and Administration guidance from July 2007 as to how confidentiality clauses are to be classified for Senate Order purposes.

In relation to the question of whether confidentiality clauses are appropriately included in particular contracts, we note that the Department of Finance and Administration Guidelines do not require

that the confidentiality criteria be met in every case before a confidentiality clause can be included in a contract. The Finance Guidelines make it clear that the agency has the choice whether to seek another supplier who will not insist on the confidentiality clause or to agree to its inclusion weighing the need to ensure adequate transparency, taking into account the nature of the contract and the information concerned, and the value for money in doing business with the prospective contractor. The contracts which the report indicates inappropriately contain confidentiality clauses all relate to the hourly rates of specified individuals in professional service firms. The protection of this information is common in a commercial setting and particularly in some industries or professions. In each case where confidentiality provisions were agreed by the Department, there are the standard clauses allowing the provision of information to Ministers and Parliament, and access by the ANAO.

## **Department of Defence (Defence)**

The Department of Defence advised that:

Defence and the Defence Materiel Organisation (DMO) acknowledge the findings of the ANAO audit of the Senate Order for Departmental and Agency Contracts No. 9 (Calendar Year 2006 Compliance) and will work to implement the recommendations proposed in this audit. Defence and DMO are committed to improving transparency in their procurement processes. DMO has already updated its Interim Defence Contracts Register (IDCR) to increase the accuracy and completeness of future Internet Listings and further developments of relevant information systems are planned. Defence and DMO will also review and update procurement policy, templates, and guidance to further improve the accuracy and completeness of Defence's future Internet listing.

## Department of Finance and Administration

The Department of Finance and Administration advised as follows:

The Department of Finance and Administration (Finance) has reviewed the report in line with our responsibility for providing *Financial Management and Accountability Act 1997* department and agencies (agencies) with policy advice on compliance with the Senate Order on departmental and agency contracts. Finance supports the report's recommendations.

The audit indicates that agencies have continued the recent trend towards better assessment of when to use confidentiality provisions in contracts. This has been reflected in the reduced incidence of specific confidentiality clauses being incorrectly used in the sampled contracts.

Finance notes the audit's findings that the Internet listings of audited agencies tended to over-report specific confidentiality provisions and that issues were also identified with the timing and coverage of agencies' Internet listings. It is anticipated that Finance's revised *Guidance on Procurement Publishing Obligations – July 2007* and *Guidance on Confidentiality in Procurement – July 2007* will assist agencies to improve on this aspect of reporting in future, as it contains updated guidelines for determining whether information is confidential and on reporting obligations.

The audit acknowledges Finance's current work aimed at enhanced the AusTender system to provide better data search and reporting capacity, so that it can in future be used as single procurement reporting mechanism. Finance's intention to revise the *Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts) – January 2004* is also mentioned.

Finance expects that the revision of this guidance will provide better clarification for agencies as to their obligations to report procurement information in line with the Senate Order.

## Series Titles

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Audit Report No.1 2007–08

*Acquisition of the ABRAMS Main Battle Tank*

Department of Defence

Defence Materiel Organisation

Audit Report No.2 2007–08

*Electronic Travel Authority Follow-up Audit*

Department of Immigration and Citizenship

Audit Report No.3 2007–08

*Australian Technical Colleges Programme*

Department of Education, Science and Training

Audit Report No.4 2007–08

*Container Examination Facilities Follow-up*

Australian Customs Service

Audit Report No.5 2007–08

*National Cervical Screening Program Follow-up*

Department of Health and Ageing

Audit Report No.6 2007–08

*Australia's Preparedness for a Human Influenza Pandemic*

Department of Health and Ageing

Department of Agriculture, Fisheries and Forestry



# Current Better Practice Guides

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*The following Better Practice Guides are available on the Australian National Audit Office Website.*

## Fairness and Transparency in Purchasing Decisions

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| Developing and Managing Contracts   |           |
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| Making implementation matter  | Oct 2006  |
| Legal Services Arrangements in Australian Government Agencies                                     | Aug 2006  |
| Preparation of Financial Statements by Public Sector Entities                                     | Apr 2006  |
| Administration of Fringe Benefits Tax   | Feb 2006  |
| User-Friendly Forms   |           |
| Key Principles and Practices to Effectively Design<br>and Communicate Australian Government Forms | Jan 2006  |
| Public Sector Audit Committees  | Feb 2005  |
| Fraud Control in Australian Government Agencies   | Aug 2004  |
| Security and Control Update for SAP R/3   | June 2004 |
| Better Practice in Annual Performance Reporting   | Apr 2004  |
| Management of Scientific Research and Development<br>Projects in Commonwealth Agencies            | Dec 2003  |
| Public Sector Governance  | July 2003 |
| Goods and Services Tax (GST) Administration   | May 2003  |
| Managing Parliamentary Workflow   | Apr 2003  |
| Building Capability—A framework for managing<br>learning and development in the APS               | Apr 2003  |
| Internal Budgeting  | Feb 2003  |
| Administration of Grants  | May 2002  |
| Performance Information in Portfolio Budget Statements  | May 2002  |
| Some Better Practice Principles for Developing<br>Policy Advice                                   | Nov 2001  |

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| Rehabilitation: Managing Return to Work                           | June 2001 |
| Business Continuity Management                                    | Jan 2000  |
| Building a Better Financial Management Framework                  | Nov 1999  |
| Building Better Financial Management Support                      | Nov 1999  |
| Commonwealth Agency Energy Management                             | June 1999 |
| Security and Control for SAP R/3                                  | Oct 1998  |
| New Directions in Internal Audit                                  | July 1998 |
| Controlling Performance and Outcomes                              | Dec 1997  |
| Protective Security Principles<br>(in Audit Report No.21 1997–98) | Dec 1997  |



