

The Auditor-General
Audit Report No.6 2009–10
Performance Audit

**Confidentiality in Government Contracts –
Senate Order for Departmental and Agency
Contracts (Calendar Year 2008 Compliance)**

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of Australia 2009

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Canberra ACT
28 September 2009

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 *Confidentiality in Government Contracts - Senate Order for Departmental and Agency Contracts (Calendar Year 2008 Compliance)*.

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

Yours sincerely

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

Ian McPhee
Auditor-General

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

AUDITING FOR AUSTRALIA

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

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Abbreviations and Glossary

ABS	Australian Bureau of Statistics
ANAO	Australian National Audit Office
ASIO	Australian Security Intelligence Organisation
ASIS	Australian Secret Intelligence Service
AusTender	A system administered by the Department of Finance and Deregulation and accessible to the public through the Internet; for agencies to publish and report information regarding procurement and contracts.
AusTender Agency User Guide (User Guide)	The User Guide contains (among other things) specific instructions on how best to transfer information into AusTender.
Commonwealth Procurement Guidelines (CPGs)	The CPGs establish the procurement policy framework within which agencies determine their own specific procurement practices.
Chief Executive's Instructions (CEIs)	These authorise Chief Executives to give instructions to officials in their agency, on any matter necessary or convenient for carrying out the FMA Act.
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 create confidentiality obligations on the parties to the contract.

DEEWR	Department of Education, Employment and Workplace Relations
DIISR	Department of Innovation, Industry, Science and Research
Finance	Department of Finance and Deregulation
Financial Management and Accountability Act 1997(FMA Act)	The Act provides the framework for the proper management of public money and public property by the Executive arm of the Commonwealth.
FMG	Financial Management Guidance
FMG 3	Financial Management Guidance No. 3 – <i>Guidance on Confidentiality in Procurement</i> , July 2007
FMG 8	Financial Management Guidance No. 8 - <i>Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)</i> , January 2004
FMG 15	Financial Management Guidance No. 15 - <i>Guidance on Procurement Publishing Obligations</i> , July 2007
FMIS	Financial Management Information System
FPA Committee	Senate Standing Committee on Finance and Public Administration
FPA Committee first report	<i>Report on the first year of operation of the Senate order for the production of lists of departmental and agency contracts</i> , Finance and Public Administration References Committee, December 2002.

FPA Committee second report	<i>Second report on the operation of the Senate order for the production of lists of departmental and agency contracts (2003-06), Senate Standing Committee on Finance and Public Administration, February 2007.</i>
ITSA	Insolvency and Trustee Services Australia
Machinery of Government (MoG) changes	These refer to the allocation and reallocation of functions between departments and Ministers, particularly after the 2007 change of Government.
OCO	Office of the Commonwealth Ombudsman
Purchase Order (PO)	The mechanism used to enter contract or procurement details into an agency's FMIS.
Senate Order/the Order	The Senate Order for Departmental and Agency Contracts requires Ministers to table letters of advice that all agencies that they administer have placed on their Internet sites lists of contracts of \$100 000 or more. These lists are required to disclose 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 each financial and calendar year.

Summary and Recommendations

Summary

Background

1. The Senate Order for Departmental and Agency Contracts (the Senate Order/the Order) was introduced in June 2001. The Order is one of several measures that the Senate introduced in recent years, to improve public knowledge of information on procurement and the expenditure of public funds. The main principle that underpins the Senate Order is that the Parliament's and public's access to this information should not be restricted by the inclusion of confidential information in contracts unless there is a sound basis for doing so. Public knowledge of information on contracted goods and services delivered to the government, can lead to better results for the Australian Government and the public. The Senate Order requirements have been amended over time to improve agency reporting, for example, on grants.
2. To comply with the Order, each agency subject to the *Financial Management and Accountability Act, 1997* (FMA Act), must place on its Internet site a list of contracts¹ valued at \$100 000 or more. The lists must indicate whether each contract requires the parties to maintain confidentiality of any of the contract's provisions, and whether there are any other requirements of confidentiality. The Order also requires Ministers to table in the Senate, letters of advice that the agencies they administer have listed their contracts on their Internet sites. At the end of the 2008 Calendar Year there were 104 agencies subject to the FMA Act with five of these exempt from the Order. The Senate Order also requests the Auditor-General to annually review contract lists and to report any incorrect use of confidentiality provisions.
3. The Department of Finance and Deregulation has produced a range of Financial Management Guidance (FMG) that is relevant to the production of contract lists and the use of confidentiality provisions in contracts. This includes:
 - *Guidance on Procurement Publishing Obligations* (FMG 15);
 - *Guidance on Confidentiality in Procurement* (FMG 3); and

¹ The Senate Order requires all contracts, grants and standing offers to be listed. For the purposes of this report contract means any, or all, of these types of agreements except in chapter 4.

- *Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)* (FMG 8).²

4. This report outlines the results of the Australian National Audit Office's (ANAO's) eleventh audit of agencies' compliance with the reporting requirements of the Senate Order.

Audit objectives and scope

5. The audit objectives were to:

- assess whether all agencies compiled Internet listings of contracts, and tabled Ministers' letters, as required by the Senate Order; and
- to review, in selected agencies the accuracy and completeness of the listing and the correctness of the use of confidentiality provisions.

6. The selected agencies, in order of size and number of contracts sampled, were: the Department of Education, Employment and Workplace Relations (DEEWR); the Department of Innovation, Industry, Science and Research (DIISR); the Australian Bureau of Statistics (ABS); Insolvency and Trustee Services Australia (ITSA); and the Office of the Commonwealth Ombudsman (OCO).

7. The ANAO agreed to include the Australian Secret Intelligence Service (ASIS) and the Australian Security Intelligence Organisation (ASIO) in the audit³, at the request of the Senate Standing Committee on Finance and Public Administration (FPA Committee).

8. In addition to assessing agencies' compliance with the Order, we also compared the agencies' data in AusTender to their Internet listings to determine whether it was consistent with the Senate Order's reporting requirements. This was to assess whether agencies could meet an FPA Committee recommendation, supported by the Government, to use the Finance administered system AusTender, for centralised reporting on contracts rather than their Internet listings.

² These guidance can be found on the Finance website at:
<<http://www.finance.gov.au/procurement/procurement-policy-and-guidance/procurement-guidance/index.html>>.

³ This recommendation is further detailed in paragraph 1.8.

Audit methodology

9. For each reviewed agency the Australian National Audit Office (ANAO):

- assessed whether the Senate Order listing and the Minister's letter were available by the due date⁴ and contained all required information;
- conducted interviews and examined files and records relating to the compilation of the Internet listing and the individual contracts selected for testing;
- compared each agency's data in AusTender to its Internet listing to determine whether it was consistent with the Senate Order's reporting requirements; and
- consulted with the agency and discussed any major audit findings.

Audit conclusion

10. The Senate Order listings for the five agencies contained 4592 contracts totalling \$8.5 billion, of which 397 (9 per cent) were reported as containing confidentiality provisions. This continues a pattern of decline in the numbers of contracts in audited agencies reported as containing confidentiality provisions. Notwithstanding this decline, there are still issues in agencies' reporting of contracts and their assessment of whether information is confidential.

11. The ANAO reviewed a sample of 115 of the contracts reported as containing confidentiality provisions. Of these, 59 contracts did not contain confidentiality provisions and 33 contracts were assessed as including confidentiality provisions that were not justified, having regard to the Finance Guidance. This meant that only 23 (20 per cent) of the contracts were correctly listed. Incorrectly including confidentiality provisions, or incorrectly listing contracts as containing confidentiality provisions, potentially precludes or restricts the Parliament and the public from accessing information about these contracts.

⁴ The due date for compliance with the Order fell on Saturday 28 February 2009, so for the purposes of the audit the ANAO adopted Monday 2 March 2009 as the date that satisfied the requirements of the Order.

12. These results for the audited agencies were mainly because they did not use the criteria provided by Finance in 2007 for assessing whether particular contract provisions should be confidential and inadequate training. In addition, although there was a central quality assurance team in each agency, these teams did not generally assess the merit of including confidentiality provisions in contracts.

13. Of the 99 agencies subject to the Senate Order at the end of 2008, 82 agencies posted their contract listings on the Internet by the due date. Seven agencies published within one month or shortly thereafter and the remaining ten agencies had not published a listing by 10 August 2009. Additionally, Ministers' letters relating to 81 agencies were tabled by the due date and another 13 within six weeks. The remaining Minister's letter covering five agencies was tabled on 5 August 2009. The listings of four of the audited agencies were generally complete. However, DEEWR did not include actual or estimated contract amounts for 1042 or a quarter of its 3959 contracts and stated that this was because 'estimates were too difficult to determine'.

14. The Parliament's FPA Committee has twice reviewed the Senate Order. One of the Committee's recommendations from the second review, supported by the Government, was to use the Finance administered system AusTender to replace individual agencies' Internet listings. The aim was to provide centralised contract information not only for individual agencies but to also consolidate whole of Government contract reporting.

15. However, there were substantial mismatches between agencies' contract information held in their Senate Order listings and AusTender due to the inaccuracy of agency data loaded into and limitations identified in AusTender. Until these issues are addressed, it will not be possible for interested parties to use the current agency data in AusTender to determine the accurate number or total value of contracts.

Key Findings

Use of confidentiality provisions (Chapter 2)

16. The five audited agencies reported 4592 contracts (valued at \$8.5 billion) in their 2008 Internet listings, 397 (9 per cent) of which were reported as containing confidentiality provisions protecting information contained in the contract. The ANAO sampled 115 of these.

Table 1

Summary of contracts reported with confidentiality provisions in the audited agencies

Agency	Reviewed contracts listed as containing confidentiality provisions	Reviewed contracts that did not contain any confidentiality provisions		Reviewed contracts that contained incorrect confidentiality provisions		Contracts containing correct confidentiality provisions and correctly listed	
		No.	%	No.	%	No.	%
DEEWR	46	24	52	14	30	8	17
DIISR	32	19	59	8	25	5	15
ABS	10	0	0	7	70	3	30
OCO	11	0	0	4	36	7	63
ITSA	16	16	100	0	0	0	0
Total	115	59	51	33	29	23	20

Source: ANAO analysis of reviewed agencies' contracts.

17. As illustrated in Table 1, of the 115 contracts reviewed by the ANAO, 59 (51 per cent) did not actually contain any confidentiality provisions. Of the remaining 56 contracts, 33 were assessed by the ANAO as incorrectly including confidentiality provisions. Consequently, only 23 contracts (20 per cent) correctly included confidentiality provisions, and were correctly listed on the Senate Order. This may prevent interested parties from accessing information in contracts that has been incorrectly identified as confidential. Consequently, in a competitive market, potential tenderers will be ill-informed about previously successful tenderers prices and other relevant information.

18. One of the main objectives of the Senate Order is to require agencies to make considered decisions in relation to the inclusion of confidentiality provisions in Government contracts. To assess the extent to which this had occurred, the ANAO applied the test of confidentiality set out in Finance Guidance⁵ to each of the 186 confidentiality provisions in the 56 contracts that included such provisions. These comprised 140 provisions relating to specific confidential information in the contracts and 46 provisions relating to confidential information generated in the performance of the contract.

19. The results of this review were that 132 (71 per cent) of the 186 provisions identifying the information to be protected were not specific, rather the information was described in general terms. Of the remaining 54 confidentiality provisions that were specific, 42 protected information in the contract and 12 protected information in the performance of the contract. The 42 provisions that protected the information in the contract were further assessed to determine if the information was commercially sensitive or it would be detrimental to any party if the information was reported. Of these, 28 (67 per cent) were assessed as not meeting either or both of these criteria.

20. There were a number of errors that suggest agencies find it difficult to differentiate between confidentiality provisions designed to protect information specifically identified in the contract, and confidentiality provisions designed to protect information generated during the performance of the contract (such as reports). This difficulty also applies to differentiating between specific and general or broad confidentiality clauses, such as those which describe how to deal with privacy issues or Intellectual Property rights.

21. The audit found that the agencies had generally not reviewed, during the term of the contracts, whether the inclusion of confidentiality provisions was current: for example, confidential information about a Ministerial launch of a grants program once the event had occurred. It would be sound practice for contract managers to review their Senate Order listing when there is no longer a need for a contract to be identified as containing confidentiality provisions. This could be when milestones are met, at the time of contract variations or extensions or when compiling the subsequent Senate Order listing.

⁵ Department of Finance and Deregulation, *Guidance on Confidentiality in Procurement (FMG 3)* July 2007, p. 10.

22. Request for Tender and contract templates in six of the seven audited agencies included a range of standard clauses relating to confidentiality and disclosure information, such as Parliamentary and ANAO access. These clauses were consistent with the model provisions in FMG 3. These templates were easily accessible by relevant staff members. Nevertheless, DEEWR included the required clauses in only 33 of the 46 contracts reviewed. ITSA did not include the clauses in any of the 16 contracts reviewed but included a provision that 'all access must be authorised in writing by the Chief Executive Officer'. Inclusion of the Parliamentary and ANAO access clauses is significant as it means that the agency and the contractor are both aware that regardless of the use of confidentiality provisions there is no absolute guarantee of confidentiality of any information.

23. The ANAO considers that inadequate training leading to a general lack of knowledge of FMG 3, for those staff in the audited agencies developing contracts, has largely contributed to the incorrect inclusion of confidentiality provisions in contracts. Also, the central quality assurance provided in each of the agencies subject to the Order, did not always assess whether confidentiality provisions should be included in contracts. It was up to contract managers, based on the information made available to them, to make an assessment of whether to include confidentiality provisions in a contract and to provide this information for inclusion in the Senate Order listing. Agencies would be better placed to meet the Order's reporting requirements if they were more active in updating their policies and guidelines, in particular including the four criteria test for confidentiality in FMG 3.

Completeness and accuracy (Chapter 3)

24. Of the 99 agencies subject to the Senate Order at the end of 2008, 82 posted their contract listings on the Internet by the due date. Of the remainder, seven agencies published within one month or shortly thereafter, and ten agencies across a range of portfolios, had not published a 2008 Calendar year listing at the time this report was produced.

25. There has been a significant improvement in the tabling of Ministers' letters of advice in Parliament. Letters relating to 82 agencies were tabled by the due date and 12 were tabled within six weeks of the due date. The remaining Minister's letter covering five agencies within his portfolio was tabled on 5 August 2009.

26. OCO and the ABS had published complete contract listings, while the remaining three audited agencies departed from this in the following respect:

- DEEWR did not meet Finance's requirements because 1042 of the 3959 (26 per cent) of its listed contracts did not include their actual or estimated values. The contracts that did include values were worth a total of \$5.2 billion. Consequently the department significantly understated the value of the contracts on its listing reducing its utility to the Parliament and unsuccessful and prospective tenderers.
- ITSA incorrectly excluded GST for 15 of its 53 contracts on the listing. The total amount of GST excluded was \$2.2 million, or 5.6 per cent of the total amount of the contracts.
- DIISR did not include the method used to calculate the cost of compliance in its list.

27. In all of the audited agencies subject to the Order, the staff compiling the Senate Order listings had a high level of relevant knowledge and experience, although they had not attended training provided by Finance after the introduction of FMG 3. Also, these staff did not assess whether confidentiality provisions were correctly included in the Senate Order listed contracts. While the audited agencies' internal policies and procedures for developing contracts and compiling the Senate Order listings were generally adequate these policies and procedures did not contain enough information to assist staff to assess whether to include confidentiality provisions in contracts.

AusTender (Chapter 4)

28. The FPA Committee has twice reviewed the Senate Order. One of the FPA Committee's recommendations from the second review and supported by the Government, was to use the Finance administered system AusTender, to replace individual agency's Internet listings. The intent was that agencies maintain their Senate Order listings until Finance implemented the AusTender module for reporting procurement contracts. However, it is not possible for the Parliament, Ministers or other interested parties to use the current agency data in AusTender to determine the accurate number or total value of contracts currently managed by all but one of the audited agencies because of three issues.

29. Each agency's internal procedures for transferring contract information resulted in incorrect total numbers and amounts of contracts being transferred

to AusTender. Also limitations within AusTender around automatically linking amendments to original contracts means that AusTender can only report whole-of-life contract totals if amendments are entered manually. AusTender reports current and previous agencies separately. Consequently, the December 2007 Machinery of Government (MoG) changes have meant that it is not possible to report on all contracts that are currently being managed within the agencies that have been substantially reorganised. These issues have resulted in significant inconsistencies between the Senate Order listings and AusTender.

30. To enable AusTender to replace the Senate Order for reporting contract information, agencies will need to address the errors in their existing AusTender data and the limitations in their current systems and processes used to transfer that data. Concurrently, Finance could consider future design solutions to address the limitations identified in AusTender, which would be informed by the improved capabilities of the agencies' systems and processes.

Recommendations

Recommendation No. 1

Paragraph 2.22

To assist agencies to meet the requirements of the next and any subsequent Senate Orders, the ANAO recommends that they:

- embed in their relevant policies and practices, the guidance and instructions in Financial Management Guidance 3, including the details of the four criteria test for confidentiality; and
- provide suitable training and guidance to staff on these policies and procedures.

Summary of organisations' responses to the audit report

The audited organisations agreed with the recommendation in this report. The organisations' responses to the recommendation are shown in Chapter 2. Other comments provided are shown in Appendix 4.

Audit Findings and Conclusions

1. Background and Context

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

The Senate Order

1.1 The Senate Order for Departmental and Agency Contracts (the Senate Order/the Order) was introduced in June 2001. The Order is one of several measures that the Senate introduced in recent years to provide more information about the expenditure of public funds. The main principle of the Senate Order is that the Parliament and public should not be prevented from access to information about government programs and services, unless there is a sound basis for determining that information should be kept confidential. Readily available information about government contracts is consistent with developments towards more 'open' government and increases competition in the private and community sectors for the supply of goods and services. This in turn, contributes to better value for money and improved program delivery.

1.2 The Senate Order requires agencies⁶ to place on their Internet sites a list of all contracts to the value of \$100 000 or more including GST, which have not been fully performed or which have been entered into during the previous 12 months.⁷ The Order also requires each Minister to table, in the Senate, a letter of advice that all of the agencies that they administer have posted their Senate Order listings on their Internet sites. The list must be posted, and the letter of advice must be tabled, no later than two calendar months⁸ after the last day of the financial year and calendar year.

1.3 The Senate Order requirements have been amended over time to improve agency reporting, for example, through the requirement to report on grants and standing offers. The Department of Finance and Deregulation (Finance) has incorporated these changes in its relevant Financial Management

⁶ The reporting requirements are for agencies subject to the *Financial Management and Accountability Act 1997*.

⁷ This is outlined in paragraph 2 in the current Senate Order, which is reproduced in Appendix 1 of this report.

⁸ The due date for compliance with the Order for calendar year 2008 fell on Saturday 28 February 2009, so for the purposes of the audit the ANAO adopted Monday 2 March 2009 as the date that satisfied the requirements of the Order.

Guidance. Additionally, the Senate requested the Auditor-General to conduct annual reviews of all agencies' contract lists and to report any unnecessary use of confidentiality provisions.

1.4 As set out in previous ANAO reports on the Senate Order, one of the main objectives of the Order is to encourage agencies to make considered decisions about the inclusion of confidentiality provisions in contracts. The operation of the Order has been reviewed twice by the FPA Committee.⁹ The Senate Order and the relevant Finance Guidance were amended to incorporate Government-agreed recommendations from the first report. The incorporated recommendations were that:

- agencies be required to report by financial and calendar year;
- standing offers and grants be included in the list;
- Finance and the ANAO develop a list of generic categories for confidentiality provisions;
- additional contract information including starting date and duration of contract be included; and
- Ministers' letters be tabled no later than two calendar months after the last day of the financial or calendar year.

1.5 A second FPA Committee report in 2007 contained 13 recommendations to improve the operation of the Senate Order and its future direction. The Government's response to the report and its recommendations was tabled in August 2008. The recommendations relevant to this audit have been summarised in the following paragraphs.

1.6 The Government agreed that if departments and agencies use the improved AusTender system to meet the requirements of the Senate Order, the quality and consistency of contract information available to the public would improve. In line with, an earlier ANAO recommendation¹⁰ the Government

⁹ Finance and Public Administration References Committee, *Report on the first year of operation of the Senate order for the production of lists of departmental and agency contracts*, December 2002. Finance and Public Administration References Committee, *Second report on the operation of the Senate order for the production of lists of departmental and agency contracts (2003-06)*, February 2007. The two reports and the Government's responses can be found on the Parliament House website at: <http://www.aph.gov.au/Senate/committee/fapa_ctte/contracts/index.htm>.

¹⁰ ANAO Audit Report No.27 2005-06, *Reporting of expenditure on consultancies*, p. 24, which can be found at: <http://www.anao.gov.au/uploads/documents/2005-06_Audit_Report_27.pdf>.

expected that not only would it improve the quality of data but it would decrease the number of contract reporting regimes. As AusTender does not have the capacity to report grants, the Government was considering an appropriate framework for public reporting of relevant grant payments.

1.7 The Government also agreed to agencies providing relevant staff with adequate training and education. In addition, the Department of the Prime Minister and Cabinet has since required agencies to include in their annual reports a note referring readers to the AusTender site for information on contracts and consultancies.

1.8 The Government also accepted, consistent with ANAO's response, that ASIO and ASIS be included in the Senate Order audit for 2008 or 2009 with the Auditor-General to consider whether to include them in any subsequent audits. While it is recognised that ASIS and ASIO are exempt from listing contract information publicly, it was expected that these agencies would manage their contracts consistent with the Government's requirements.

Finance Guidance

1.9 It is important that agencies assess all confidentiality claims carefully by ensuring that they are protecting Australian Government information and assessing each contractor's claim for confidentiality on a case by case basis. As stated previously, agencies must have adequate systems for 'the proper management and reporting of contracts', including those containing confidentiality provisions and ensuring that they report provisions correctly.

1.10 Finance has a range of guidance material on contracts covering reporting and the inclusion of confidentiality provisions which comprises:

- FMG 8: *Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)*, January 2004;
- FMG 3: *Guidance on Confidentiality and Procurement*, July 2007; and
- FMG 15: *Guidance on Publishing Obligations*, July 2007.¹¹

1.11 FMG 8 was designed to support agencies in developing improved methods of compiling their Senate Order listing and explains in detail the

¹¹ These guidance can be found at: <http://www.finance.gov.au/procurement/procurement-policy-and-guidance/procurement-guidance/index.html>.

requirements of the Order. FMG 3 provides more specific information on how to assess and when to include confidentiality provisions, and a four criteria test that agencies should apply to determine this. For the purposes of this audit, the ANAO has applied the definitions and test in FMG 3 in its assessment of the reporting of the use of confidentiality provisions. Additionally, FMG 15 outlines agencies' procurement publishing obligations particularly in relation to AusTender. Finance administers AusTender on behalf of the Government.

AusTender

1.12 AusTender¹² is the Australian Government's Internet based system for agencies to centrally publish and report information on procurement and contracts. Finance administers the system which was improved in September 2007 to incorporate the Government's requirement to publish contract notices. *The Commonwealth Procurement Guidelines* (CPGs) set out the Australian Government's requirements for publishing information relating to the procurement of property or services, the details of which are outlined in FMG 15.¹³ Agencies must report on AusTender all procurement contracts, including standing offer arrangements and any variations or extensions to these contracts which meet the reporting criteria. The contract reporting criteria are that:

- the instrument to be reported is a Commonwealth contract, agency agreement or standing offer arrangement or amendment thereto; and
- the instrument meets the relevant contract reporting value. That is, the value of the Commonwealth contract (including GST where applicable), agency agreement, standing offer arrangement or amendment thereto is \$10 000 or above for FMA Act agencies.

1.13 In addition, there are two specific types of confidentiality that can be identified in contracts on AusTender. These are designed to protect confidential information within the contract, for example, profit margins, or material obtained or produced during the life of the contract, such as a report.

¹² AusTender can be found at: <<https://www.tenders.gov.au/>>.

¹³ Department of Finance and Deregulation, *Guidance on Procurement Publishing Obligations (FMG 15)*, p.14. July 2007.

Audit approach

1.14 This is the ANAO's eleventh audit of the Senate Order, satisfying the Senate's request. The audit reviewed the contract information that was reported in each agency's 2008 Calendar Year listing. That is, contracts entered into during the twelve months ending 31 December 2008 or contracts entered into before 2008 which were not fully performed by 31 December 2008.

Audit objectives and criteria

1.15 The audit objectives were to assess whether all agencies compiled Internet listings of contracts, and tabled Ministers' letters, as required by the Senate Order and to review, in selected agencies the accuracy and completeness of the listing and the appropriateness of the use of confidentiality provisions.

1.16 To assess all agencies' compliance with the Order, the ANAO:

- reviewed the Senate Order listings on the Internet sites as of the due date including the method and cost of complying; and
- reviewed Ministers' letters to confirm tabling dates.

1.17 In addition the ANAO assessed whether the reviewed agencies had:

- reported a complete and accurate listing of contracts;
- appropriately used and reported confidentiality provisions in a selection of listed contracts; and
- appropriate policies, guidance and training for staff to support the accurate listing of contracts including appropriate inclusion and reporting of confidentiality provisions.

Audit methodology

1.18 For each reviewed agency the ANAO:

- assessed whether the Senate Order listing and the Minister's letter were available by the due date and contained all required information;
- conducted interviews and examined files and records relating to the compilation of the Internet listing and the individual contracts selected for testing;

- compared the agency's data in AusTender to the Internet listing to determine whether it was consistent with the Senate Order's reporting requirements; and
- consulted with the agency and discussed any major audit findings.

1.19 The ANAO selected a non-random sample of large, medium and small agencies that were subject to the Order. The selected agencies, in order of size and number of contracts sampled, were: the Department of Education, Employment and Workplace Relations (DEEWR); the Department of Innovation, Industry, Science and Research (DIISR); the Australian Bureau of Statistics (ABS); Insolvency and Trustee Services Australia (ITSA); and the Office of the Commonwealth Ombudsman (OCO).

1.20 The ANAO selected from these agencies, a representative sample of contracts that were reported as including confidentiality provisions. The sample was designed, as far as possible, to represent a cross-section of the types of contracts¹⁴ let by the agencies.

1.21 ASIO and ASIS are not subject to the Senate Order. However, as previously mentioned in paragraph 1.8, at the request of the FPA Committee the ANAO also included ASIO and ASIS in the audit. Accordingly, for these agencies the audit focused on whether they had:

- up-to-date Chief Executive Instructions (CEIs) with instructions on spending public money and procurement;
- tender and contract templates that met the requirements of FMG 3; and
- procedures for the identification and recording of contract details, including the use of confidentiality provisions.

Previous ANAO Senate Order audits

1.22 The previous Senate Order audit reports, and the recommendations made in each of those reports, are listed in Appendix 2.

¹⁴ The Senate Order requires all contracts, grants and standing offers to be listed. For the purposes of this report contract means any, or all, of these types of agreements except in chapter 4.

Auditing standards

1.23 The audit was conducted, consistent with the ANAO's Auditing Standards and, under Section 18 of the *Auditor-General Act 1997*. The cost of the audit to the ANAO was approximately \$391 966.

Report structure

1.24 This report contains an introductory chapter and three chapters that comprise:

- Confidentiality Provisions in Contracts (Chapter 2);
- Compliance with Senate Order Requirements (Chapter 3); and
- The Senate Order and AusTender (Chapter 4).

2. Confidentiality Provisions in Contracts

This chapter contains an assessment of the extent to which agencies correctly used confidentiality provisions in contracts.

Introduction

2.1 The main principle of the Senate Order is that the Parliament and public should not be prevented from access to information about government programs and services through the incorrect use of confidentiality provisions. As outlined in Chapter 1, Finance developed a range of guidance to assist agencies to compile their Senate Order listings and to meet this principle. FMG 8 (2004) sets out the requirements for the contents of the Senate Order Listing and FMG 3 (2007) deals specifically with confidentiality in procurement. The ANAO has applied the definitions and test in the latter Guidance for the purposes of this audit. In addition, the ANAO report on the Senate Order for calendar year 2007¹⁵ included a recommendation which was:

The ANAO recommends agencies implement review measures to assess the appropriateness of decisions to include confidentiality provisions in contracts and provide suitable feedback to staff involved in procurement.

2.2 Given the recommendation applied to all agencies subject to the Order, this Chapter also includes an assessment of whether the reviewed agencies had implemented this recommendation prior to compiling Senate Order listings for the 2008 Calendar year.

Trends in the use of confidentiality provisions

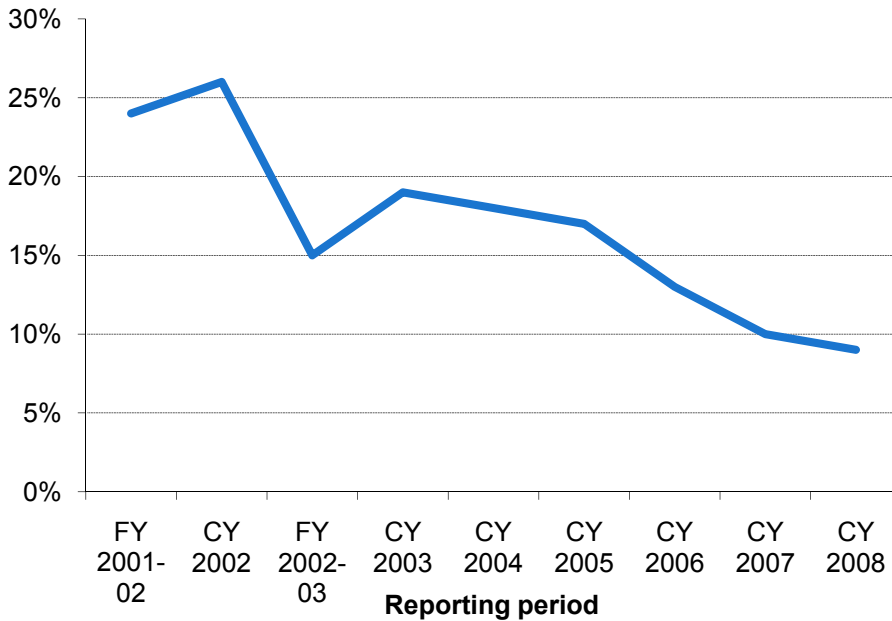
2.3 At the Senate's request, the ANAO has conducted annual reviews of agencies' Senate Order listings to report on the use of confidentiality provisions. As illustrated in Figure 2.1, since the ANAO's first audit of compliance with the Senate Order, there has been a steady decrease in the number of contracts listed as containing confidentiality provisions in the audited agencies. However, as discussed further in this Chapter there is still

¹⁵ ANAO Report No. 5 2008-09 *The Senate Order for Departmental and Agency Contracts (Calendar Year 2007 Compliance)*, September, 2008. p.21. The report can be found at: <http://www.anao.gov.au/director/publications/auditreports/2008-2009.cfm?pageNumber=9>.

incorrect reporting of contracts and incorrect assessment of whether information is to be kept confidential.

Figure 2.1

Audited agencies' proportion of contracts reported as containing confidentiality provisions¹⁶



Source: ANAO analysis of audited agencies contracts and previous ANAO Senate Order reports.

Framework for assessment

2.4 There are two types of confidentiality provisions detailed in FMG 3 that are listed as either Column 1 or Column 2 in each agency's Senate Order listing (see paragraph 2.5). Column 1 provisions are specific clauses that protect information contained in the contract. Column 2 provisions are specific clauses protecting information obtained or generated in performing a contract. An example of information generated by a contract could be a future report.

2.5 FMG 3 also details four 'tests' for determining the use of confidentiality provisions in contracts. These tests, and the Column/s they apply to, are:

¹⁶ It should be noted that each ANAO audit was based on a non-random sample of agencies.

1. information in the contract must be specifically identified (Column 1 and 2);
2. information must be commercially sensitive (Column 1 only);
3. disclosure of the information would cause unreasonable detriment to the contractor or another party (Column 1 only); and
4. information was provided under the understanding that the information would remain confidential (Column 1 and 2).¹⁷

2.6 For Column 1 information to be protected, it must meet all of these requirements to be correctly identified as confidential. The ANAO made an assessment of whether contracts contained provisions that were correctly included and were consequently correctly identified on the Senate Order listings.

2.7 For the remainder of this report any references to Column 1 information will be referred to as ‘information contained in the contract’ and Column 2 as ‘information obtained or generated in performing the contract’.

Assessment of reviewed contracts

2.8 The five audited agencies reported 4592 contracts (valued at \$8.5 billion) in their 2008 Internet listings. Of these contracts 397 (9 per cent) were reported as containing confidentiality provisions. These provisions were designed to protect information contained in the contract or information generated in the performance of the contract. In some cases, the contracts were reported as containing both types of confidentiality provisions. Notwithstanding the low number of contracts containing confidentiality provisions, there are still issues in agencies’ reporting of contracts as containing confidential information and assessment of whether information is confidential. The ANAO reviewed 115 contracts with the results illustrated in Table 2.1.

¹⁷ The ANAO assumed that if the preceding three criteria were met the information would have been provided on the understanding that it would remain confidential.

Table 2.1**Summary of contracts with confidentiality provisions**

Agency	Reviewed contracts listed as containing confidentiality provisions	Reviewed contracts that did not contain any confidentiality provisions		Reviewed contracts that contained incorrect confidentiality provisions		Contracts containing correct confidentiality provisions and correctly listed	
		No.	%	No.	%	No.	%
DEEWR	46	24	52	14	30	8	17
DIISR	32	19	59	8	25	5	15
ABS	10	0	0	7	70	3	30
OCO	11	0	0	4	36	7	63
ITSA	16	16	100	0	0	0	0
Total	115	59	51	33	29	23	20

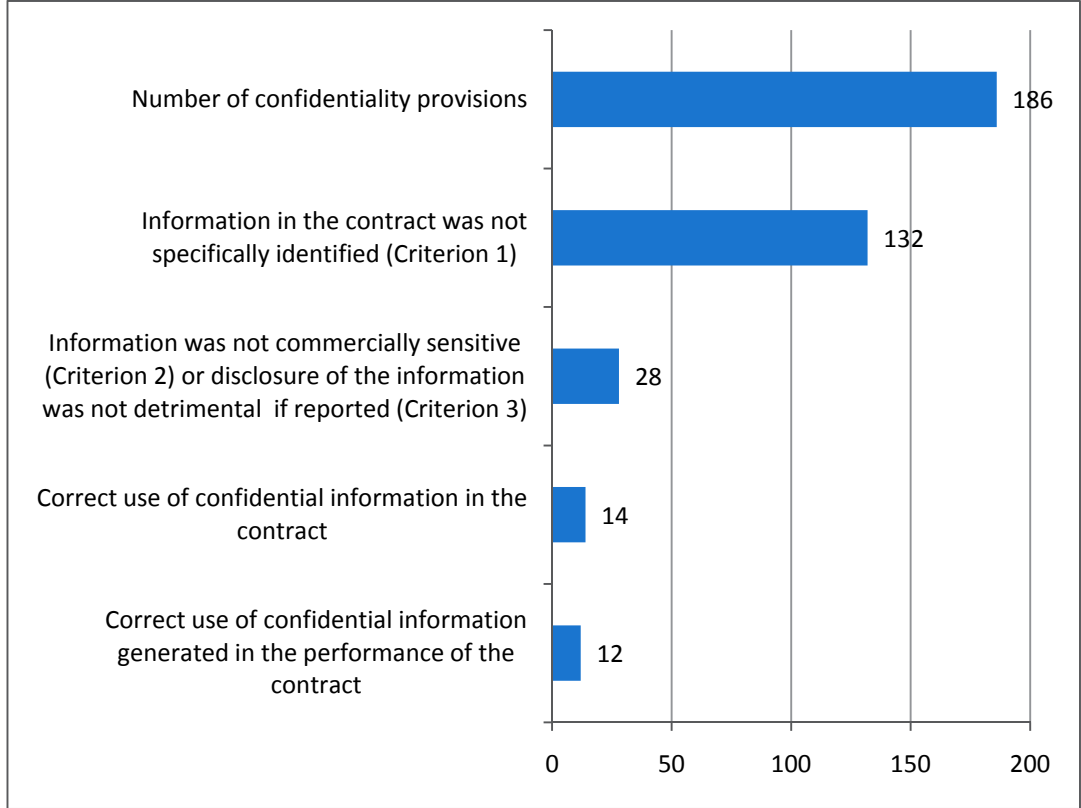
Source: ANAO analysis of reviewed agencies' contracts

2.9 The results shown in Table 2.1 illustrate that the agencies provided accurate information on confidentiality to the Parliament and the public in only 23 of the 115 reviewed contracts. This was because 59 (51 per cent) of the contracts reviewed, did not actually contain any confidentiality provisions. While misreporting these contracts would not prevent the Parliament and the public from accessing these contracts it could deter interested parties from requesting access. Additionally, 33 (29 per cent) of the 56 remaining contract were assessed as incorrectly containing confidentiality provisions, and therefore were incorrectly reported. If confidentiality provisions are incorrectly included in contracts, this could reduce access to this information which in turn, could undermine the purpose of the Senate Order.

2.10 As previously mentioned, one of the aims of the Senate Order audit is to ensure agencies are making a correct assessment of confidential information in contracts. To assess if there was any pattern to the incorrect inclusion of confidentiality provisions, the ANAO applied the test of confidentiality set out

in Finance Guidance.¹⁸ This test was applied to each of the 186 confidentiality provisions included in the 56 contracts identified as containing these provisions. This comprised 140 provisions relating to specific confidential information in the contracts and 46 provisions relating to specific confidential information generated in the performance of the contract. The results of the ANAO’s analysis of these confidentiality provisions are summarised in Figure 2.2.

Figure 2.2
Analysis of confidentiality provisions in audited agencies’ contracts



Source: ANAO analysis of selected contracts.

2.11 Figure 2.2 illustrates that only 26 (7 per cent) of the 186 confidentiality provisions met the test for confidentiality in FMG 3. The ANAO used the test’s

¹⁸ Department of Finance and Deregulation, *Guidance on Confidentiality in Procurement (FMG 3)* July 2007, p. 10.

four criteria sequentially to determine whether the confidentiality provisions were appropriately included and therefore correctly reported. The test and the criteria are outlined in paragraph 2.5 and their application and results are detailed in the following paragraphs.

Confidential information in the contract to be specifically identified (Criterion 1)

2.12 The ANAO initially reviewed the 186 confidentiality provisions to determine whether they met Criterion 1. This criterion applied to provisions designed to protect both information in the contracts and information generated in the performance of the contract. If this criterion was not met, the ANAO did not assess the confidentiality provisions against the remaining criteria. Of these provisions 132 did not meet Criterion 1. That is, 71 per cent of the provisions identifying the information required to be protected were not specific, rather the information was described in general terms.

2.13 This suggests confusion about what is a general or specific confidentiality clause. For example, a confidentiality clause contained a statement that if any unexpected confidential information arose and needed to be protected for the remainder of the contract, a deed of confidentiality will be signed by both parties. This confidentiality provision did not meet Criterion 1, and therefore did not require reporting, because it was not specific and there was only a possibility of it occurring. However, the agency and the contractor were reassured that, by its inclusion, changing circumstances around confidentiality could be accommodated.

Information is commercially sensitive or would cause detriment if made public (Criteria 2 and 3)

2.14 Of the confidentiality provisions that were specific, 42 protected information in the contract and 12 protected information in the performance of the contract. The 42 confidentiality provisions that met Criterion 1 and protected information in the contract were further assessed against criterion 2 and 3. That is, the information identified for protection was commercially sensitive or disclosure of the information would cause unreasonable detriment to the contractor or another party. Of these provisions, 28 were assessed as not meeting either or both criteria. A significant proportion of these contracts claimed the confidentiality of contractors' hourly rates or fees and pricing information. However, Finance's Guidance states that a claim for confidentiality of pricing information will only be legitimate where that

information reveals details of a supplier's internal costing or profit margins. Although a potential supplier may not want its competitors to know its prices, public knowledge of such information contributes to increased competition and better value for money.¹⁹

Reviewing confidentiality provisions

2.15 The audited agencies had not consistently reviewed the inclusion of confidentiality provisions in contracts. In some instances confidentiality provisions were no longer valid once milestones were met or stated dates had passed. It would be sound practice for contract managers to ensure that they revise their Senate Order listing when there is no longer a need for a contract to be identified as containing confidentiality provisions. This could be when milestones are met, at the time of contract variations or extensions or when compiling the subsequent Senate Order listing.

Training

2.16 All audited agencies subject to the Order, had a centralised procurement and contract management section or branch aimed at providing quality assurance, procedural information and advice. Staff in these areas in four of the five agencies attended training on procurement and contract management provided by Finance. However, this was generally before FMG 3 was produced, so prior to the four criteria test being available.

Internal procedures

2.17 Each of the reviewed agencies subject to the Order generally had adequate internal policies and procedures for developing contracts and compiling the Senate Order listings. The centralised sections in these agencies provided procedures and informal training to contract managers to assist them to make assessments on the inclusion of confidentiality provisions. While the information provided to contract managers included the different categories of confidentiality in Finance's Guidance, it did not include the assessment criteria.

¹⁹ Department of Finance and Deregulation, *Guidance on Confidentiality in Procurement (FMG 3)* July 2007, p. 32.

2.18 ASIO and ASIS had a range of policy and procedural documents containing information on spending public moneys, including guidance on the decision-making requirements associated with procurement and contracting activities. However, that documentation did not contain information on identifying and assessing confidential information. There would be benefit in ASIO and ASIS including this information in their policy and procedural documents.

2.19 The central quality assurance provided within each of the agencies subject to the Order did not include an assessment of confidentiality provisions in contracts. The reviewed agencies advised that contracts managers assessed whether to include confidentiality provisions in a contract and provided this information to the staff compiling the Senate Order listing. Contract managers' experience in, and frequency of, developing contracts and assessing claims for confidentiality, varied considerably within the audited agencies.

2.20 The ANAO considers that there was inadequate training and a general lack of knowledge of FMG 3 in the audited agencies. This combined with limited quality assurance, largely contributed to the inclusion of incorrect confidentiality provisions in contracts.

2.21 The ANAO considers that agencies could take a more active role in keeping up-to-date on Finance's relevant contract policies and procedures. In addition, the lack of knowledge of the four criteria test in FMG 3 indicated that the agencies had not implemented the recommendation from the previous ANAO audit of the Senate, detailed in paragraph 2.1.

Recommendation No.1

2.22 To assist agencies to meet the requirements of the next and any subsequent Senate Orders, the ANAO recommends that they:

- embed in their relevant policies and practices, the guidance and instructions in Financial Management Guidance 3, including the details of the four criteria test for confidentiality; and
- provide suitable training and guidance to staff on these policies and procedures.

Organisations' responses

DEEWR

2.23 DEEWR acknowledges the recommendation of the ANAO Performance Audit. The Department has incorporated the Financial Management Guidance 3, including the details of the four criteria test for confidentiality within its staff training material and relevant policies and practices including the DEEWR Procurement Manual and the DEEWR Contract Management Framework.

2.24 DEEWR has started rolling out a comprehensive education campaign/training program and other support (e.g. Intranet information/handy tips, Helpdesk) to improve staff's understanding of policies and procedures.

DIISR

2.25 Agreed.

2.26 The Department of Innovation, Industry, Science and Research agrees with the recommendation. The Department currently provides guidance (including links to the Financial Management Guidance 3) via our Intranet site, on the requirements of confidentiality. In addition, the Department is currently refreshing its procurement training; the refresh will include a focus on confidentiality provisions. Further, the Department is introducing a Contracts Module in the Financial Management Information System which will contain additional measures to contribute to greater accuracy of confidentiality claims.

ABS

2.27 Agreed.

2.28 The ABS agrees with the report's recommendation and will continue to include the guidance and instructions in the Financial Management Guidance 3, including the details of the four criteria test for confidentiality in its tools, templates and training.

ITSA

2.29 Agreed.

2.30 ITSA believes that the audit has most usefully focused attention on aspects of contracts reporting where improvements will be realised through better procedures, training and guidance.

OCO

2.31 Supported.

2.32 The office agrees that procurement policies and procedures need to include clear guidance on identifying and reporting confidentiality provisions. In addition, we also agree that staff need to be provided training and guidance in procurement. The office recently updated its guidance documents on procurement and it also intends to offer information sessions to staff in this regard. The office requires the staff responsible for preparing the Senate Order and updating AusTender to attend the training and information forums offered by the Department of Finance and Deregulation.

ASIO

2.33 Agreed.

2.34 ASIO appreciates the opportunity for its contract management processes to be independently reviewed and, for the most part, validated by the ANAO. The feedback provided by the ANAO is received in the constructive spirit in which it was furnished. ASIO acknowledges the findings of the report as they pertain to ASIO and are taking appropriate measures to address the deficiency in our processes identified, being the manner in which details on supplier confidentiality provisions are maintained by the Organisation.

ASIS

2.35 Agreed.

Parliamentary and ANAO access clauses

2.36 Where appropriate, contracts should also contain clauses dealing with the rights and obligations that arise from the Government's various accountability and disclosure mechanisms. Specifically, contracts should contain clauses about disclosure of contract-related information to the Parliament, including to its Committees. In addition, contracts should contain a clause that specifies that the ANAO will be allowed access to the contractor's premises.²⁰

²⁰ Department of Finance and Deregulation, *Guidance on Confidentiality in Procurement (FMG 3)*, July 2007, p. 24.

2.37 The most recent Request for Tender and contract templates provided by six of the seven audited agencies included clauses relating to confidentiality and the disclosure of information, such as Parliamentary and ANAO access, which were consistent with the model provisions in FMG 3. In each agency these templates were easily accessible by relevant staff. However, DEEWR included the required clauses in only 33 of the 46 reviewed contracts. ITSA did not have the clauses in any of the 16 contracts reviewed, but instead included a clause that stated 'all access must be authorised in writing by the Chief Executive Officer'. The absence of these clauses was generally due to older contracts being developed on templates that are no longer used.

2.38 The standard contract templates at ASIO contained 'guidance notes' to assist staff deal with requests to treat information as confidential. The ANAO considers this to be sound practice. The ANAO suggested that ASIS update a number of provisions contained in its Request for Tender and contract templates to better reflect the model clauses in FMG 3.

2.39 The inclusion of these clauses is significant as it means that the agency and the contractor will both be aware that 'irrespective of the terms of the contract, the Australian Government cannot provide an absolute guarantee of confidentiality'.²¹

²¹ *ibid.*

3. Compliance with Senate Order Requirements

This chapter contains the ANAO's assessment of the extent to which each agency complied with the Senate Order requirements to table a Minister's letter and post a complete contract list on the Internet for the 2008 Calendar Year by the due date.

Background

3.1 The Senate Order requires that each agency post all contracts that meet the requirements of the Order to its Internet and that relevant Ministers table a letter stating that the listing has been posted no later than two months after the end of both the financial and calendar years. The listing must identify contracts that contain confidentiality provisions and the reason for their inclusion. These letters are required to identify any contracts that have been excluded from the Senate Order listing and why. These letters must also specify if any of the portfolio agencies do not have any contracts to report or are exempt from reporting under the Senate Order.

3.2 The ANAO conducted a review of Internet listings for the 99²² agencies governed by the FMA Act 1997 and subject to the Senate Order at the end of calendar year 2008. As illustrated in Table 3.1, five agencies were exempt from complying with the Order, although the Department of the Senate chose to produce a Senate Order listing in the interests of openness and accountability.

²² These agencies were identified by ANAO on 27 February 2009, from the *Chart of agencies under the Financial Management and Accountability Act 1997*, published by Finance. The Chart can be found at: <http://www.finance.gov.au/publications/flipchart/index.html>.

Table 3.1**Senate Order agency exemptions**

Agency	Reason for exemption
Australian Security Intelligence Organisation	National security. ^(a)
Australian Secret Intelligence Service	National security. ^(a)
Department of the House of Representatives	Although the three Parliamentary Departments are classified as agencies under the FMA Act, they are not Departments of State administered by Ministers and, as a result, are not included in the Senate Order. ²³
Department of Parliamentary Services	
Department of the Senate	

Note ^(a): The Heads of ASIO and ASIS issued determinations stating that publicly reporting information about their respective organisation's contracts, including publishing Senate Order contract listings, could prejudice Australia's national security.

Source: Senate Order, FPA Committee Report No. 2

3.3 The audit also included analysis in the audited agencies subject to the Order to assess that, in addition to meeting the reporting requirements, they had appropriate procedures, training systems and reconciliation methodologies related to the Order.

Review of all agencies subject to the Senate Order

Internet listings

3.4 The majority of the agencies met the Internet contract listing requirements of the Senate Order. Of the 99 agencies that were required to report against the Order at the end of 2008, 82 posted their contract listings on the Internet by the due date. Of the remainder, seven agencies published within one month or shortly thereafter, and at 10 August 2009, ten agencies²⁴ had not published a listing.

3.5 Of the 89 agencies that had posted an Internet listing, 66 met all of the listing requirements. The remaining 23 agencies met most of the requirements

²³ The Department of the Senate has published an Internet listing 'in the interest of transparency' as suggested by the FPA Committee Report No. 2 which can be found at: http://www.apf.gov.au/Senate/committee/fapa_ctte/contracts/index.htm.

²⁴ The ten agencies are: Australian Pesticides and Veterinary Medicines Authority, Biosecurity Australia, Federal Court of Australia, Human Rights and Equal Opportunity Commission, National Native Title Tribunal, Australian Industrial Registry, Office of the Australian Building and Construction Commissioner, Office of the Workplace Ombudsman, Private Health Insurance Ombudsman and Inspector-General of Taxation.

with the exception of listing the cost of compliance and describing the method used to calculate their costs. These were:

- the Department of Defence and the Defence Materiel Organisation who combined their costs of compliance.
- Additionally, the Department of Defence and the Defence Materiel Organisation did not specify an amount for the 2008 Calendar Year but instead provided the total cost of all years since 1 January 2003. The agencies have since addressed this issue by providing separate costs for the 2008-09 financial year (the reporting period for the current Senate Order listings) on their websites.
- A further 19 agencies did not include the cost or method of compliance with the Order.
- An additional two agencies included the cost of compliance with the Order but did not include the method used to calculate this cost.

Ministers' letters

3.6 There has been a significant improvement in the tabling of Ministers' letters of advice in Parliament. Last year's audit of the Senate Order noted that only one letter of advice was tabled by the due date, while this year letters relating to 82 agencies were tabled by the due date. Of the remainder, 12 letters were tabled within six weeks. The remaining Minister's letter, covering five agencies within his portfolio, was tabled on 5 August 2009.

Review of audited agencies

3.7 The results of the ANAO review of the five audited agencies are summarised in Table 3.2.

Table 3.2**ANAO analysis of audited agencies compliance with the Order**

Agency	Contract list posted on website by due date	Minister's letter tabled by due date	Inclusion of required contract details	Cost and method of compliance
ABS	✓	✓	✓	✓
DEEWR	✓	Tabled on 6 March 2009.	1042 contracts did not include an amount. 5 contracts had values less than \$100 000.	✓
DIISR	✓	✓	✓	Did not include the method of calculating the cost of compliance.
ITSA	✓	✓	15 contracts incorrectly excluded GST.	✓
OCO	✓	✓	✓	✓

Source: ANAO analysis of agency websites, contracts, documentation and Ministers' letters tabled in the Senate.

3.8 As can be seen in Table 3.2, DEEWR substantially under-reported because it did not include actual or estimated values for 1042 contracts in its listing reducing its utility to the Parliament and unsuccessful or prospective tenderers. However, FMG 8 states:

‘for contracts that do not contain a specified value (e.g. demand-driven contracts) agencies should initially provide estimates of the expected “whole of life” value of the contract. Subsequent listings may have notations, including either updated estimate expenditure on, or actual values of, the contract’.²⁵

3.9 DEEWR advised that due to the type of contracts ‘there is no way to estimate the value of the contract’ but that it ‘will be in a position to provide final contract values in August 2009²⁶ and will endeavour to provide estimates for this

²⁵ Department of Finance and Deregulation, *Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)* FMG 8, p. 15, July 2007.

²⁶ DIISR's Internet listing also contained ‘demand-driven’ contracts with estimated totals included.

type of contract arrangements from 1 July 2009 onwards'. Since 83 per cent of these contracts have existed since 1 July 2006, the ANAO considers that the agency could have listed payments to date with an explanatory note on each of the Senate Order listings that were produced after the contracts were executed. Such an approach would help to partially meet the requirements and intent of the Order.

3.10 In addition, DIISR's list did not include the method used to calculate the cost of compliance. ITSA incorrectly excluded GST for 15 of the 53 contracts on the listing which resulted in under-reporting the value of its contracts.²⁷ ITSA specified in a footnote to the Internet listing the contracts that were GST exclusive. While the listing clearly identified these contracts, the Order and Finance Guidance state that the total of each contract is to be GST inclusive.

Internal procedures and training for compiling the listing

3.11 Staff in the audited agencies subject to the Order had long-term experience compiling the Senate Order listings. Four of the five audited agencies had appropriate guidance material for compiling the Senate Order. At the time of the audit, OCO did not have procedural documentation and was relying on this long-term experience of staff. The agency has since provided procedural guidance which is consistent with recent changes to its CEIs.

3.12 Apart from the issues around confidentiality provisions referred to in paragraphs 2.17 and 2.18, the policies and procedures to develop contracts and compile Senate Order listings were generally adequate. Although there was no training provided internally, staff in four of the five audited agencies attended external training provided by Finance. However, this training pre-dated changes to the Order and Finance's Guidance.

3.13 Six of the seven audited agencies²⁸ typically used two internal systems to record contractual information, their Contract Registers and Financial Management Information Systems (FMISs). The Contract Registers in the five reviewed agencies subject to the Order, contained the information required to compile the listings and are considered by both the ANAO and agencies to be the most accurate representation of this information. ASIO's contracts register

²⁷ The total amount of GST it excluded was \$2.2 million, 5.6 per cent of the total value of its contracts.

²⁸ At the time of the audit, ASIS did not have a contracts register. It advised that, as part of the upgrade of its FMIS, it was developing a database to capture details of contracts.

is designed to capture a range of relevant information about each contract. However, it did not capture information on the use of confidentiality provisions in contracts.

3.14 Each of the five reviewed agencies that were subject to the Senate Order reconciled their Contract Register to their FMIS to verify the completeness of the Senate Order listing. The ANAO reviewed these reconciliation processes and internal procedures and determined that these were generally adequate, and supported the compilation of complete and accurate content.

3.15 As previously mentioned, DEEWR did not have estimates or total values for 26 per cent of its contracts. Consequently data for estimates or totals did not exist in the agency's Senate Order listing and the contracts did not exist individually in its FMIS. This meant that complete information required to compile the listing was not available in either system which prevented reconciliation of the two systems, for these contracts.

3.16 Also, the central quality assurance team in each of the agencies generally did not assess information contained in their listings. Therefore, agencies would benefit from a greater focus on quality assurance of contract information they include in the Internet listings.

4. The Senate Order and AusTender

The chapter details the results of the ANAO's comparison of each agency's contract information in its Senate Order listing and in AusTender.

Background

4.1 As previously stated, the FPA Committee twice reviewed the Senate Order. One of the FPA Committee's Government-supported recommendations was to use AusTender as the single source of reporting on contract information, thus replacing each agency's separate Senate Order listing on their individual websites. 'This was with the proviso that agencies' separate listings continue until the AusTender system was implemented.'

4.2 The recommendation was based on a Finance proposal to overhaul reporting arrangements for procurement contracts. In turn, this Finance recommendation originated in a 2006 ANAO audit on the reporting of expenditure for consultancies which found a high incidence of under-reporting, non-compliance, and problems with data integrity and accuracy of information reported internally, in AusTender and in agencies' annual reports.²⁹

4.3 AusTender is designed to allow agencies to use the Internet to centrally publish and report information on procurement and contracts.³⁰ Its use and application particularly by the public, is much broader than accessing contract information. Finance advised that AusTender supports the procurement processes for 137 Government agencies. It also publishes approximately 3000 approaches to market each year and issues more than 40 000 business opportunity notifications each week to 65 000 registered suppliers. Finance further advised that 'agencies and suppliers have provided positive feedback about the ability of the system to satisfy their compliance and operational requirements'. Finance revised AusTender in September 2007, to incorporate the requirement to publish contract notices.

²⁹ ANAO Audit Report No.27 2005–06, *Reporting of expenditure on consultancies*, which can be found at: <http://www.anao.gov.au/uploads/documents/2005-06_Audit_Report_27.pdf>.

³⁰ The AusTender website is at: <<https://www.tenders.gov.au/>>.

4.4 There is no facility or requirement to enter grant agreements into AusTender, although grants must be included in agencies' Senate Order listings. The ANAO excluded all grants from the audited agencies listings to enable comparison to the AusTender reports.

4.5 As mentioned previously, a 2006 ANAO audit and Finance both identified problems with contract related data integrity and accuracy of information within AusTender. Due to these problems and the issues identified during this audit, comparison of the Senate Order listings to AusTender data has the following limitations:

- Senate Order listings are based on contract information at a given point in time while agencies have up to six weeks to enter contracts into AusTender which is then updated when the information is successfully transferred.
- As well as transferring contract information to AusTender agencies also transfer data on payments made to vendors, if a record of a contract does not exist and the amount is greater than \$10 000.
- The agencies have stated that they generally do not reconcile their Senate Order listings to AusTender due to their different requirements.

4.6 This audit was not a full review of AusTender but an assessment of its contract reports to determine whether they could be used as a means to publish each agency's Senate Order listing.

Meeting Finance's requirements

4.7 Finance provides FMG 15³¹ to assist agencies to meet their reporting obligations. This Guidance contains principles for determining the information agencies must publish and explanations of the specific requirements. The ANAO reviewed each agency's guidelines and procedures to determine whether they had incorporated the relevant information in FMG 15 into these and if they assisted staff to accurately transfer contract information into AusTender. The ANAO also reviewed whether staff in the agencies received training on the guidelines and procedures.

³¹ This guidance can be found on the Finance Website at:
<<http://www.finance.gov.au/procurement/procurement-policy-and-guidance/procurement-guidance/index.html>>.

4.8 In addition to the information in this Guidance, Finance also provides to each agency the *AusTender Agency User Guide* (User Guide). The User Guide contains more specific instructions on how to best transfer contract information into AusTender. Agencies have the option to enter contract information either manually or via an automated process. Manually transferring contract information is time consuming, but for small agencies with small numbers of contracts, this can be less costly than developing software to automate the process. Conversely, agencies that opt for an automated process must have a financial or contract management information system that has the capacity to automatically transfer large amounts of contract information. OCO uses a manual process and the remaining four agencies use automated processes to transfer their data to AusTender, all in accordance with Finance's advice in its User Guide. All audited agencies have centralised their processes to transfer contract information into AusTender.

Comparison of the Senate Order listings to AusTender

4.9 Table 4.1 illustrates the results of the comparison of each agency's Senate Order listings to the agency's data in AusTender. The results in the Table indicate substantial inconsistencies between the Senate Order listings and agency data in AusTender because of:

- each agency's internal procedures;
- limitations in AusTender; and
- the impact of the December 2007 MoG changes.

Table 4.1**Comparison of agencies' Internet listed contracts to AusTender data**

	DEEWR	DIISR	ABS	ITSA	OCO
Total contracts in Senate Order (excluding grants)	2320	415	103	53	14
Total contracts in AusTender	196	117	103 ³²	48	11
Contracts not in Senate Order list	127	57	70	28	1
Contracts identified in both Senate Order and AusTender as matching	64	53	15	16	10
Contract total does not match	15	19	9	11	5
Confidentiality provisions listed inconsistently with Senate Order or not included in AusTender	16	3	0	10	7

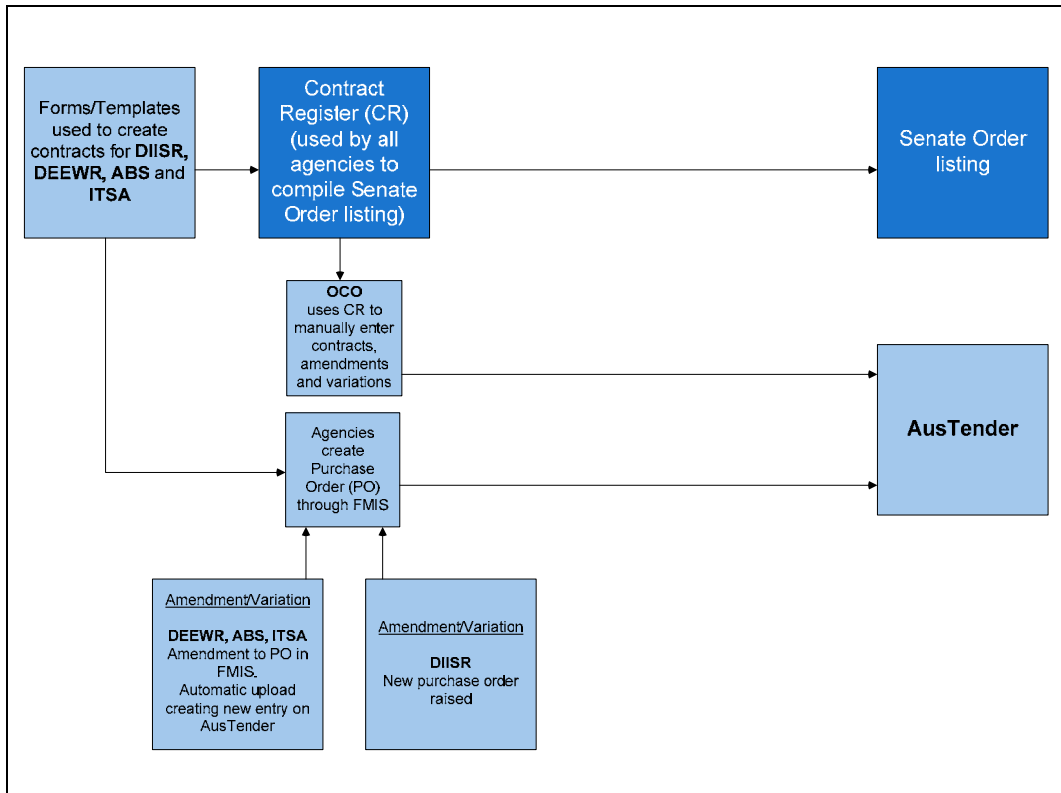
Source: Audited agencies Senate Order listings and AusTender confidentiality provision report for contracts greater than \$100 000 and entered into or not fully performed in 2008 Calendar Year.

Note: Contracts that were matching in the AusTender report and Senate Order listing included the same vendor name and subject and had either the same start and end dates or the same total contract value.

Internal procedures

4.10 Each audited agency maintains a central Contract Register which is used to compile the Senate Order listing. The Contract Registers contain all of the information required to compile the listings and are considered by both the ANAO and agencies to be the most accurate representation of the contracts each agency manages. OCO uses contract forms to manually enter information into its Contract Register and AusTender. The remaining four agencies, ITSA, ABS, DIISR and DEEWR, transfer contract information from their Financial Management Information Systems (FMISs). These processes, including contract variations and amendments, which are explained in more detail in paragraph 4.13, are illustrated in Figure 4.1.

³² Although the number of contracts in ABS's Senate Order listing and AusTender match, this is coincidental as the remainder of the comparison shows.

Figure 4.1**Current systems for transferring data to AusTender**

Source: All agency information on uploading contract information into AusTender.

Entering contract information

4.11 OCO's AusTender report demonstrated a high percentage of matching information with its Senate Order listing, missing only one contract that was reported on AusTender. However, OCO reported only 11 contracts on AusTender. Although they were the most successful in maintaining the consistency of data on their Internet listing and in AusTender, OCO manually enters contract information into AusTender and the volume of contracts reported is low.

4.12 Each of the four remaining agencies created a Purchase Order (PO) to enter information for each contract into its FMIS. The detail in these purchase orders is the basis for the contract information transferred into AusTender. This approach is dependent on controls to ensure that the information in the PO matches the information in the contract.

Entering variations or extensions

4.13 Each time DEEWR, ABS and ITSA varies or extends a contract the related PO is usually varied or extended. However, the agencies advised that quite often this did not occur so a new PO was raised instead. DIISR is not able to vary or extend a PO in its FMIS so a new PO is always created for a variation or extension. Consequently, these four agencies have multiple POs for many of their contracts and each of these POs is entered into AusTender as a new contract with a unique contract number.

4.14 As previously mentioned in paragraph 3.8, DEEWR did not enter complete data for 1042 entries on its Senate Order listing. After eliminating grants from the listing, the ANAO identified that 667 of these entries were contracts that should have been entered into AusTender. Since individual POs were not raised for these contracts, there were no data in the agency's FMIS to transfer the contract information into AusTender. The agency advised that to address this difficulty 'revised processes have been implemented in DEEWR in conjunction with the Department of Finance and Deregulation'. The agency has also stated that the majority of these contracts were due to expire on 30 June 2009 and that it would enter the total amounts in AusTender by the end of August 2009. ANAO analysis determined that the number of these contracts that expired on 30 June was 492 (74 per cent).

Limitations in AusTender

4.15 As previously stated AusTender consolidates a broad range of information on procurement and contracting. In the future, it is expected that the system will be the single source for agencies to externally report this information. While improvements have been achieved by automating links to agencies' FMISs, the ability to give a complete picture of government contracts is limited by AusTender's inability to link variations or extensions to original contracts if the information is automatically transferred. OCO was the only audited agency that successfully linked amendments and variations to their original contracts, because it manually transferred all contract information. As previously mentioned, due to the high volume of amendments in the remaining four agencies, each used an automated process to transfer new data to AusTender. These amendments were not linked to the original contract but

were created as a new contract with a new contract number.³³ Finance has advised that it intends to address this issue in 2009-10.

4.16 In these instances where an automated upload of amendments was used, AusTender overestimated the number of these contracts. In turn, if all contracts were not entered into AusTender, as was the case with DEEWR, then the number and value of these contracts was underestimated in AusTender.

4.17 This issue is compounded if a date specific report was run, say for all contracts greater than \$100 000 for the 2008 Calendar Year, to replicate the Senate Order. If an original contract end date had passed, and only an extension or variation was current, AusTender reported the open extension or variation and not the original contract.

Impact of Machinery of Government changes

4.18 In addition to the limitations in entering amendments, current agencies and retired (former) agencies that were subject to MoG changes are separate in AusTender.³⁴ Consequently, DIISR and DEEWR had additional inconsistencies between the Senate Order listings and AusTender reports because they were both subject to the MoG changes. AusTender allows for a report to be run for current and retired agencies and the system includes a link to all related agencies (prior to MoG changes). Although this option allows for all contracts in the related agencies to be reported, it is not possible to identify which agency currently manages these contracts. As a result, all current contracts managed by agencies subject to MoG changes cannot be listed in a single report. Affected agencies need to assess each AusTender contract notice initiated in these retired agencies to determine which of those contracts they currently manage. This process would be time intensive and costly, particularly given this information is already available in their Contract Registers and reported in their Senate Order listings. There would be a benefit for those agencies significantly affected by MoG changes to liaise with Finance

³³ For example, an agency signed a contract in August for \$120 000 with an option for additional work valued at \$60 000 which was utilised in May. The original contract notice in AusTender would be \$120 000 and the amended total would be \$180 000 if the amendment was entered manually. However, if the amendment was entered via an automated process there would be a contract notice for \$120 000 in August and a contract notice for \$60 000 in May.

³⁴ As a result of the change of government in November 2007 a number of agencies changed in December 2007. For example, DIISR was created as a new Department with new functions and responsibilities. Therefore it has only existed as an agency on AusTender since December 2007.

to identify solutions to enable the reporting of all active contracts these agencies are managing.

4.19 The five agencies and Finance have all advised that they are working to resolve the issues that contribute to the substantial mismatches in agencies' data currently held internally and in AusTender.

4.20 The inaccuracy of agency data and the limitations identified in AusTender mean it is not currently possible to use AusTender to meet the Senate Order's reporting requirements.

4.21 To enable AusTender to replace the Senate Order for reporting contract information, agencies will need to address the errors in their existing AusTender data and the limitations in their current systems and processes used to transfer that data. Concurrently, Finance could consider future design solutions to address the limitations identified in AusTender, which would be informed by the agencies' improved systems and processes. Ultimately, improvement in AusTender necessitates careful consideration of its multiple stakeholders, such as the Parliament and its Committees, industry and the broader community and their differing requirements for information on government procurement. The intention for AusTender to provide stakeholders this information is reflected in the recently released³⁵ *Australian Government Procurement Statement* which comments that 'AusTender is a key component of the Government's commitment to transparency and accountability in government procurement'.



Ian McPhee
Auditor-General

Canberra ACT
28 September 2009

³⁵ The document was released in July 2009.

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 and the subject matter of each such contract, the commencement date of the contract, the duration of the contract, the relevant reporting period and the twelve-month period relating to the contract listings;
- (c) whether each such contract contains provisions requiring the parties to maintain confidentiality of any of its provisions, or whether there are any other requirements of confidentiality, and a statement of the reasons for the confidentiality; and
- (d) an estimate of the cost of complying with this order and a statement of the method used to make the estimate.

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:

- (e) the list is not up to date;
- (f) not all relevant agencies are included; and
- (g) 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 incorrect 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 year 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 in any year, as the case may be.³⁶

³⁶ (20 June 2001 J.4358, amended 27 September 2001 J.4994, 18 June 2003 J.1881, 26 June 2003 J.2011, 4 December 2003 J.2851)

Appendix 2: Previous ANAO Audit Reports on the Operation of the Senate Order

Audit Report	Recommendations contained in the report
Audit Report No. 05 2008-09 (Calendar Year 2007 Compliance)	<p>The ANAO considers the recommendation is relevant to all Australian Government agencies subject to the Senate Order. Therefore all agencies subject to the order should assess the benefits of implementing the recommendation in light of their own circumstances, including the extent that the recommendation of part thereof, is addressed by practices already in place.</p> <p>Recommendation No. 1 – the ANAO recommends that agencies implement review measures to assess the appropriateness of decisions to include confidentiality provisions in contracts and provide suitable feedback to staff involved in procurement.</p>
Audit Report No. 07 2007-08 (Calendar Year 2006 Compliance)	<p>Recommendation No. 1 - the ANAO recommends that agencies improve the accuracy and completeness of their Internet listings by:</p> <ul style="list-style-type: none"> implementing controls to assist in confirming that Internet listings are complete and accurate. This could include, for example, reconciling the Internet listing details to AusTender and other relevant sources of information such as Financial Management Information System records; and developing quality assurance processes to improve the accuracy of the Internet listing.
Audit Report No. 05 2006-07 (Calendar Year 2005 Compliance)	<p>Recommendation No. 1 - the ANAO recommends that agencies improve the accuracy and completeness of their contract listings by:</p> <ul style="list-style-type: none"> implementing controls to assist in confirming that contract listings are complete and accurate. This could include, for example, reconciling the contract listing details to other relevant sources of information, such as FMIS records or to AusTender; and developing quality assurance processes to improve the accuracy of the contract listing. <p>Recommendation 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.</p>

Audit Report	Recommendations contained in the report
Audit Report No. 11 2005-06 (Calendar Year 2004 Compliance)	<p>Recommendation 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 include in their FMIS.</p> <p>Recommendation No. 2 - The ANAO recommends that agencies provide further guidance, together with training and/or awareness raising sessions on the requirements of the Senate Order to all staff responsible for negotiating contracts.</p> <p>Recommendation No. 3 - The ANAO recommends that agencies ensure adequate documentation of the reasons for agreeing to identify specified information in contracts as being confidential.</p>
Audit Report No. 10 2004-05 (Calendar Year 2003 Compliance)	The Report did not contain any recommendations.
Audit Report No. 31 2003-04 (Financial Year 2002-03 Compliance)	The Report did not contain any recommendations.
Audit Report No. 5 2003-04 (Autumn 2003 Compliance)	The Report did not contain any recommendations.
Audit Report No. 32 2002-03 (Spring 2002 Compliance)	The Report did not contain any recommendations.

Audit Report	Recommendations contained in the report
<p>Audit Report No. 8 2002-03 (September 2002 Compliance)</p>	<p>Recommendation No. 1 - To assist with the compilation of the Internet listing, the ANAO recommends that all FMA agencies, as appropriate:</p> <ul style="list-style-type: none"> • give priority consideration to establishing contracts registers where the number of contracts makes it a practicable solution; and • implement quality assurance processes, as necessary, to ensure the completeness and accuracy of the contract information listed on the Internet. <p>Recommendation No. 2 - the ANAO recommends that all FMA agencies, as appropriate:</p> <ul style="list-style-type: none"> • 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; • implement procedures which require a case-by-case consideration of requests for information in, or associated with, contracts to be treated as confidential; • provide guidance and training for procurement officers to assist them determine the appropriateness of claims of confidentiality made by potential contractors; and • establish a training and staff awareness program covering the new governance and accountability framework for contracting for all relevant staff.
<p>Audit Report No. 33 2001-02 (Audit of the Senate Order of 20 June 2001)</p>	<p>The Report did not contain any recommendations.</p>

Appendix 3: Confidentiality test

These criteria are used to determine whether information should be protected as confidential. All 4 criteria must be met for each confidentiality provision identified in Column 1 of the Senate Order list.

Criterion 1:

The information to be protected must be specifically identified.

Agencies are to consider what specific information, if any, is legitimately protected from disclosure. A request for inclusion of a provision in a contract that states that all information is confidential does not pass this test. Individual items of information, for example pricing, must be separately considered.

Criterion 2:

The information must be commercially sensitive – this means that the information should not generally be known or ascertainable.

The specific information must be commercially 'sensitive' and it must not already be in the public domain. A request by a potential supplier to maintain the confidentiality of commercial information would need to show that there is an objective basis for the request and demonstrate that the information is sensitive.

Criterion 3:

Disclosure would cause unreasonable detriment to the owner of the information or another party.

A potential supplier seeking to maintain confidentiality would normally need to identify a real risk of damage to commercial interests flowing from disclosure, which would cause unreasonable detriment. For example, disclosure of Internet price lists would not harm the owner, but disclosure of pricing information that reveals a potential supplier's profit margins may be detrimental.

Criterion 4:

The information was provided under an understanding that it would remain confidential.

This criterion requires consideration of the circumstances in which the information was provided and a determination of whether there was a mutual, express or implied understanding that confidentiality would be maintained. The terms included in request documentation and in draft contracts will impact on this. For example, a request for tender and draft contract which included specific confidential provisions would support an assertion by a potential supplier that the agency has agreed to accept information on the understanding that it would remain confidential.

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

Appendix 4: Comments from the Audited Agencies

Secretary

Matt Cahill
Group Executive Director
Performance Audit Services Group
Australian National Audit Office
GPO Box 707
CANBERRA ACT 2601



Australian Government
Department of Innovation
Industry, Science and Research

Industry House, 10 Binara Street Canberra City ACT 2601
GPO Box 9839 Canberra ACT 2601
Phone: (02) 6213 6650
Fax: (02) 6213 6657
Email: mark.paterson@innovation.gov.au
www.innovation.gov.au
ABN: 74 599 608 295

Dear Mr Cahill

Performance Audit: Senate Order for Departmental and Agency Contracts (Calendar Year 2008 Compliance)

I am writing in response to your letter of 12 August 2009, to provide comments on the findings of the Senate Order for Departmental and Agency Contracts (Calendar Year 2008 Compliance) performance audit.

I have provided my comments against the three areas of the audit report as requested.

1. Formal agency comments on the proposed report including, in respect to each of the audit's recommendations, whether the agency agrees, agrees with qualification or does not agree.

Recommendation No. 1

To assist agencies to meet the requirements of the next and any subsequent Senate Orders, the ANAO recommends that they:

- embed in their relevant policies and practices, the guidance and instructions in Financial Management Guidance 3, including details of the four criteria tests for confidentiality; and
- provide suitable training and guidance to staff on these policies and procedures

Agency Comment

The Department of Innovation, Industry, Science and Research agrees with the recommendation. The Department currently provides guidance, (including links to the *Financial Management Guidance 3*) via our Intranet site, on the requirements of confidentiality. In addition, the Department is currently refreshing its procurement training; the refresh will include a focus on confidentiality provisions. Further, the Department is introducing a Contracts Module in the Financial Management Information System which will contain additional measures to contribute to greater accuracy of confidentiality claims.

2. A summary of agency comments to be included in the report summary and brochure.

The Department of Innovation, Industry, Science and Research acknowledges the findings of the ANAO Audit of the Senate Order for Departmental and Agency Contracts (Calendar Year 2008) and supports the recommendation proposed in the report. The Department found the audit process to be a valuable exercise and is continuing to implement measures to further improve its performance in this area. In particular, developing additional training to ensure that all staff involved in contracts have a greater understanding of the requirements of the Senate Order (with a particular reference to confidentiality).

3. Additional comments

Section 4.18 of the report refers to the inconsistencies between the 2008 Senate Order and AusTender resulting from the Machinery of Government (MoG) changes. The report states that 'there would be a benefit for those agencies significantly affected by MoG changes to liaise with the Department of Finance and Deregulation to identify solutions to enable the reporting of all active contracts these agencies are managing'. The issue of AusTender accuracy and MoG changes is not a new issue. The Department agrees that this is an issue that needs to be addressed, as this is a whole-of-government reporting issue it is best managed by the AusTender team within the Department of Finance and Deregulation.

If you have any further questions in relation to this audit, please contact Cherie Ellison, General Manager Business Collaboration Branch on 6276 1988.

Yours sincerely


Mark I Paterson AO

7 September 2009



Australian Government

Australian Security
Intelligence Organisation

AUDIT IN CONFIDENCE

20 August

eA: 113

Director-General of Security

Mr Matt Cahill
Group Executive Director
Performance Audit Services Group
Australian National Audit Office
GPO Box 707
Canberra ACT 2601

Dear Mr Cahill,

As you are aware, ASIO participated in the subject performance audit this year and, pursuant to the *Auditor-General Act 1997*, Section 19, has been invited to respond to ANAO's proposed report in the following manner:

1. by providing formal comments on the proposed report, including whether ASIO agrees with the audit's recommendations.
2. by providing a short summary of ASIO's comments, to be included in the report summary and brochure; and
3. by providing any additional detailed commentary, including of an editorial nature, that can be reflected as appropriate in the body of the report.

With regard to item 1, ASIO acknowledges the audit's recommendation and agrees without qualification.

With regard to item 2, ASIO wishes to respond accordingly:

"ASIO appreciates the opportunity for its contract management processes to be independently reviewed and, for the most part, validated by ANAO. The feedback provided by ANAO is received in the constructive spirit in which it was furnished.

ASIO acknowledges the findings of the report as they pertain to ASIO and are taking appropriate measures to address the deficiency in our processes identified, being the manner in which details on supplier confidentiality provisions are maintained by the Organisation."

AUDIT IN CONFIDENCE

AUDIT IN CONFIDENCE

With regard to item 3, ASIO is satisfied with all content concerning the Organisation within the body of the report, and does not propose any editorial modification.

David Irvine

David Irvine

cc: Dr Paul Nicholl, ANAO
Mr William Bonney, ANAO



Australian Government

Department of Education, Employment and Workplace Relations

Your Ref: 2009/406

Our Ref:

Matt Cahill
Group Executive Director
Australian National Audit Office
GPO Box 707
CANBERRA ACT 2601

Dear Mr Cahill,

I am writing in response to the recommendation from the Australian National Audit Office (ANAO) Performance Audit: Senate Order for Departmental and Agency Contracts (Calendar Year 2008 Compliance).

DEEWR proposes the following responses as requested in your letter dated 12 August 2009:

1. Formal agency comment on the recommendation:

DEEWR acknowledges the recommendation of the ANAO Performance Audit. The Department has incorporated the Financial Management Guidance 3, including the details of the four criteria test for confidentiality within its staff training material and relevant policies and practices including the DEEWR Procurement Manual and the DEEWR Contract Management Framework.

DEEWR has started rolling out a comprehensive educational campaign/training program and other support (e.g. Intranet information/handy tips, Helpdesk) to improve staff's understanding of policies and procedures.

2. A short summary of comments for inclusion in the report summary and brochure:

DEEWR acknowledges the recommendation of the ANAO Performance Audit and has included references to Financial Management Guidance 3 in its policies, procedures and associated staff training material to improve staff's understanding of their obligations.

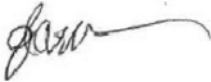
3. Any additional detailed commentary for the body of the report:

DEEWR while acknowledging the need to improve the information quality including the use of the confidentiality provisions notes the limitations in the design of AusTender. It presents an inaccurate view of an agency not meeting its reporting obligations. For example, AusTender does not link contract listing of pre-Machinery of Government departments to the new entity, it does not allow publication of demand driven contracts (with \$0 value) and does not automatically link the contract variations to the original contract listing resulting in mismatches, e.g. contract values and end dates.

Notwithstanding issues relating to AusTender functionality, DEEWR has initiated a comprehensive educational campaign to improve staff's understanding of reporting obligations and introduced tighter governance arrangements including the quality assurance process with an aim to assisting staff in determining the use of confidentiality in relations to contracts.

Please contact Dr Aloka Sinha, Branch Manager, Procurement, Grant and Contract Management on 02-6240 4901 or through email: aloka.sinha@deewr.gov.au for assistance or further information.

Yours sincerely



Glen Casson
A/g Chief Internal Auditor

Date 9 SEP 2009



Ground Floor, 1 Farrell Place ■ Canberra
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Our ref: A/2009-102741

2 September 2009

Mr Matt Cahill
Group Executive Director
Performance Audit Services Group
ANAO
GPO Box 707
CANBERRA ACT 2601

Dear Mr Cahill

ANAO Performance Audit: Confidentiality in Government contracts – Senate Order for Departmental and Agency contracts (Calendar Year 2008 Compliance)

In response to your letter dated 12 August 2009 the office provides the following comments on the proposed report.

The formal agency comment is that the office supports the recommendation.

The comments we would like to be included in the report summary and brochure are that the office agrees that procurement policies and procedures need to include clear guidance on identifying and reporting confidentiality provisions. In addition, we also agree that staff need to be provided training and guidance in procurement. The office recently updated its guidance documents on procurement and it also intends to offer information sessions to staff in this regard. The office requires the staff responsible for preparing the Senate Order and updating AusTender to attend the training and information forums offered by the Department of Finance and Deregulation.

Our additional commentary is that the office appreciated the ANAO providing clear guidance as to the interpretation of the four criteria test for confidentiality. As a small agency it is quite challenging for staff to keep abreast of the changes in procurement policy as well as continue to meet reporting requirements.

I thank you for giving the office the opportunity to comment on the proposed report.

Yours sincerely

A handwritten signature in black ink, appearing to read "John McMillan", written over a horizontal line.

Prof. John McMillan
Commonwealth Ombudsman

Defence Force Ombudsman ■ Immigration Ombudsman ■ Law Enforcement Ombudsman ■ Postal Industry Ombudsman ■ Taxation Ombudsman



Australian Government

Insolvency and Trustee Service Australia

8 September 2009

Mr Matt Cahill
Group Executive Director
Performance Services Audit Group
Australian National Audit Office

Dear Mr Cahill,

**ANAO PERFORMANCE AUDIT; SENATE ORDER FOR DEPARTMENTAL AND
AGENCY CONTRACTS (CALENDAR YEAR 2008 COMPLIANCE)**

I refer to your letter of 12 August 2009 regarding the recent audit conducted by your office on ITSA's compliance with the Senate Order for Departmental and Agency Contracts.

Please find the requested ITSA responses attached as per;

- Attachment A – Response to the audit recommendations.
- Attachment B – Summary report to the audit.
- Attachment C – Additional commentary on the proposed audit report.

This ANAO audit has been valuable to ITSA at a time when our internal procurement and contracting is being reviewed, and the audit recommendations and advice received during the audit will assist when framing new processes within ITSA.

Yours sincerely

Veronique Ingram
Chief Executive & Inspector General in Bankruptcy

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OFFICES IN ADELAIDE BRISBANE CANBERRA HOBART MELBOURNE PERTH SYDNEY TOWNSVILLE

ATTACHMENT A

AUDIT RECOMMENDATIONS

Recommendation No. 1

Paragraph 2.22

To assist agencies to meet the requirements of the next and any subsequent Senate Orders, the ANAO recommends that they:

- Embed in their relevant policies and practices, the guidance and instructions in Financial Management Guidance 3, including details of the four criteria test for confidentiality; and
- Provide suitable training and guidance to staff on these policies and procedures.

ITSA response:

AGREED

ATTACHMENT B

ITSA SUMMARY REPORT TO THE AUDIT

ITSA believes the audit has most usefully focussed attention on aspects of contracts reporting where improvements will be realised through better procedures, training and guidance.



www.abs.gov.au
ABN: 26 331 428 522

CENTRAL OFFICE

ABS House
45 Benjamin Way
Belconnen ACT 2617

Locked Bag 10
Belconnen ACT 2616

Telephone: (02) 6252 5000
Facsimile: (02) 6251 6009

Mr Matt Cahill
Group Executive Director
Performance Audit Services Group

Dear Mr Cahill

Response to ANAO Performance Audit: Confidentiality in Government Contracts -
Senate Order for Departmental and Agency Contracts (Calendar Year 2008
Compliance)

Thank you for providing the ABS with a copy of the proposed ANAO report and the
opportunity to respond.

The ABS reiterates comments provided to Dr Paul Nicoll in an ABS Issues Paper
dated 30th June 2009. As requested in your letter dated 12 August 2009, the ABS
has provided comments in three parts.

**Part 1. Formal agency comments to be included in full as an appendix to the final
report**

The ABS agrees with the report's recommendations and will continue to
include the guidance and instructions in Financial Management Guidance 3,
including the details of the four criteria test for confidentiality in its tools,
templates and training.

**Part 2. Short Summary of ABS' comments to be included in the report summary and
brochure**

The ABS has a legislated obligation under the Census and Statistics Act 1905
with regards to the protection of data. This obligation is taken very seriously
by the ABS and for this reason, the ABS will continue to include contractual
clauses where appropriate to ensure it meets its legislative obligations, and to
maintain the confidence of the community that the ABS will protect data in its
possession.

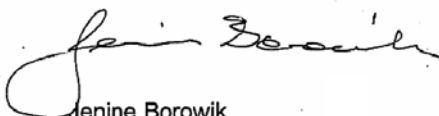
ABS has in place the appropriate level of support and skills and knowledge to
ensure that Commonwealth confidentiality is applied well with very few
exceptions.

Part 3. Additional ABS commentary

Nil commentary from the ABS.

If you have any questions regarding the content of this response please do not hesitate to call me on 02 6252 6272.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jenine Borowik', with a large, stylized initial 'J'.

Jenine Borowik
Chief Information Officer
Australian Bureau of Statistics

9 September 2009



Australian Government
Department of Finance and Deregulation



Reference: 08/6590-02
Contact: Director, Office of Chief Audit Executive, Mark Errey
Telephone: 02 6215 2102
e-mail: mark.errey@finance.gov.au

Mr Matt Cahill
Group Executive Director
Performance Audit Services Group
19 National Circuit Barton ACT 2600

MHC
11/9

Dear Mr Cahill

Finance Response to Audit into Confidentiality in Government Contracts

Thank you for your letter of 12 August 2009 to Dr Ian Watt, inviting the Department of Finance Deregulation (Finance) to comment on the proposed audit report into Confidentiality in Government Contracts. Finance does wish to make comment on the proposed audit report, both formal comments for inclusion in the final report and some additional comments on the thrust of the report and the conclusions drawn.

Formal Comments

For procurement contracts, AusTender reporting allows enhanced data, timeliness of data, search and reporting capacity, and should replace the Senate Order. Ideally, in practice, shifting to a single system of reporting would mean that agencies would only need to confirm in their Annual Report that details are available on AusTender.

Paragraph 15 (Summary) notes that 'there were substantial mismatches between agencies' contract information held in their Senate Order listings and AusTender due to the inaccuracy of agency data loaded into and limitations identified in AusTender'. AusTender requires *Financial Management and Accountability Act 1997* (FMA) agencies to input confidentiality information for all contracts \$10,000 and above. Linking of amendment contracts in AusTender by the batch upload mechanism has been identified as an area for further investigation and development. AusTender will undergo development work in 09-10 with the aim of creating more transparent linkages between amendment contracts uploaded by batch and the original contracts. It should be noted that satisfying procurement reporting

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obligations under the Commonwealth Procurement Guidelines has always been the purpose of reporting from AusTender, and the system is designed accordingly.

Paragraph 4.18 discusses limitations in AusTender around Machinery of Government changes. As AusTender reflects point in time reporting obligations, agency changes as a result of Machinery of Government changes are mapped to assist to find relevant data. If a report or search is conducted on an agency on AusTender the public user can select from current or retired agencies if they know which agency they wish to search on. Where there is a relationship between an agency and another agency (active or retired), a link is presented at the top of the report or search result detailing the related agency. The user can then click on the link provided to conduct the same report or search on the related agency.

On the 1st January 2009, as part of its new grants policy framework, the Government introduced a requirement that all FMA agencies publish on their agency websites information on individual grants no later than seven working days after the funding agreement for the grant takes effect. This requirement is one of the mandatory requirements of the Commonwealth Grant Guidelines (CGGs) (paragraphs 4.1- 4.6) issued by the Finance Minister under *Financial Management and Accountability Regulations 1997* 7A(FMA Regulation), which took effect on 1 July 2009. FMA Regulation 7A requires officials to act in accordance with the CGGs when performing duties in relation to grants administration. Detailed guidance on the grants web reporting requirements is in Finance Circular 2009/04 *Grants - Reporting Requirements*.

In addition to grants web reporting, Senate Order 95, agreed by the Senate on 24 June 2008, requires each Minister to table no later than seven days before the commencement of the budget estimates, supplementary budget estimates and additional estimates hearings a list of all grants approved in each portfolio or agency, including the value of the grant, recipient of the grant and the program from which the grant was made.

Additional Comments

The Report at paragraph 4.6, notes that the audit was not a full review of AusTender but an assessment of a sample of its contract reports to determine whether they could be used as a means to publish each agency's Senate Order listing.

The Report is critical of the accuracy of AusTender data, and suggests that it is not currently possible to use AusTender to meet the Senate Order's reporting requirements. Specifically, the Report notes that to enable AusTender to replace the Senate Order for reporting contract information, agencies will need to address the errors in their existing AusTender data and the limitations in their current systems and processes used to transfer that data (paragraph 4.20 and 4.21).

The Report notes (paragraph 8) that the ANAO compared the agencies' data in AusTender to their Internet listings to determine whether it was consistent with the Senate Order's reporting requirements. However, Finance notes that the requirements for data differ between reporting mechanisms, as do the timing and frequency of contract reporting. This makes a comparison of entries for the same contract problematic and works against the aim of promoting transparency.

The Senate Order requires that agencies specify details, including in relation to confidentiality, for ongoing contracts or contracts which have been entered into during the previous 12 months, and that have consideration of \$100,000 or more. In contrast, AusTender reports contract details, including confidentiality provisions, with the much lower threshold of \$10,000. AusTender also requires agencies to report contracts and agency agreements within six weeks of entering into the arrangement; compared to the Senate Order's requirement, which could see contracts reported up to 12 months after they have been entered into.

The complexities of the current reporting regimes are clear in the following simple example. An agency signs a consultancy contract in August for \$120,000, with an option for additional work valued at \$60,000. The initial contract was completed and an option was utilised in May, with a further \$10,000 spent (of the additional work) before the end of the financial year. The amounts reported would be:

- \$180,000 in AusTender;
- \$120,000 in the calendar year Senate Order Listing;
- \$180,000 in the financial year Senate Order Listing;
- \$180,000 in the agency's Annual Report; and
- \$130,000 in the agency's Annual Report, as part of the agency's consolidated expenditure total.

In Finance's view, for procurement contracts, AusTender reporting allows enhanced data, timeliness of data, search and reporting capacity, and should replace the Senate Order.

Further, AusTender delivers the following benefits:

- a much lower reporting threshold (\$10,000);
- reporting of contracts and agency agreements within six weeks of entering into the arrangement;
- reduced complexity and red tape; and

- ready availability of contract information that is easily searchable.

Yours sincerely

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