

The Auditor-General  
Audit Report No.7 2010–11  
Performance Audit

**Confidentiality in Government Contracts:  
Senate Order for Departmental and Agency  
Contracts (Calendar Year 2009 Compliance)**

Australian National Audit Office

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of Australia 2010

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Canberra ACT  
22 September 2010

Dear Mr President  
Dear Mr Speaker

The Australian National Audit Office has undertaken an independent performance audit across agencies in accordance with the authority contained in the *Auditor-General Act 1997*.

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 2009 Compliance)*.

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

Yours sincerely

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

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agencies	Agencies include Departments of State, Departments of Parliament and ‘prescribed agencies’ for the purpose of the <i>Financial Management and Accountability Act 1997</i> .
agency agreement	An agreement between Australian Government agencies that articulates respective agency responsibilities but is not legally enforceable.
AusAID	Australian Agency for International Development
AusTender	The Australian Government’s web-based procurement information system. AusTender provides centralised publication of Australian Government business opportunities, annual procurement plans, multi-use lists and contracts awarded.
CPU	central procurement unit
confidentiality provisions	The clauses of a contract that operate to create the contractual confidentiality obligations on the parties to the contract in respect of information that is specified in the contract.
DAFF	Department of Agriculture, Fisheries and Forestry
FaHCSIA	Department of Families, Housing, Community Services and Indigenous Affairs
Federal Court	Federal Court of Australia
Finance	Department of Finance and Deregulation
FMG	Financial Management Guidance
FMIS	Financial Management Information System





# **Summary and Recommendations**



# Summary

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## Introduction

1. The *Senate Order for Departmental and Agency Contracts* (the Senate Order/the Order) was introduced in 2001 to improve public access to information about Australian Government procurement. The main principle that underpins the Order is that the Parliament and public should not be prevented from accessing information about government expenditure unless there is a sound basis for that information to be kept confidential.<sup>1</sup> Public knowledge of information on contracted goods and services delivered to government can lead to better results for the Australian Government and the public.
2. The Government agreed to comply with the Order and its subsequent amendments.<sup>2</sup> To accord with the Order, Ministers are to table letters advising that each of the agencies<sup>3</sup>, which they administer, have placed a list of contracts<sup>4</sup> on the Internet. The contracts to be listed are those that were fully performed or entered into during the preceding 12 months. The contract listings are to indicate, among other things, whether any of the contracts listed contained confidentiality provisions. The Senate Order also requests the Auditor-General to annually review contract lists and to report any incorrect use of confidentiality provisions.<sup>5</sup>
3. The Australian National Audit Office (ANAO) used the Department of Finance and Deregulation's (Finance) Financial Management Guidance (FMG)

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<sup>1</sup> Department of Finance and Deregulation, *Guidance on Confidentiality in Procurement* (FMG 3), July 2007, p. 4.

<sup>2</sup> The Government agreed to comply with the spirit of the Order and advised that information regarding individual contracts would not be provided where disclosure would be contrary to the public interest, legislative requirements and undertakings given.

<sup>3</sup> Subject to the *Financial Management and Accountability Act 1997* (FMA Act).

<sup>4</sup> This includes grants and funding agreements that meet the Contract Criteria set out in Department of Finance and Deregulation, *Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)* (FMG 8), January 2004, p. 13.

<sup>5</sup> Parliament of Australia, *Procedural Orders of Continuing Effect* [Internet]. Parliament of Australia, Australia, 2009, available from <[http://www.aph.gov.au/senate/pubs/standing\\_orders/d05.htm#11](http://www.aph.gov.au/senate/pubs/standing_orders/d05.htm#11)> [accessed 24 May 2010].

in its assessment of the use of confidentiality provisions and exclusion of contracts from Senate Order contract listings, to fulfil the Senate's request to the Auditor-General.

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

## **Audit objective and scope**

5. The audit objective was to assess the appropriateness of the use and reporting of confidentiality provisions in Australian Government contracts. This included assessing compliance with the Order and following up on the implementation of recommendations made in previous Senate Order audits.

6. The audit involved three components:

- an examination of a stratified random sample of 150 contracts listed as containing confidentiality provisions from material and small agencies across the Australian Government to determine whether confidentiality provisions were used and reported appropriately;
- an examination of all FMA Act agencies' calendar year 2009 contract listings and ministers' letters of advice, to assess compliance with the requirements of the Order and check reported instances of excluded contracts; and
- a follow-up of the implementation of previous audit recommendations relating to the administration of the Senate Order in four agencies. The selected agencies were the: Australian Agency for International Development (AusAID); Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA); Department of Agriculture, Fisheries and Forestry (DAFF); and the Federal Court of Australia (Federal Court). The selected agencies were audited in one of the ANAO's previous five audits of Senate Order compliance.

## Overall conclusion

7. The Senate Order contract listings for the calendar year 2009 contained 41 937 contracts for goods and services totalling \$165 billion, of which 4084 contracts were reported as containing confidentiality provisions. The reported use of confidentiality provisions by audited agencies, in around 10 per cent of contracts, has been constant over the last three calendar years and reflects a significant decline from 24 per cent of contracts in 2001–02, when the Order was first introduced.

8. The ANAO examined a sample of 150 contracts, managed by 33 agencies, that were reported to contain confidentiality provisions. Of the 150 contracts examined, 52 contracts (35 per cent) correctly included confidentiality provisions and 21 contracts (14 per cent) incorrectly included confidentiality provisions, having regard to Financial Management Guidance (FMG) No. 3. The remaining 77 contracts (51 per cent) did not contain confidentiality provisions and were incorrectly listed as containing confidentiality provisions. The incorrect inclusion and listing of confidentiality provisions in contracts potentially precludes or restricts the Parliament and the public from accessing information about these contracts.

9. Due to the sampling methodology employed, these results are broadly representative of the Australian Government agencies subject to the Senate Order, and indicate scope for improvement in agencies' understanding and application of criteria provided by Finance in FMG 3 for assessing whether particular contract provisions should be confidential. For the contracts examined, a sound practice observed was the inclusion of a section in contracts that outlines details of any confidential information in the contract and the reasons for this information to be kept confidential. Where agencies had adopted this approach, they were more likely to use confidentiality provisions appropriately.

10. A large majority of agencies (84 of 99 agencies) subject to the Order at the end of 2009<sup>6</sup> published contract listings or notes on the Internet in the required timeframe. Of the agencies that did not publish a contract listing on

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<sup>6</sup> This includes 98 agencies required to meet the Senate Order and the Department of the Senate that complies voluntarily. A minister's letter is not tabled for the Department of the Senate as it is not administered by a minister.

time, four agencies published within one month, six agencies within five months and five agencies had not published a listing by 20 July 2010. Additionally, ministers' letters relating to 69 agencies were tabled by the due date and letters representing 20 more agencies were tabled in the following fortnight. The remaining ministers' letters covering nine agencies were not tabled as at 20 July 2010.

11. Of the agencies that published contract information, 83 per cent (78 of 94 agencies) included all required contract details and 77 per cent (72 of 94 agencies) included all required confidentiality information for every contract. Nevertheless, for the 150 contracts examined by the ANAO, 78 contracts (52 per cent) had discrepancies between details contained in the contract and the contract listings, while 39 per cent of all agencies' listings included some information not required by the Order, such as agency agreements. These results are partly attributable to weaknesses in agencies' procurement information systems, and the difficulties experienced by agencies in gearing these systems towards meeting multiple procurement reporting requirements.

12. The ANAO examined four agencies' implementation of recommendations made in the past five audits of the Senate Order. These recommendations identified common areas for improvement that if addressed, provide a sound basis for appropriate use of confidentiality provisions and accurate listing of contracts.

13. The agencies had made significant progress in implementing the recommendations relating to controls to support the completeness and accuracy of contract listings (including through central procurement unit checks), and staff awareness of Senate Order requirements. This progress was reflected in the four agencies' calendar year 2009 contract listings, which were largely compliant with the Senate Order listing requirements.

14. More limited progress had been made in implementing the recommendations focused on considered decision making on the appropriate use of confidentiality provisions. Agencies would generally be better placed to make considered decisions about the use of confidentiality provisions during the contract preparation stage, if they put in place practices to more clearly identify, substantiate and review the use of such provisions in contracts.

15. Overall, while the use of confidentiality provisions has decreased since the Order was introduced, the benefit of the Order, as an accountability and

transparency mechanism for Australian Government contracting activity, is not being fully realised due to incorrect use of confidentiality provisions and inaccuracies in contract reporting. To better focus agencies on the correct use and reporting of confidentiality provisions, improve the accuracy of contract reporting, and meet the FMGs, the ANAO recommends:

- the Department of Finance and Deregulation review opportunities to consolidate procurement reporting requirements; and
- agencies assess whether their contract preparation practices support adequate consideration of the use of confidentiality provisions in contracts.

## Key findings by chapter

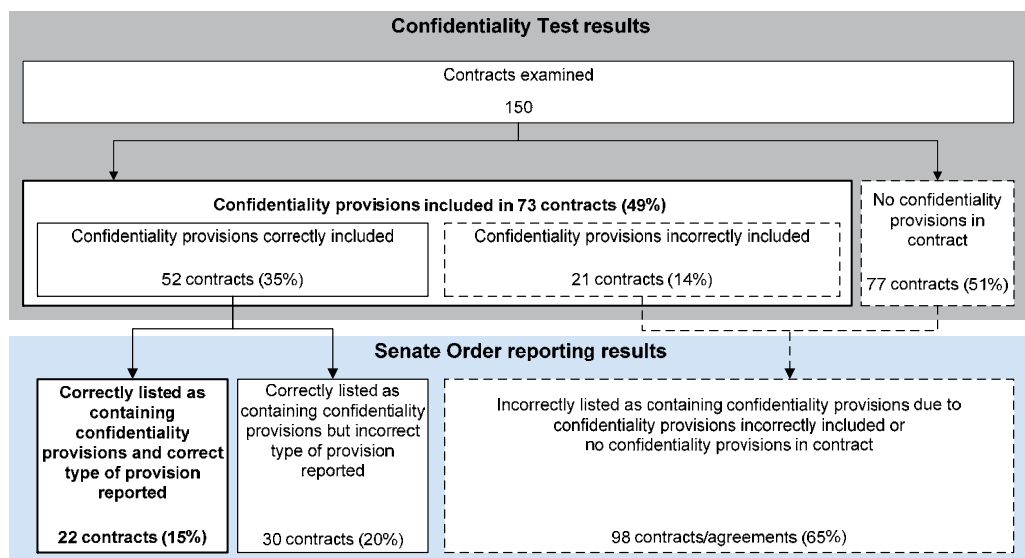
### Confidentiality Provisions in Contracts (Chapter 2)

16. Agencies reported 41 937 contracts (valued at \$165 billion) in their 2009 contract listings, 4084 (10 per cent) of which were reported as containing confidentiality provisions. The ANAO examined 150 of the 4084 contracts.

17. As illustrated in Figure S 1, 77 of the contracts examined (51 per cent) did not actually contain any confidentiality provisions, and were therefore incorrectly listed for the Senate Order. Of the remaining 73 contracts, 21 were assessed as incorrectly including confidentiality provisions. Consequently, only 52 contracts (35 per cent) correctly included confidentiality provisions, and were therefore correctly listed as containing confidentiality provisions. Twenty-two of the 52 contracts also reported the correct type of confidentiality provision used (related to either contract contents or contract outputs).

**Figure S 1**

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



Source: ANAO analysis.

18. The 150 contracts examined contained 226 specific confidentiality clauses, of which 152 clauses related to confidential information in contracts.<sup>7</sup> Two-thirds of these clauses (100 of 152 clauses) were assessed as not containing commercially sensitive information that would cause detriment if made public, as required by FMG 3. The main area of misclassification of information as commercially sensitive was pricing details. FMG 3 classifies some pricing details as commercially sensitive, such as pricing structures, but not other pricing details, including price lists. The misclassification of pricing information reduces price transparency which can increase competition among tenderers and lead to greater cost efficiencies for government.

19. As mentioned above, since the Order was introduced in 2001–02, the reported use by audited agencies of confidentiality provisions in Australian Government contracts declined from 24 per cent of contracts to 10 per cent of

<sup>7</sup> The remaining 74 clauses related to information obtained or generated in the performance of the contract. Assessment of the commercial sensitivity of these clauses was not within the scope of the audit.



contracts in 2009. Over the past four years there was a small increase in the proportion of contracts that used confidentiality provisions consistent with the Confidentiality Test in FMG 3, from 26 per cent of contracts examined by the ANAO in 2006 to 35 per cent of contracts examined in 2009. Overall, these results indicate continuing scope for agencies to improve their understanding and application of the Confidentiality Test (Appendix 4).

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

20. The majority of agencies published contract listings by the due date<sup>8</sup> (84 of 99 agencies) with half that published a contract listing meeting all of the Order's listing requirements (47 of 94 agencies). The requirements were met for 94 per cent of all contracts listed (39 489 of 41 937).<sup>9</sup> However, 52 per cent of the contracts examined (78 of 150) had discrepancies between the information contained in contract documents and the contract listings, for example, the value of the contract. Further, 39 per cent of agencies' listings (37 of 94) included some entries not required by the Order valued at \$4 billion, such as agency agreements and contracts valued at less than \$100 000.

21. These findings reflect the difficulties that agencies encounter in developing and maintaining systems that produce procurement reporting to satisfy multiple requirements. In this regard, the presence of multiple obligations limits the capacity of agencies to focus on data quality for any single requirement. The inclusion of agency agreements in Order listings is also a consequence of inconsistencies in how the FMGs treat agency agreements for procurement reporting purposes. Agency agreements are not included in the contract definition for Senate Order reporting, but are required to be reported on AusTender. Similarly, for the contracts examined by the ANAO, agencies reported confidential information contained in successful tender documents in multiple ways. The FMGs do not clearly articulate that tender information should only be reported as confidential under the Order if it meets the Confidentiality Test and forms part of the contract. To help address these issues, there would be merit in Finance exploring options to

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<sup>8</sup> The due date for compliance with the Order fell on Sunday 28 February 2010, so for the purposes of the report, the ANAO adopted Monday 1 March as the date that satisfied the requirements of the Order.

<sup>9</sup> Of the six per cent of contracts where listing requirements were not met, half were water entitlement contracts managed by the Department of the Environment, Water, Heritage and the Arts. Refer to paragraph 3.8.

consolidate procurement reporting obligations, in conjunction with the department's continuing focus on improving AusTender functionality. Any consolidation would also allow streamlining of current procurement guidance.

22. Letters relating to 69 of the 98 agencies<sup>10</sup> were tabled in the Senate by the due date. This represents a decline from the letters representing 82 agencies that were tabled on time last year but an improvement on the preceding year.<sup>11</sup> Three ministers' letters indicated that four agencies had excluded contracts from the listings.<sup>12</sup> The ANAO examined a sample of 11 excluded contracts from two of the four agencies and found that the contracts were appropriately excluded from the listings.

## **Implementation of Previous Senate Order Audit Recommendations (Chapter 4)**

23. Over the past five years the ANAO has made eight recommendations in its Senate Order audits. The ANAO assessed whether the four agencies selected for the follow-up component of the audit had addressed four common areas for improvement identified in these recommendations:

- data entry and systems controls used to support the completeness and accuracy of agency contract listings;
- adequate documentation of the reasons for agreeing to identify specified information in contracts as being confidential;
- mechanisms to review the appropriateness of the decision to include, and the ongoing relevance of, confidentiality provisions in contracts; and
- guidance and training to staff related to the Senate Order.

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<sup>10</sup> The Department of the Senate was not included in this analysis because it does not have a minister.

<sup>11</sup> ANAO Audit Report No.06 2009–10 *Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2008 Compliance)*, p. 45; ANAO Audit Report No.05 2008–09 *The Senate Order for Departmental and Agency Contracts (Calendar Year 2007 Compliance)*, p. 45.

<sup>12</sup> The Order provides for confidential contracts to be excluded from listings in rare circumstances, such as when disclosure would be contrary to the public interest. FMG 8 sets out specific categories for agencies to consider when determining whether contracts should be excluded.

24. The four agencies had controls and quality assurance processes appropriate to their procurement management arrangements which supported the completeness and accuracy of their contract listings. This included data cleansing, reconciliation and verification processes. As a consequence, the agencies' calendar year 2009 contract listings were largely compliant with the Senate Order listing requirements.

25. There was limited evidence that the four agencies documented the reasons for the inclusion of confidentiality provisions in contracts. For the calendar year 2009, none of the four agencies' procurement policies and guidance materials specified the requirement to document assessments of contractors' requests for the use of specific confidentiality provisions. Agencies would generally be better placed to make more considered decisions during the contract negotiation stage, if their documentation practices required substantiation of the reasons for agreeing to contractors' requests to include confidentiality provisions. Such documentation need not be lengthy but should address the significant factors that were taken in to account in the decision to keep information confidential.

26. Two of the audited agencies, FaHCSIA and the Federal Court, had implemented mechanisms to review the appropriateness of the inclusion of confidentiality provisions during the contract preparation stage. None of the audited agencies had implemented mechanisms to review the use of confidentiality provisions during a contract's term. Deliberations on the use of confidentiality provisions are likely to be strengthened by an appropriate level of review at the contract preparation stage. Depending on each agency's procurement management arrangements, these reviews could be undertaken by the central procurement unit, legal unit or suitably experienced managers.

27. AusAID, FaHCSIA and the Federal Court, had appropriate guidance and training in support of staff awareness of the Order. DAFF would benefit from providing targeted training on its guidance materials to increase staff awareness of the requirements of the Order, particularly in view of its more decentralised procurement management arrangements.

## Summary of agencies' responses

28. General comments on the proposed audit report from the agencies subject to the follow-up component of the audit, and from the Department of Finance and Deregulation, are contained in full in Appendix 1. A summary of the responses is as follows:

## **Australian Agency for International Development**

29. AusAID acknowledges the findings of the ANAO audit and agrees with the recommendations and suggestions proposed in the report. The Agency found the audit to be beneficial and will work to improve its systems and practices as specifically suggested in the report.

## **Department of Agriculture, Fisheries and Forestry**

30. The department supports the recommendations in the proposed audit report and notes that the recommendation to consolidate procurement reporting obligations will reduce the reporting burden on agencies.

31. The department will carefully consider the audit recommendations, findings and conclusions to ensure that we continue to improve our contract preparation and management processes, including the appropriate use and reporting of confidentiality clauses.

## **Department of Families, Housing, Community Services and Indigenous Affairs**

32. Overall, FaHCSIA considers that this report is well targeted and has made sound recommendations which the Department supports. In addition, FaHCSIA looks forward to being party to consultations as part of implementing these recommendations.

33. It is pleasing that FaHCSIA's policy and guidance material as well as its review practices were found to reflect better practice. In addition to this, FaHCSIA is currently enhancing its financial management information system to further strengthen its policies, procedures and guidance through electronic governance and auditable workflows.

## **Department of Finance and Deregulation**

34. The multiple and overlapping procurement contract reporting requirements imposed on Australian Government agencies create unintended complexities and unnecessary red tape. Since 2005, Finance has proposed that AusTender should be the sole procurement reporting requirement for Australian Government Agencies. AusTender provides searchable reports on all procurement contracts over \$10,000 within six weeks of the contract being entered into. As such, AusTender provides superior timeliness, transparency, accountability and useability to the Senate Order's biannual written report on contracts over \$100,000. Finance will continue to work with Australian

Government agencies, the ANAO and relevant Parliamentary committees to rationalise procurement reporting requirements and to improve the accuracy and completeness of the procurement contract information available through AusTender.

35. Finance has published a range of guidance materials to assist agencies to comply with the variety of procurement and contract reporting obligations. As each reporting obligation has different elements, albeit sourced from the same data, the guidance materials differ in purpose and coverage. Finance is updating and consolidating the guidance material to better enable agencies to understand their different procurement and contract reporting requirements. AusTender also has a function that enables the Senate Order to be published through AusTender.

### **Federal Court of Australia**

36. The Federal Court of Australia acknowledges the findings of the ANAO audit, and it agrees with the recommendations and suggestions proposed in the report.

# Recommendations

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## **Recommendation No.1**

### **Paragraph 3.29**

To assist agencies to provide more accurate, timely and complete procurement reporting, the ANAO recommends that the Department of Finance and Deregulation review opportunities to consolidate procurement reporting requirements, in conjunction with the department's continuing focus on improving AusTender functionality.

**Agencies' responses: Agreed**

## **Recommendation No.2**

### **Paragraph 4.40**

The ANAO recommends that agencies assess whether their contract preparation processes support adequate consideration of the appropriate use of confidentiality provisions in contracts.

**Agencies' responses: Agreed**

# **Audit Findings and Conclusions**





# 1. Introduction

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## The Senate Order

**1.1** The *Senate Order for Departmental and Agency Contracts* (the Senate Order/the Order) was introduced in 2001 to improve public access to information about Australian Government procurement. The main principle that underpins the Order is that the Parliament and public should not be prevented from accessing information about government expenditure unless there is a sound basis for that information to be kept confidential.<sup>13</sup> Public knowledge of information on contracted goods and services delivered to government can lead to better results for the Australian Government and the public.

**1.2** The Government agreed to comply with the Order and its subsequent amendments.<sup>14</sup> To accord with the Order, Ministers are to table letters advising that each of the agencies<sup>15</sup>, which they administer, have placed a list of contracts<sup>16</sup> on the Internet. The contracts to be listed are those that were fully performed or entered into during the preceding 12 months, with a value of \$100 000 or more (including GST). The contract listings are to indicate, among other things, whether any of the contracts listed contained confidentiality provisions. The list is to be posted, and the letter of advice is to be tabled, no later than two calendar months after the last day of the financial year and calendar year.<sup>17</sup>

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

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<sup>13</sup> Department of Finance and Deregulation, *Guidance on Confidentiality in Procurement* (FMG 3), July 2007, p. 4.

<sup>14</sup> The Government agreed to comply with the spirit of the Order and advised that information regarding individual contracts would not be provided where disclosure would be contrary to the public interest, legislative requirements and undertakings given.

<sup>15</sup> Subject to the *Financial Management and Accountability Act, 1997* (FMA Act).

<sup>16</sup> This includes grants and funding agreements that meet the Contract Criteria and Order criteria set out in Department of Finance and Deregulation, *Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)* (FMG 8), January 2004, p. 13.

<sup>17</sup> Parliament of Australia, *Procedural Orders of Continuing Effect* [Internet]. Parliament of Australia, Australia, 2009, available from <[http://www.aph.gov.au/senate/pubs/standing\\_orders/d05.htm#11](http://www.aph.gov.au/senate/pubs/standing_orders/d05.htm#11)> [accessed 24 May 2010].

- agencies have appropriately used confidentiality provisions<sup>18</sup>; and
- contracts not included in agencies' contract listings should be listed.

**1.4** The Australian National Audit Office (ANAO) used the Department of Finance and Deregulation's (Finance) Financial Management Guidance (FMG) in its assessment of the use of confidentiality provisions and exclusion of contracts from Senate Order contract listings, to fulfil the Senate's request to the Auditor-General.

## Financial Management Guidance

**1.5** Finance is responsible for providing agencies subject to the *Financial Management and Accountability Act 1997* (FMA Act) with policy advice on compliance with the Order. This advice is set out in the FMG series of publications. The three publications with direct relevance to the audit are:

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

**1.6** The FMGs advise agencies on the appropriateness of claims for confidentiality and how to manage confidential information in procurement (FMG 3); articulate the rationale of the Order and clarify the terms and requirements of the Order (FMG 8); and outline the procurement reporting requirements (FMG 15).

## AusTender

**1.7** In addition to the Senate Order, agencies are also required to report procurement activity in AusTender. AusTender is a system administered by Finance and accessible to the public through the Internet<sup>19</sup> for agencies to publish and report information regarding procurement and contracts.

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<sup>18</sup> 'Appropriately' refers to consistent with the Confidentiality Test in *Guidance on Confidentiality in Procurement* (FMG 3), July 2007.

<sup>19</sup> The AusTender Internet page is <<https://www.tenders.gov.au/>>.

**1.8** Agencies are required to report contracts on AusTender that meet the following criteria:

- the instrument to be reported is a Commonwealth contract, agency agreement<sup>20</sup> 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: for FMA Act agencies: \$10,000 or above.<sup>21</sup>

**1.9** For these contracts, agencies are required to report whether there is confidential information within the contract (contract contents), for example, profit margins, or confidential information obtained or generated during the term of the contract (contract outputs), such as a particular report.

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

## Previous ANAO Senate Order audits

**1.11** This audit is the twelfth in a series of audits that have fulfilled the Senate's request for the Auditor-General to provide an annual report on agencies' compliance with the Order.

**1.12** Over the past five years the ANAO has made eight recommendations in its audit reports designed to improve agencies' compliance with the Order (see Appendix 2 for a list of recommendations made in these audits). There are four common areas for improvement identified in these recommendations:

- data entry and system controls used to support the completeness and accuracy of agency contract listings;
- adequate documentation of the reasons for agreeing to identify specified information in contracts as being confidential;

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<sup>20</sup> An agreement between Australian Government agencies that articulates respective agency responsibilities but is not legally enforceable.

<sup>21</sup> Department of Finance and Deregulation, *Guidance on Procurement Publishing Obligations* (FMG 15), July 2007, p. 14.

- mechanisms to review the appropriateness of the decision to include, and the ongoing relevance of, confidentiality provisions in contracts; and
- guidance and training to staff related to the Senate Order.

## Audit approach

**1.13** The audit objective was to assess the appropriateness of the use and reporting of confidentiality provisions in Australian Government contracts. This included assessing compliance with the Order and following-up on the implementation of recommendations made in previous Senate Order audits.

**1.14** The audit criteria used to assess agencies' performance against this objective were:

- confidentiality provisions were used appropriately in the sample of contracts selected;
- agencies complied with the requirements of the Senate Order for Departmental and Agency Contracts; and
- selected agencies had implemented recommendations made in Senate Order audits in the past five years.

**1.15** The agencies were selected based on the findings of previous Senate Order audits, the value of contracts managed and to gain coverage of agencies of different sizes.

**1.16** The audit involved three components:

- An examination of a stratified random sample of 150 contracts<sup>22</sup> listed as containing confidentiality provisions from material and small agencies across the Australian Government to determine whether confidentiality provisions were used appropriately.

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<sup>22</sup> The sampling methodology provided results that were broadly representative of the Australian Government agencies subject to the Senate Order due to: the size of the contract sample; the number of agencies represented in the sample; the number and value of the contracts that these agencies manage and the inclusion of contracts from agencies of varying size. See Appendix 3.

- An examination of agencies' calendar year 2009 contract listings and ministers' letters of advice, to assess compliance with the requirements of the Order and check reported instances of excluded contracts.
- A follow-up of the implementation of previous audit recommendations relating to the administration of the Senate Order in four agencies. The selected agencies were the: Australian Agency for International Development (AusAID); Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA); Department of Agriculture, Fisheries and Forestry (DAFF); and the Federal Court of Australia (Federal Court). The selected agencies were auditees in one of the ANAO's previous five audits of Senate Order compliance.

**1.17** The audit was conducted in accordance with ANAO auditing standards at a cost to the ANAO of approximately \$284 000.

## Report structure

<b>Chapter 2</b> Confidentiality Provisions in Contracts	Examines the appropriateness of the use of confidentiality provisions in a sample of Australian Government contracts.
<b>Chapter 3</b> Compliance with Senate Order Requirements	Reports the ANAO's assessment of agencies' compliance with the Senate Order requirements to table a minister's letter and post a complete contract listing for the calendar year 2009 by the due date.
<b>Chapter 4</b> Implementation of Previous Senate Order Audit Recommendations	Assesses the implementation of previous Senate Order audit recommendations in four selected agencies.

## 2. Confidentiality Provisions in Contracts

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*This chapter examines the appropriateness of the use of confidentiality provisions in a sample of Australian Government contracts.*

### Background

**2.1** The Senate Order (the Order) is underpinned by the principle that the Parliament and public should not be prevented from accessing contract information unless there is a sound basis for determining that the information should be kept confidential. The Department of Finance and Deregulation (Finance) has issued guidance to assist agencies to apply this principle through the appropriate use of confidentiality provisions<sup>23</sup> and correct reporting of the use of these provisions in Senate Order contract listings.<sup>24</sup>

**2.2** To determine whether confidentiality provisions were used appropriately, the ANAO examined:

- trends in the reporting of the use of confidentiality provisions in agencies' Senate Order contract listings;
- the appropriateness of the use of confidentiality provisions for a sample of 150 contracts; and
- the correctness of the reporting of the type of confidentiality provisions for these contracts.

### Reporting of the use of confidentiality provisions

**2.3** In response to the Senate's request, the ANAO has conducted annual audits of the use of confidentiality provisions by agencies. Figure 2.1 shows that the proportion of contracts reported as containing confidentiality provisions in agencies audited by the ANAO followed a downwards trend

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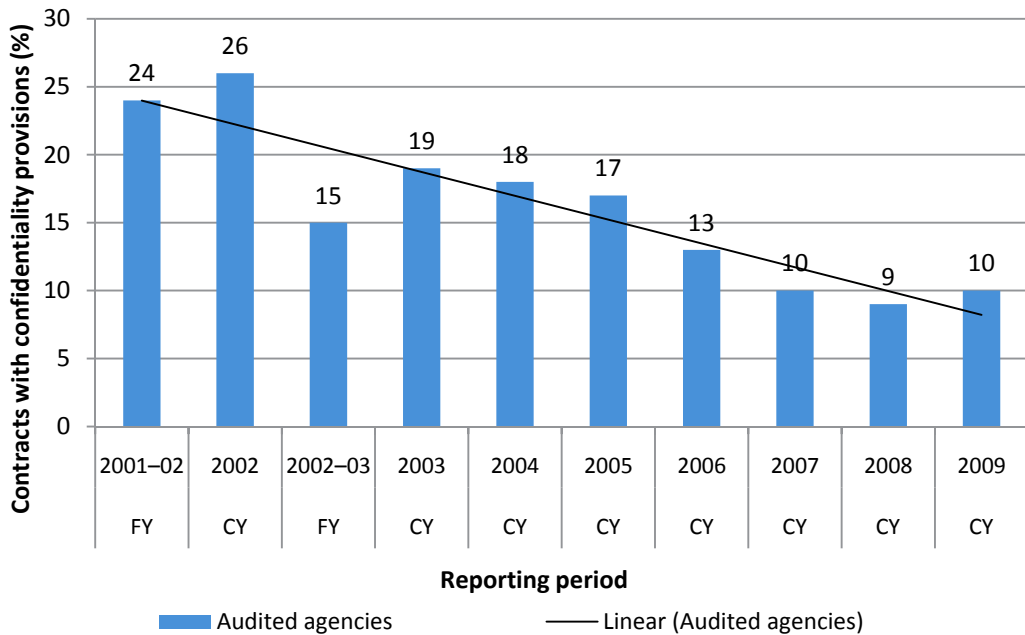
<sup>23</sup> Department of Finance and Deregulation, *Guidance on Confidentiality in Procurement* (FMG 3), July 2007.

<sup>24</sup> Department of Finance and Deregulation, *Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)* (FMG 8), January 2004.

between the ANAO's first audit of 2001–02 financial year and 2008 calendar year.

**Figure 2.1**

**Proportion of contracts reported as containing confidentiality provisions by audited agencies**



Source: ANAO analysis of contracts in calendar year 2009 contract listings, and previous ANAO Senate Order audits.

Note: The 2001–02 to 2008 figures are based on the contracts of a non-random sample of audited agencies. The 2009 figure represents the contracts of all agencies that listed contracts on the Internet. Linear (Audited agencies) represents the linear line of best fit (trendline) for the agencies audited.

FY: Financial Year, CY: Calendar Year.

**2.4** For calendar year 2009, the ANAO examined the reporting of confidentiality provisions in all agencies. The proportion of contracts reported to contain confidentiality provisions was slightly greater than the proportion reported by audited agencies in the preceding year (10 per cent; 4084 of 41 937 of contracts reported). The proportion of contracts reported as containing confidentiality provisions has remained relatively constant over the last three calendar years (at around 10 per cent) and reflects a significant decline since the Order was introduced (from 24 per cent of contracts in financial year 2001–02).

## Appropriateness of the use of confidentiality provisions

**2.5** Agencies are required to keep information confidential due to the operation of legislation, such as the *Privacy Act 1988*, or determine that it is necessary to keep information confidential in the public interest, to protect intellectual property or for other commercial reasons.<sup>25</sup> Confidentiality provisions in contracts are considered to be used appropriately if they meet the criteria of the Confidentiality Test outlined in Financial Management Guidance (FMG) No. 3:

- The information to be protected must be specifically identified (criterion 1).
- The information must be commercially sensitive. This means that information should not generally be known or ascertainable (criterion 2).
- Disclosure would cause unreasonable detriment to the owner of the information or another party (criterion 3).
- The information was provided under an understanding that it would remain confidential (criterion 4).<sup>26</sup>

**2.6** To assess the appropriateness of the use of confidentiality provisions in contracts reported in agencies' Senate Order contract listings for calendar year 2009, the ANAO examined 150 contracts selected using stratified random sampling of the 4084 contracts listed as containing confidentiality provisions.<sup>27</sup> The contracts selected were managed by 33 agencies that were responsible for 69 per cent of contracts over \$100 000 reported in Senate Order contract listings in 2009, and 61 per cent of the total number of contracts reported to contain confidentiality provisions in 2009. Combined, these agencies managed contracts with a reported value of \$141 billion, or 86 per cent of the total reported value of contracts managed by Australian Government agencies in 2009. The contract analysis results in this audit are broadly representative of Australian Government agencies subject to the Senate Order.

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<sup>25</sup> Department of Finance and Deregulation, *Guidance on Confidentiality in Procurement* (FMG 3), July 2007, p. 9.

<sup>26</sup> The complete Confidentiality Test is included at Appendix 4.

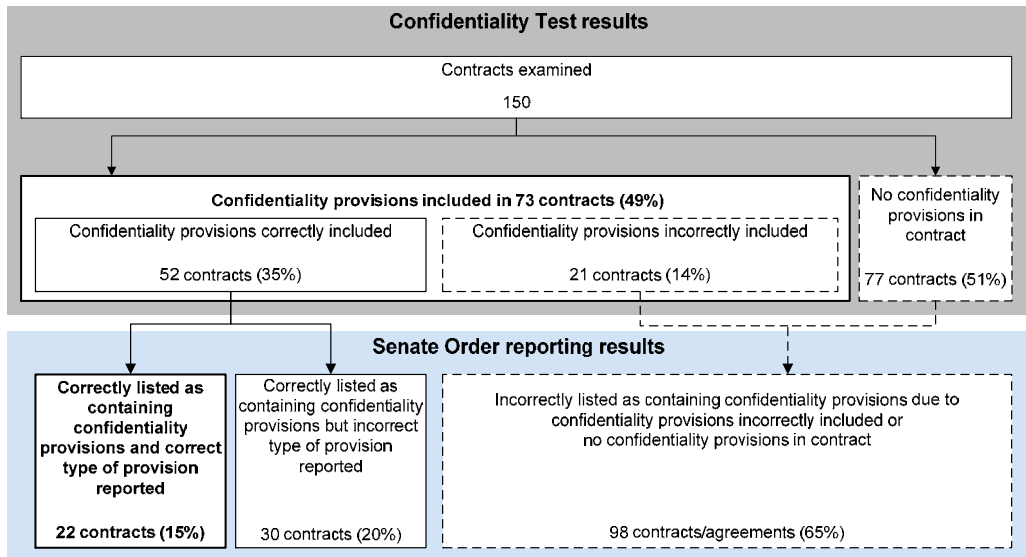
<sup>27</sup> An explanation of the methodology used to select the stratified random sample is included at Appendix 3.



**2.7** The results of the ANAO's contract analysis of the appropriateness of the use (Confidentiality Test results) and the reporting (Senate Order reporting results) of confidentiality provisions are shown in Figure 2.2.

**Figure 2.2**

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



Source: ANAO analysis.

**Confidential information in the contract is specifically identified (criterion 1 of the Confidentiality Test)**

**2.8** The ANAO assessed the contracts against the criteria of the Confidentiality Test. For a contract to be assessed as meeting criterion 1 of the Confidentiality Test at least one provision must specifically identify information to be protected (specific confidentiality provisions).<sup>28</sup> The 150 contracts examined contained 307 confidentiality provisions in total. Of the 307 confidentiality provisions, 226 were specific confidentiality clauses while 81 were general confidentiality clauses and did not meet the Confidentiality

<sup>28</sup> If criterion 1 was not met, the other criteria were not assessed.

Test.<sup>29</sup> To address the resultant incorrect listing of contracts as containing confidentiality provisions, agencies need to:

- remove the references to the use of confidentiality provisions in Senate Order contract listings; or
- amend the contracts to specifically identify the information to be protected and retain references to the use of confidentiality provisions in the contract listings.

**2.9** Based on these results, 73 of the 150 contracts (49 per cent) examined included confidentiality provisions, while the remaining 77 contracts (51 per cent) either had only general confidentiality provisions (47 contracts) that did not meet the Confidentiality Test, or contained no reference to confidential information (30 contracts). The absence of provisions that specifically identify the information to be protected is problematic because the understanding between the agency and the contractor about the information that is to be kept confidential is not appropriately reflected in the contract document.

**2.10** Some agencies use contract templates that provide for identification of:

- the specific information that the agency has agreed with the contractor will be kept confidential;
- the reason/s why this specific information is considered to be confidential; and
- the term for which it will be kept confidential.<sup>30</sup>

**2.11** Table 2.1 represents a contract template extract that is considered to be better practice for specifically identifying confidential information.<sup>31</sup> Such a template could be used by agencies to meet criteria 1 and 4 and assist it to meet criteria 2 and 3, of the Confidentiality Test. The contract analysis results

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<sup>29</sup> General confidentiality provisions 'either restate legislative obligations for confidentiality ... or set out a general understanding between the parties in relation to how they will deal with information'. Department of Finance and Deregulation, *Guidance on Confidentiality in Procurement* (FMG 3), July 2007, p. 20.

<sup>30</sup> The sensitivity of contractual information may diminish over time once contract milestones are met, such as the publication of information obtained or generated as part of a contract.

<sup>31</sup> Further practices that would support agencies to adequately consider the use and reporting of confidentiality provisions, and to meet the Confidentiality Test are outlined at paragraphs 4.38 to 4.40.

showed that 38 of the 52 contracts examined that met the Confidentiality Test contained a section similar to that depicted in Table 2.1.<sup>32</sup>

**Table 2.1**

**Contract template extract: confidential information**

Information in the contract			
Item	Title	Reason for confidentiality	Period of confidentiality
Schedule 4	Internal costing information	The schedule discloses the supplier's profit margin. The information is not generally known or ascertainable and the supplier would suffer unreasonable detriment if the profit margin was disclosed.  The total price of the contract is not considered confidential.	Term of the contract
Information obtained or generated in the performance of the contract			
Item		Reason for confidentiality	Period of confidentiality
Fit-out functional design brief		The brief will contain the supplier's unique fit-out methodology that is not publicly known. The disclosure of the methodology will affect the supplier's competitive position in the market.	Term of the contract

Source: ANAO representation of Department of Defence and Australian Customs and Border Protection Service contract templates.

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

**2.12** The Confidentiality Test states that for information to be considered confidential, it must be commercially sensitive, and disclosure of the information would cause detriment to the owner of the information or another party.<sup>33</sup> FMG 3 provides examples of how to apply these criteria, and identifies information that may or may not meet the Confidentiality Test (see Table 2.2).

<sup>32</sup> The ANAO considers criterion 4 to be met if criterion 1 is met.

<sup>33</sup> Department of Finance and Deregulation, *Guidance on Confidentiality in Procurement* (FMG 3), July 2007, p. 10.

**Table 2.2**

**Information that may or may not meet the requirements of the Confidentiality Test**

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

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

**2.13** Of the 226 specific confidentiality clauses, 152 clauses from 62 contracts specified information contained in the contract as confidential (contract contents) and 74 clauses from 33 contracts specified information obtained or generated in the performance of the contract (contract outputs) as confidential.<sup>34</sup> The ANAO assessed the commercial sensitivity of the 152 confidentiality clauses related to contract contents. Fifty-two of the 152 clauses (from 29 contracts) assessed, contained commercially sensitive information that would cause detriment if made public.<sup>35</sup>

**2.14** The most common information specified in the 152 clauses were:

- prices of individual item/s (29 clauses); and

<sup>34</sup> Assessment of the commercial sensitivity of contract output clauses was not within the scope of the audit.

<sup>35</sup> Some contracts contained both specific confidentiality clauses related to contract contents and contract outputs.

- pricing structures (17 clauses).

**2.15** FMG 3 classifies some pricing details as commercially sensitive, such as pricing structures, but not other pricing details, including price lists. The misclassification of pricing information reduces price transparency, which can increase competition among tenderers and lead to greater cost efficiencies for government.

**2.16** Over one-third (56 of 152) of the contract contents clauses did not fit the examples provided in FMG 3 (see Table 2.2). Of these 56 clauses, 16 were considered by the ANAO to be commercially sensitive and 40 were not.<sup>36</sup> These results indicate that a clearer understanding of the information that is considered to be, and not considered to be, confidential is necessary for agencies to meet the requirements of the Confidentiality Test.

### **Appropriateness of the use of confidentiality provisions over time**

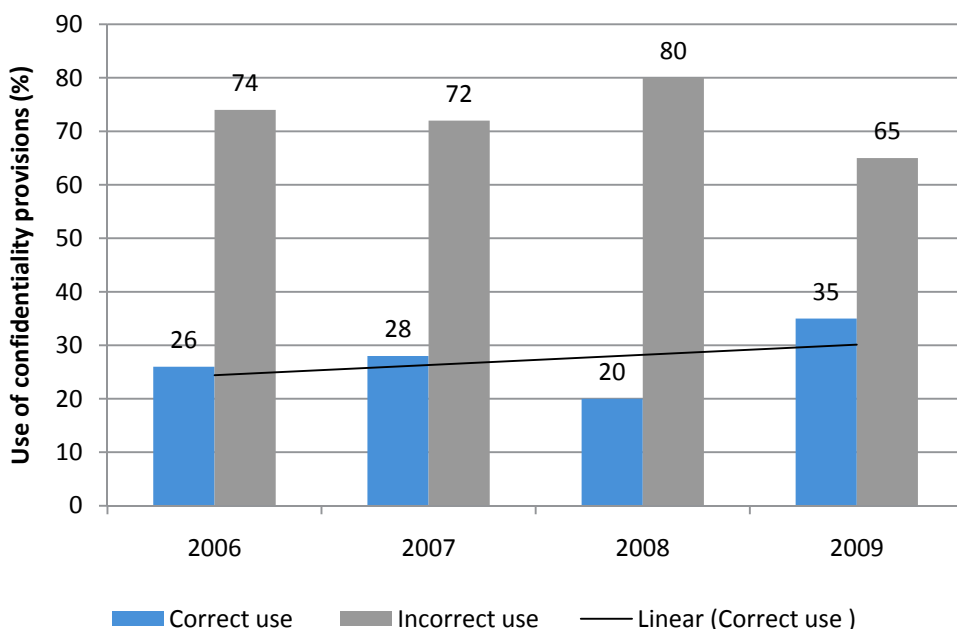
**2.17** Since 2001 the ANAO has assessed the appropriateness of the use of a sample of audited agencies' contracts as containing confidentiality provisions. In its previous assessments the ANAO found that a small to moderate proportion of contracts (reported to contain confidentiality provisions) contained confidentiality provisions that met the Confidentiality Test in FMG 3. Figure 2.3 shows the results from the previous three audits, alongside this year's results.

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<sup>36</sup> Information such as private addresses contained in statutory declarations within the contract were considered to be confidential. Information such as document reproduction quantities were not considered to be commercially sensitive.

**Figure 2.3**

**Appropriate use of confidentiality provisions in examined contracts in audited agencies, 2006–09**



Source: ANAO analysis.

Linear (Correct use) represents the linear line of best fit (trendline) for the agencies audited for 2006 to 2009.

**2.18** There was an overall increase in the appropriate use of confidentiality provisions during this period, to around one-third of contracts examined in 2009 (52 of 150 contracts). The continued increase is encouraging; however, sample results indicate that confidentiality provisions are still not used appropriately or listed correctly for the majority of Australian Government contracts reported to contain such provisions. Agencies would therefore benefit from further developing staff understanding and their procurement practices to support the appropriate inclusion of confidentiality provisions in contracts (see paragraph 4.38).

## Reporting of the type of confidentiality provisions

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

contains provisions requiring the parties to maintain confidentiality of any of its provisions [contract contents], or whether there are any other requirements of confidentiality [contract outputs].<sup>37</sup>

**2.20** For contracts to be reported correctly the type of confidentiality provision in the contract (related to contract contents or contract outputs) must align with type of provision reported.<sup>38</sup> Figure 2.2 shows that of the 150 contracts examined:

- 22 contracts (15 per cent) were correctly listed as containing confidentiality provisions and the correct type of provision was reported; and
- 30 contracts (20 per cent) were correctly listed as containing confidentiality provisions and the incorrect type of provision was reported.

**2.21** The most common type of provisions incorrectly reported by agencies related to costing and profit information contained in the contract. The ANAO suggests that, where practicable, agencies modify their contract registers so that confidentiality provisions related to costing and profit information are reported as relating to contract contents.

**2.22** Five contracts in the sample that had confidentiality provisions related to tender submissions were reported in contract listings in three different ways.<sup>39</sup> FMG 3 and the Commonwealth Procurement Guidelines allow agencies to determine successful tender documents to be confidential.<sup>40</sup> FMG 8

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<sup>37</sup> Clause 2(c) of the *Senate Order for Departmental and Agency Contracts*.

<sup>38</sup> The contract listing template in FMG 8 has two types of confidentiality provisions for reporting: 'whether contract contains provisions requiring the parties to maintain confidentiality of any of its provisions' (contract contents); and 'whether there are any other requirements of confidentiality' (contract outputs).

<sup>39</sup> Two contracts were reported in the column headed 'whether contract contains provisions requiring the parties to maintain confidentiality of any of its provisions'; one was reported in the column headed 'whether there are any other requirements of confidentiality'; and two were reported in both columns.

<sup>40</sup> Department of Finance and Deregulation, *Guidance on Confidentiality in Procurement* (FMG 3), July 2007, p. 8. Department of Finance and Deregulation, *Commonwealth Procurement Guidelines* (FMG 1), December 2008, p. 22.

and FMG 15<sup>41</sup> relate only to contract information, so for successful tender information to be reported as confidential it must firstly, be in the contract and secondly, meet the Confidentiality Test. For the contracts examined, the agencies either had not included the information in the contract or the information in the tender did not meet the Confidentiality Test. The ANAO suggests that Finance examine the issue and clarify reporting requirements for confidentiality provisions associated with tender documents.

## Conclusion

**2.23** Since the Order was introduced, agencies' reporting of the use of confidentiality provisions in contracts has declined from 24 per cent of contracts in 2001–02, to 10 per cent of contracts in 2009. This indicates that less Australian Government contracting information is being classified as confidential than in the past.

**2.24** The ANAO examined a sample of 150 contracts, managed by 33 agencies, that were reported to contain confidentiality provisions. Of the 150 contracts examined, 77 contracts (51 per cent) did not contain confidentiality provisions and 21 contracts (14 per cent) were assessed as including confidentiality provisions that were not justified, having regard to Financial Management Guidance (FMG) No. 3. Of the 52 contracts (35 per cent) that were correctly listed as containing confidentiality provisions, 22 (15 per cent of contracts examined), also reported the correct type of confidentiality provision in contract listings (related to either contract contents or contract outputs). The incorrect inclusion and listing of confidentiality provisions in contracts potentially precludes or restricts the Parliament and the public from accessing information about these contracts.

**2.25** In 2009, one-third of the contracts examined (52 of 150 contracts) contained confidentiality provisions that met the Confidentiality Test in FMG 3. While this represents an increase of nine per cent in the appropriate use of confidentiality provisions in the contracts of audited agencies between 2006 and 2009, there remains room for further improvement.

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<sup>41</sup> Department of Finance and Deregulation, *Guidance on Procurement Publishing Obligations* (FMG 15), July 2007, p. 20.



**2.26** To improve agencies' considerations of the appropriate use of confidentiality provisions and reduce instances of agencies reporting provisions that do not exist or meet the Confidentiality Test, it would be beneficial for:

- agencies to consider documenting within contracts the details of, and reasons for, specific confidentiality provisions (see Table 2.1);
- agencies to assess the commercial sensitivity of costing and profit information in line with FMG 3; and
- Finance to clarify the reporting requirements for confidentiality provisions related to tender documents.

# 3. Compliance with Senate Order Requirements

*This chapter examines agencies’ compliance with the Senate Order requirements to table a minister’s letter and publish a complete contract listing for the calendar year 2009, by the due date.*

## Background

**3.1** To determine agencies’ compliance with the Order, the ANAO assessed whether:

- agencies’ contract listings were published by the due date and met the listing requirements;
- ministers’ letters of advice were tabled by the due date and included the information required by the Order; and
- a sample of contracts excluded from agencies’ listings were appropriately excluded.

**3.2** Figure 3.1 shows the template for Order contract listings in Financial Management Guidance (FMG) No. 8. The template enables agencies to report all of the contract details and confidentiality information required by the Order.

**Figure 3.1**

**Template for contract listing**

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

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

**3.3** The ANAO also considered the multiple procurement reporting requirements that agencies are required to meet, and implications for the quality of data reported under different requirements.

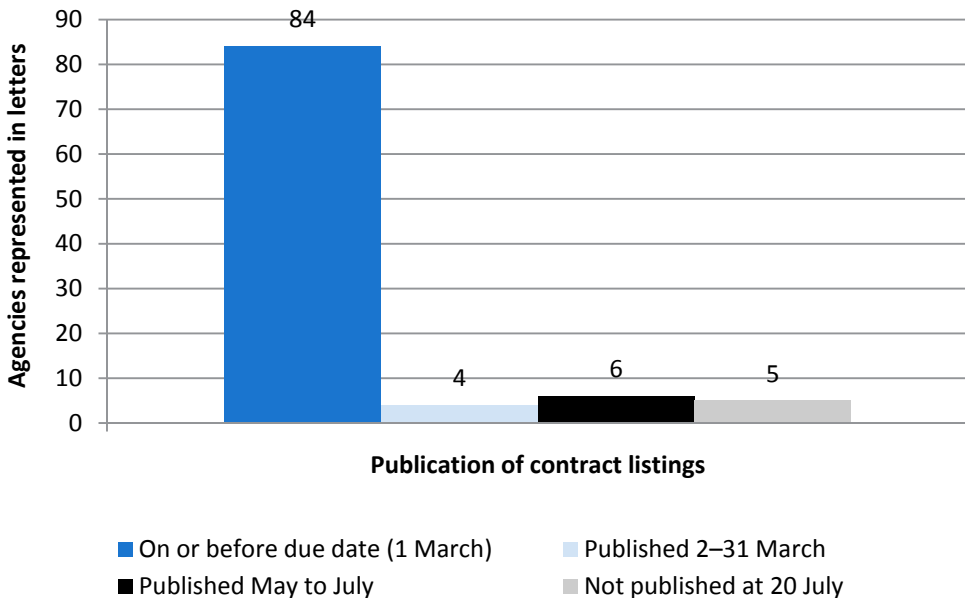
## Contract listings

### Timeliness of contract listings

3.4 Eighty-four of the 99 agencies<sup>42</sup> required to comply with the Order, published on the Internet a contract listing, or a note that the agency had not entered into any relevant contracts, by the due date<sup>43</sup> of 1 March 2010. Ten agencies published a listing after the due date and five agencies had not published a listing or note as at 20 July 2010. Figure 3.2 shows the timeliness of the contract listings published by the 99 agencies.

**Figure 3.2**

### Timeliness of contract listing publication



Source: ANAO analysis.

<sup>42</sup> This includes 98 agencies required to meet the Senate Order and the Department of the Senate that complies voluntarily. The following agencies are exempted from the Senate Order: Australian Security Intelligence Organisation, Australian Secret Intelligence Service, Department of the House of Representatives and Department of Parliamentary Services.

<sup>43</sup> The due date for compliance with the Order fell on Sunday 28 February 2010, so for the purposes of the audit, the audit team adopted Monday 1 March 2010 as the date that satisfied the requirements of the Order.

**3.5** Of the five agencies yet to publish a listing or note, four are small and one is a Department of State. In previous Senate Order listings the four small agencies have each reported 11 or fewer contracts. The five agencies that are yet to publish a listing or note generally differ from those that did not publish a contract listing for the 2008 calendar year.<sup>44</sup>

## **Comprehensiveness of contract listings**

**3.6** Under the Senate Order, agencies are required to report contract details and confidentiality information for each contract, as well as the cost of compliance with the Order and the method used to calculate this cost of compliance. Of the 94 agencies that posted a contract listing<sup>45</sup>, 47 included all contract details and confidentiality information for every contract, the method used to calculate the cost of compliance and the cost of compliance. A similar proportion of agencies were compliant with the contract details, confidentiality and compliance information reporting requirements of the Order:

- contract details: 78 agencies (83 per cent);
- confidentiality information: 72 agencies (77 per cent); and
- compliance information: 72 agencies (77 per cent).

**3.7** The 94 agencies reported 41 937 contracts in their listings. Contract details and confidentiality information reporting requirements were met for 94 per cent of the contracts (39 489 of 41 937). In total, these contracts were reported to total \$155 billion, representing 94 per cent of the value of all Australian Government contracts (\$165 billion) reported in the Senate Order contract listings.

### ***Contract details***

**3.8** Fourteen of the 94 agencies did not include the contract details envisaged by the Order for a total of 1884 contracts in the contract listings. Two of the 14 agencies omitted a significant number of contract details from their contract listings:

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<sup>44</sup> The Private Health Insurance Ombudsman was the one exception. This agency did not upload a contract listing for the 2008 or 2009 calendar years.

<sup>45</sup> This included two agencies that posted a note on their Internet advising that no relevant contracts had been entered into and therefore no contract listings were published.

- the Department of the Environment, Water, Heritage and the Arts (DEWHA) did not list the contractor name for 1392 water entitlements contracts (74 per cent of all agencies' contracts with contract details omitted, having a total reported value of \$1.3 billion); and
- the Department of Health and Ageing (DoHA) did not list the contractor name or start and end dates for 214 contracts (11 per cent of all agencies' contracts with contract details omitted, having a total reported value of \$123 million).

**3.9** DEWHA advised that it does not include contractor names in its reporting of water entitlements contracts to protect the privacy and identity of individuals in accordance with the *Privacy Act 1988*. The 214 DoHA contracts that omitted contract details were reported in the listing as containing confidentiality provisions due to the operation of the *Privacy Act 1988*, national security and statutory secrecy provisions. For 185 of the 214 contracts, DoHA sought an exemption from publicly reporting the contracts in 2009. The Finance Minister supported a partial exemption of contract details, such as the contractor, to address sensitivities in reporting personal information, and prevent adverse affects on the policy outcomes of the relevant program.

**3.10** The principle underpinning the Senate Order is that information in government contracts should not be protected as confidential unless there is good reason to do so. On rare occasions, where the existence of a contract is confidential, the Order allows for the contract to be excluded from contract listings.<sup>46</sup> However, it does not provide for contract details to be excluded from listings.

**3.11** While agencies should seek to report contract details for all contracts, there may be instances where an appropriate authority has agreed there is good reason to exclude some details from contract listings. In these circumstances, the balance of the Senate Order listing requirements should be

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<sup>46</sup> Parliament of Australia, *Procedural Orders of Continuing Effect* [Internet]. Parliament of Australia, Australia, 2009, available from <[http://www.aph.gov.au/senate/pubs/standing\\_orders/d05.htm#11](http://www.aph.gov.au/senate/pubs/standing_orders/d05.htm#11)> [accessed 24 May 2010].

Contracts should only be excluded from listings on rare occasions and when this occurs notification of exclusions should be included in the minister's letter of advice. Department of Finance and Deregulation, *Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)* (FMG 8), January 2004, p.16.

satisfied, in keeping with the principle of the Order. As illustrated by the example above, it would be beneficial for agencies to seek guidance from Finance in cases where they consider that particular contract details should not be reported.

*Confidentiality information*

**3.12** Twenty agencies omitted confidentiality information from 532 contracts in their contract listings. Of these, five agencies did not include one or more of the confidentiality information columns in their contract listings for 170 contracts. The remaining fifteen agencies did not provide all the required confidential information for each contract in the listings (362 contracts). The omission of confidentiality information from contract listings reduces the information available to the public about the use of confidentiality in government contracts.

*Compliance information*

**3.13** Eighty agencies indicated an estimate of the cost of complying with the Order and 73 agencies included the method for calculating the cost of compliance in their listing. This represents an improvement from the calendar year 2008 contract listings: from 74 per cent to 87 per cent of agencies for the cost, and from 53 per cent to 79 per cent of agencies for the method. The total estimated cost of compliance for these agencies was \$1.1 million.

**3.14** Table 3.1 below shows the total estimated cost of compliance, the average and median cost of compliance per agency and the average cost per contract.

**Table 3.1**  
**Cost of compliance with the Senate Order**

Estimated cost of compliance	Cost of compliance
Total	\$1 142 557
Average per agency	\$14 282
Median per agency	\$1500
Average per contract	\$31

Source: ANAO analysis of estimated cost of compliance as reported by 80 agencies.

**Accuracy of contract listings**

**3.15** The findings of the ANAO’s examination of 150 contracts from a selection of agencies across the Australian Government are set out in Chapter 2. As part of this analysis, the ANAO checked the accuracy of ‘start

date', 'anticipated end date' and 'amount of consideration' data specified for these contracts in the agencies' listings, and compared it to the information contained in the contracts. Seventy-eight of the 150 contracts (52 per cent) had discrepancies in one or more of the three categories. Discrepancies in the 'amount of consideration' comparison ranged from \$5000 to \$17 million. Similarly, the discrepancy of start and end date information between the two sources varied from days to years. These results indicate that the contract listings do not accurately represent some contract details for a significant proportion of contracts.

### **Information in listings not required by the Senate Order**

**3.16** Thirty-seven of the 94 agencies (39 per cent) included 318 contracts in their contract listings that were not required by the Order. These included:

- agency agreements;
- contracts performed outside the listing period; and
- contracts valued under \$100 000.<sup>47</sup>

**3.17** The additional entries had a reported combined value of \$4 billion. They represent 0.8 per cent of the total contracts listed, and 2.4 per cent of the total value of all contracts listed. While potentially useful, the inclusion of information not required by the Order, such as agency agreements, could lead to the misrepresentation of Australian Government agencies' contracting activity.

#### ***Agency agreements***

**3.18** Agencies are required to report arrangements that meet the Contract Criteria set out in FMG 8 in their contract listings.<sup>48</sup> Twenty-seven agencies erroneously included 165 agency agreements in their listings. The reported value of these agreements was \$1.4 billion. The Contract Criteria states that for a contract to exist there must be an intention to create legal relations. Agreements between Australian Government agencies are not legally

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<sup>47</sup> Agencies may list amendments to contracts separately on their contract listings. The combined value of the contract and amendments may be greater than \$100 000. When contracts and amendments are listed separately it may not be clear if the value threshold has been met.

<sup>48</sup> Department of Finance and Deregulation, *Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)* (FMG 8), January 2004, pp. 19–20.

enforceable as it is not possible for different parts of the same legal entity to enter into a legally enforceable agreement.<sup>49</sup>

**3.19** The potential for agencies to incorrectly include agency agreements in their contract listings is attributable to inconsistencies in the FMGs. FMG 3, for example, refers collectively to contracts and agency agreements as ‘contracts’ for the purposes of agencies’ identification, management and reporting of confidentiality information for procurements.<sup>50</sup> However, FMG 8 outlines that for the purposes of the Order, agency agreements are most likely not to be considered ‘contracts’ and therefore do not need to be reported.<sup>51</sup> Further, FMG 15 advises agencies how to meet the Government’s policy (as set out in the Commonwealth Procurement Guidelines) on the public reporting of agencies’ procurement activities, by requiring agencies to publish both contracts and agency agreements, including the use of confidentiality provisions, on AusTender.<sup>52</sup>

**3.20** As mentioned earlier, there is a lack of clarity in the FMGs about the treatment and reporting of confidential information in tender documents (see paragraph 2.22), which has contributed to incorrect listing of contracts as containing confidentiality provisions, and incorrect reporting of the type of provision (contract contents or contract outputs).

**3.21** In order to streamline and clarify guidance, Finance is currently consolidating the information provided in the three FMG documents referred to above. It would be beneficial for Finance to include in its revised guidance clarification of the reporting requirements for agency agreements and tender documentation in the Senate Order contract listings.

#### *Contracts outside listing period and below threshold*

**3.22** Eleven agencies included one or more contracts in their listings with an estimated value of less than \$100 000, including five contracts with a

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<sup>49</sup> *ibid.*, p. 23.

<sup>50</sup> Department of Finance and Deregulation, *Guidance on Confidentiality in Procurement* (FMG 3), July 2007, p. 2.

<sup>51</sup> Department of Finance and Deregulation, *Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)* (FMG 8), January 2004, p. 23.

<sup>52</sup> Department of Finance and Deregulation, *Guidance on Procurement Publishing Obligations* (FMG 15), July 2007, p. 4.



'zero dollar' value reported. These five contracts may meet the value threshold but have an incorrect value reported. Nine agencies included 126 contracts (0.3 per cent of all contracts listed) in their listing that, according to contract details listed, were performed outside of the listing period.

## Procurement reporting requirements

**3.23** Agencies must comply with multiple contract reporting requirements, for the Order, Annual Reports<sup>53</sup> and AusTender.<sup>54</sup> Each of the requirements has different reporting criteria and some contracts need to be reported in multiple formats to meet the multiple requirements. For example, a consultancy contract with a value of \$100 000 or more should be reported in an agency's Senate Order contract listing, Annual Report and on AusTender.

**3.24** Typically, agencies extract data for procurement reporting from a contract register, Financial Management Information System (FMIS), and/or AusTender. As the functionality of these systems does not always readily accommodate the multiple reporting needs, there is often a need to quality assure and filter data (from one or more data sources) and put it into an appropriate reporting format. As an example, one agency (in the follow-up component of the audit) reconciled information extracted from its FMIS with reports from its contract register and AusTender, before formatting the data to fit the contract listing template in FMG 8 and adding the reason/s for the use of confidentiality provisions.

**3.25** Finance has proposed AusTender as the primary procurement reporting requirement for agencies as it offers the following benefits in comparison to the Order:

- 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

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<sup>53</sup> Department of the Prime Minister and Cabinet, *Requirements for Annual Reports for Departments, Executive Agencies and FMA Act Bodies* [Internet]. DPMC, Australia, 2009, <[http://www.dpmc.gov.au/guidelines/docs/annual\\_report\\_requirements.pdf](http://www.dpmc.gov.au/guidelines/docs/annual_report_requirements.pdf)> [accessed 21 June 2010].

<sup>54</sup> Department of Finance and Deregulation, *Guidance on Procurement Publishing Obligations* (FMG 15), July 2007.

- ready availability of contract information that is easily searchable.<sup>55</sup>

**3.26** Previous ANAO audits have identified problems with the integrity and accuracy of agencies' contract data in AusTender and its predecessor database (Gazette Publishing System), including contract notice anomalies and timeliness of reporting, reflecting limitations in the functionality of AusTender and shortfalls in data input by agencies.<sup>56</sup> To address these issues it will be necessary for Finance to continue to focus on improving the functionality of AusTender, and for agencies to improve the quality of data reported.

**3.27** Currently, AusTender cannot replicate Senate Order reporting because contract amendments that are automatically transferred by agencies to AusTender are not linked to original contracts.<sup>57</sup> Further, to produce a listing of all contracts managed by an agency in a given time period (as required by the Order) requires the production and manipulation of multiple AusTender reports. It would also require AusTender functionality to reflect the migration

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<sup>55</sup> ANAO Audit Report No.6 2009–10, *Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2008 Compliance)*, p. 78. In response to the proposed audit report Finance advised that, 'The Senate Order requires reporting of only contracts (and not agency agreements) valued over \$100 000. Collectively, Australian Government agencies enter into a significant number of contracts under this threshold. In the Senate Order reporting period, AusTender reported approximately 85 000 procurement contracts, of which about 66 000 (78%) were below the \$100 000 Senate Order reporting threshold. As the Senate Order does not report these contracts, the Senate Order is not positioned as an authoritative source of evaluating Australian Government agencies' procurement contracting activity. As AusTender includes procurement contracts and agency agreements valued at \$10 000 or above, and is readily searchable, it provides superior transparency and accountability for Australian Government procurement than the Senate Order.'

<sup>56</sup> ANAO Audit Report No.6 2009–10, *Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2008 Compliance)*, p. 56; ANAO Audit Report No. 27 2005–06, *Reporting of Expenditure on Consultants*, p. 49; ANAO Audit Report (forthcoming), *Direct Source Procurement Processes*.

<sup>57</sup> ANAO Audit Report No.6 2009–10, *Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2008 Compliance)*, p. 54. In response to the proposed audit report Finance advised that, 'Linking of original contracts and their amendments is already available on AusTender for direct entry by agencies. Where agencies elect to 'batch upload' their contract amendments, linking to original contracts requires modifications to AusTender and input systems of all 65 agencies using 'batch uploading'. AusTender continues to be enhanced. For example, following consultation with agencies, the linking of amendments that have been batch uploaded is well advanced and is now in User Acceptance Testing. While the new functionality will be available to agencies on AusTender from 1 October 2010, uptake is dependent on the cost and timeframe for redevelopment of agency systems.'

of contracts between departments following changes to administrative arrangements.<sup>58</sup>

**3.28** Nevertheless, the ANAO considers that identified shortcomings in both Senate Order and AusTender contract reporting partly reflect multiple procurement reporting requirements, which have meant that agencies have been unable to focus attention on accurately fulfilling any single reporting requirement. During this audit and other contract management-related ANAO audits, agencies have commented on the difficulties of meeting multiple procurement reporting requirements. Consolidation of reporting obligations would assist in addressing these difficulties and support promulgation of consistent and more readily understood guidance.

## Recommendation No.1

**3.29** To assist agencies to provide more accurate, timely and complete procurement reporting, the ANAO recommends that the Department of Finance and Deregulation review opportunities to consolidate procurement reporting requirements, in conjunction with the department's continuing focus on improving AusTender functionality.

### Agencies' responses

#### AusAID

**3.30** AusAID agrees with ANAO's Recommendation No. 1. Agencies like AusAID would be greatly assisted in improving their contracting reporting if procurement reporting requirements were able to be consolidated further.

#### DAFF

**3.31** Agreed. The recommendation to consolidate procurement reporting obligations will reduce the reporting burden on agencies. The proposed change may assist external stakeholders to better understand the government's contractual activities and avoid the confusion caused by the numerous

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<sup>58</sup> In response to the proposed audit report Finance advised that, '*AusTender manages Machinery of Government (MOG) changes by linking Retired Agencies to Active Agencies. When a user runs any report or advanced search for an Active Agency, they will be prompted to run the same report/search for related Retired Agencies. This provides an orderly process for finding contracts awarded under each evolution of an agency. This process allows users to easily follow contracts prior to previous MOG changes, without concealing agency name changes. A more intrusive approach to accounting for MOG changes could result in reduced procurement contracting transparency.*'

reporting mechanisms which occur at different stages through the contract life cycle.

### *FaHCSIA*

**3.32** Agree. FaHCSIA is eager to work with the Department of Finance and Deregulation and other Australian Government agencies in assisting to consolidate and streamline procurement reporting requirements, in the context of improving AusTender functionality.

### *Finance*

**3.33** Agreed. AusTender provides searchable reports on all procurement contracts over \$10,000 within six weeks of contract signing. This enables superior timeliness, transparency, accountability and useability to the Senate Order's biannual report on procurement contracts over \$100,000. Finance will continue to work towards the rationalisation of reporting requirements through its work on improving compliance. Finance continues to improve AusTender functionality and work with agencies and the Australian National Audit Office (ANAO) to improve data quality. Adopting AusTender as the sole Australian Government agency reporting requirement would also lessen the administrative burden on agencies and remove unintended complexities created by multiple reporting regimes.

### *Federal Court*

**3.34** Agreed.

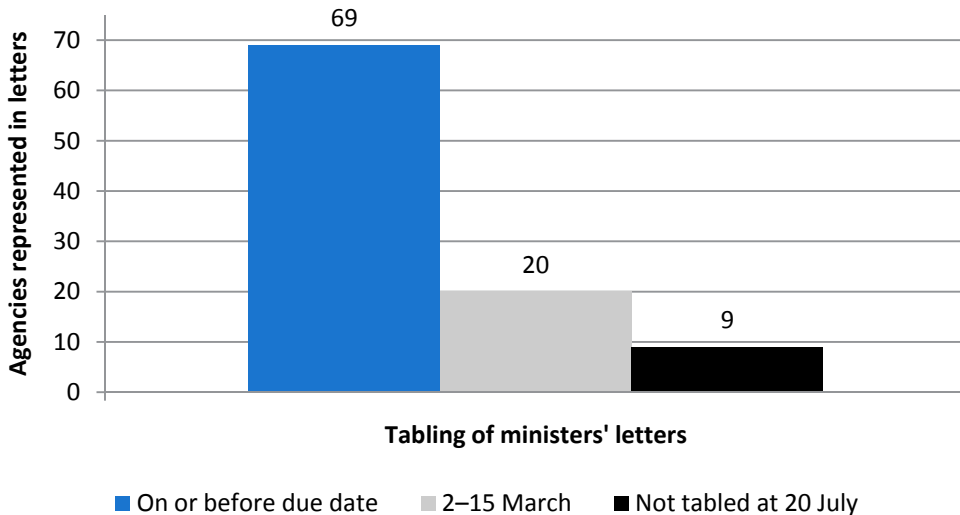
## Ministers' letters of advice

**3.35** The ministers' letters of advice create an official record in Parliament and establish relevant ministers' accountability for the completeness and accuracy of the contract listings. Ministers' letters typically reflect the publication of the contract listings for all agencies in their portfolios.

**3.36** The ANAO reviewed whether the ministers' letters of advice on Senate Order reporting requirements were tabled in the Senate by the due date. Figure 3.3 below shows the timeliness of the tabling of ministers' letters by the due date.

**Figure 3.3**

### Timeliness of ministers' letters of advice tabling



Source: ANAO analysis.

**3.37** Letters relating to 69 of the 98 agencies<sup>59</sup> were tabled in the Senate by the due date. This is a decline from the letters representing 82 agencies that were tabled on time last year, but an improvement on the preceding year.<sup>60</sup>

<sup>59</sup> A minister's letter is not tabled for the Department of the Senate as it is not administered by a minister.

<sup>60</sup> ANAO Audit Report No.06 2009–10 *Confidentiality in Government Contracts Senate Order for Departmental and Agency Contracts (Calendar Year 2008 Compliance)*, p. 45; ANAO Audit Report No.05 2008–09 *The Senate Order for Departmental and Agency Contracts (Calendar Year 2007 Compliance)*, p. 45.

Letters representing a further 20 agencies were tabled in the fortnight following the due date. The remaining ministers' letters covering nine agencies were not tabled as at 20 July 2010.

**3.38** Forty-seven agencies did not achieve full compliance with the Order's requirements but the relevant ministers' letters did not advise that full compliance had not been achieved. This indicates that some ministers' letters did not 'indicate the extent of, and reasons for, non-compliance, and when full-compliance is expected to be achieved'<sup>61</sup>, as stated in the Senate Order.

### *Excluded contracts*

**3.39** The Senate Order provides for confidential contracts to be excluded from listings in rare circumstances with notification to be included in ministers' letters. FMG 8 sets out specific categories for agencies to consider when determining whether contracts should be excluded, such as disclosure being contrary to the public interest. Three ministers' letters indicated that four agencies had excluded contracts from the listings. The ANAO examined a sample of 11 excluded contracts from two of the four agencies: the Defence Materiel Organisation (DMO) and the Australian Federal Police.<sup>62</sup> The contracts examined were appropriately excluded from the listings and the agencies followed appropriate processes to determine if contracts should be excluded from Senate Order reporting.

## Conclusion

**3.40** The ANAO's assessment of agencies' compliance with the Order found:

- the majority of contract listings were published by the due date, and of the agencies that published contract information, 83 per cent included all required contract details and 77 per cent included all required confidentiality information for every contract;
- ministers' letters representing over two-thirds of agencies were tabled by the due date; and

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<sup>61</sup> Clause 3 of the *Senate Order for Departmental and Agency Contracts*.

<sup>62</sup> The other agencies were the Department of Agriculture, Fisheries and Forestry (DAFF) and the Commonwealth Director of Public Prosecutions. DAFF subsequently advised that the reference to excluded contracts was an error.

- a sample of contracts not included in contract listings were appropriately excluded.

**3.41** These findings represent a slight improvement in the timeliness of the publication of contract listings (from 82 to 84 agencies), but a decline in the timeliness of the tabling of ministers' letters of advice (from letters representing 82 to 69 agencies), from the calendar year 2008. Agencies can improve their compliance with the Order's requirements by implementing the recommendations made in this audit and previous ANAO audits of the Order (see Appendix 2). More broadly, there are opportunities for Finance to consolidate procurement reporting requirements to enable agencies to better focus efforts to improve the quality of data reported. This would also contribute to one of the objectives of the *Reform of Australian Government Administration* to reduce internal red tape.<sup>63</sup>

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<sup>63</sup> Department of the Prime Minister and Cabinet, *Reform of Australian Government Administration: Staying Ahead of the Game*, DPMC, Canberra, 2010, p. 7.

## 4. Implementation of Previous Senate Order Audit Recommendations

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*This chapter assesses the implementation of previous Senate Order audit recommendations in four agencies.*

**4.1** The ANAO examined four agencies' implementation of recommendations made in the past five audits of the Senate Order. These recommendations identified common areas for improvement that if addressed, provide a sound basis for appropriate use of confidentiality provisions and accurate listing of contracts. The four agencies were the:

- Australian Agency for International Development (AusAID);
- Department of Agriculture, Fisheries and Forestry (DAFF);
- Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA); and
- Federal Court of Australia (Federal Court).

### **Management arrangements in the four selected agencies**

**4.2** The ANAO recognises that agencies' management arrangements for procurement activities will vary to suit their circumstances.<sup>64</sup> The four agencies examined have different arrangements to manage procurement, including contract management. One common feature across the agencies was the existence of a central procurement unit (CPU)<sup>65</sup>, with responsibility for the development and maintenance of procurement policies and procedures, and preparation of the Senate Order contract listings. Beyond these similarities, each of the four CPUs undertook activities that determined the extent to which the management of procurement was centralised within each agency.

**4.3** FaHCSIA's and the Federal Court's management of procurement activities were more centralised, while AusAID's and DAFF's were less

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<sup>64</sup> ANAO Better Practice Guide—Developing and Managing Contracts, February 2007, p. 68.

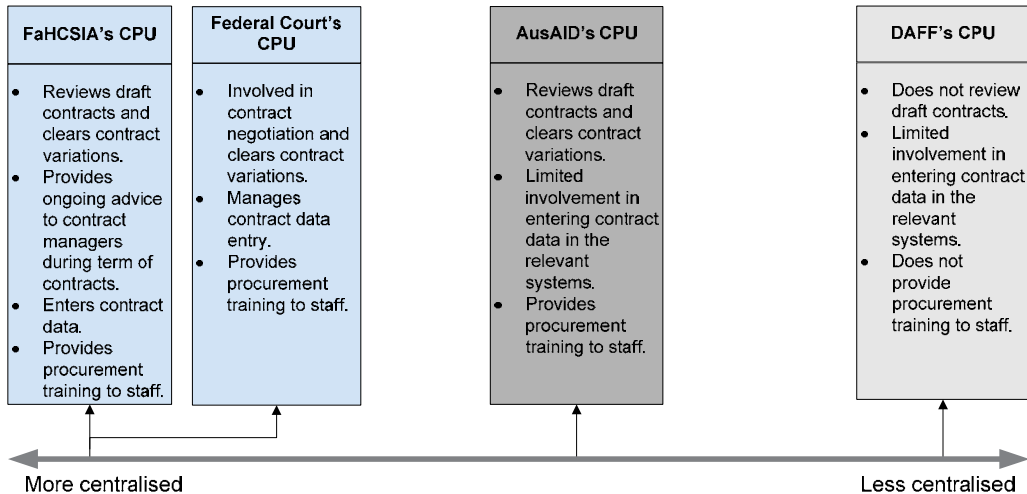
<sup>65</sup> For the purpose of this report, in the case of the Federal Court, 'central procurement unit' refers to the Federal Court's Contract Manager.



centralised. Figure 4.1 shows the roles and responsibilities of each of the four agencies' CPUs.

**Figure 4.1**

### **Roles and responsibilities of the four agencies' central procurement units**



Source: ANAO analysis.

**4.4** For agencies with a less centralised approach, it is more important that contract managers have sufficient knowledge of an agency's procurement processes and reporting obligations, including the Senate Order. When a centralised approach is used, some of this knowledge may be sourced from the CPU.

### **Previous Senate Order audit recommendations**

**4.5** Over the past five years the ANAO has made eight recommendations in its Senate Order audits (see Appendix 2). The ANAO assessed whether the four agencies selected had addressed the four common areas identified in these recommendations:

- data entry and systems controls used to support the completeness and accuracy of agency contract listings;
- adequate documentation of the reasons for agreeing to identify specified information in contracts as being confidential;
- mechanisms to review the appropriateness of decisions to include and the ongoing relevance of, confidentiality provisions in contracts; and

- guidance and training to staff related to the Senate Order.

## **Completeness and accuracy of Senate Order contract listings**

**4.6** The Order requires that an agency's contract listing is complete and accurate. The ANAO examined whether the four agencies had implemented appropriate controls, including system controls and processes for recording contract information and compiling the contract listing. In particular, the ANAO assessed, in line with previous recommendations, whether agencies had in place documented quality assurance processes for their contract listings. Ideally, agencies' systems controls and processes would include:

- reconciling an agency's Senate Order listing with other relevant information sources such as the agency's Financial Management and Information System (FMIS) or AusTender; and
- verifying the accuracy and completeness of the agency's contract listing, where appropriate, with relevant business/line areas.

### **Systems controls for contract data**

**4.7** Typically, agencies extract data for contract listings from: a contract register, FMIS, and/or AusTender. Data entry controls are essential to record and maintain accurate and up-to-date contract data within these systems. Effective data entry controls include drop-down fields or field masks, mandatory fields, and allocating responsibility for data entry. System controls are particularly important in maintaining quality contract data when responsibility for entering contract data into the relevant systems is largely devolved to individual business areas and contract managers.

**4.8** The CPUs of each agency had overall responsibility for management of the system primarily used to record and compile information for their contract listings. All four of the audited agencies had developed and implemented system controls and procedures to support the completeness and accuracy of their calendar year 2009 contract listings. These included appropriate data entry controls, the use of unique contract identifiers and processes to record and reflect contract variation data. While agencies' systems controls and the allocation of responsibility for management of Senate Order information varied, the ANAO assessed the existing controls as appropriate to the agencies' respective management arrangements.

## Quality assurance of contract listings

**4.9** In addition to the systems controls outlined above, the four agencies undertook complementary quality assurance activities to support the completeness and accuracy of their listings. In each of the agencies, the contract listing was compiled by the CPU. In three of the agencies, quality assurance processes included initial checks by the CPU on draft contract information and documents. DAFF's policies and instructions did not however, mandate procurement documents to be passed through its CPU.

**4.10** Other quality assurance activities, such as reconciling information across systems and verifying information with the relevant business/line areas, were undertaken by all four audited agencies. For example, FaHCSIA's CPU checked data from its FMIS against reports extracted from the contract register and AusTender, and where appropriate, undertook data cleansing before the final contract listing was compiled and published. DAFF's management of procurement activities is less centralised. Its CPU appropriately undertook a more comprehensive quality assurance process to compile the contract listing. All four agencies also performed additional contract data quality assurance activities throughout the year, including data cleansing and data reconciliation and verification.

**4.11** Consistent practices to collect, record and amend data are integral to maintain high-quality information for agency reporting. The maintenance of these practices is supported by the existence of documented internal procedures to be performed by staff. Three of the audited agencies, AusAID, DAFF and the Federal Court, had documented internal procedures for compilation of the calendar year 2009 contract listings.

**4.12** Overall, reflecting these findings the agencies' contract listings were largely compliant with the Senate Order listing requirements. The three agencies (AusAID, DAFF and FaHCSIA) that were directly subject to recommendations in previous audits that related to controls on the completeness and accuracy of the contract listing had implemented these recommendations.

## Documentation of reasons for including confidentiality provisions

**4.13** Documentation by agencies of their considerations and decisions regarding contractors' requests to include confidentiality provisions in contracts is important to:

- ensure adequate transparency and accountability of an agency's contract listing;<sup>66</sup> and
- assist staff to focus on the appropriateness of the use of confidentiality provisions and to make more considered assessments, particularly in agencies with less centralised procurement management arrangements.

**4.14** In previous audits some agencies provided minimal evidence in support of their assessments to include confidentiality provisions in contracts and one audit recommended that agencies adequately document reasons for agreeing to identify particular information in contracts as confidential.<sup>67</sup> The ANAO assessed whether the four agencies had developed and implemented policies designed to ensure that there is adequate documentation of the reasons for the agency's assessment of contractors' requests for specific information to be kept confidential.

**4.15** For the calendar year 2009 contract listings, none of the four agencies' procurement policies and guidance materials specified the requirement to document assessments of contractors' requests for the use of specific confidentiality provisions. Further, the ANAO found limited evidence that contract managers in the four agencies documented the reasons for the inclusion of confidentiality provisions in contracts. Similarly, CPUs did not record or maintain this information in their record management systems.

**4.16** FaHCSIA was directly involved in the 2005–06 Senate Order audit and agreed to the ANAO's recommendation that:

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<sup>66</sup> Department of Finance and Deregulation, *Guidance on Confidentiality in Procurement* (FMG 3), July 2007, p. 17.

<sup>67</sup> ANAO Audit Report No.5 2005–06, *The Senate Order for Departmental and Agency Contracts (Calendar Year 2004 Compliance)*, p. 14.

agencies ensure adequate documentation of the reasons for agreeing to identify specific information in contracts as being confidential.<sup>68</sup>

**4.17** In response to the recommendation, FaHCSIA stated that ‘specific mention will be made of the need to document reasons in relation to confidentiality assessments.’<sup>69</sup> During the course of this audit FaHCSIA modified its *Procurement Policy* to reflect the 2005–06 recommendation.

**4.18** DAFF recently revised its record-keeping checklist to incorporate the requirement to document reasons why specific confidentiality provisions have been agreed to by the department. Further, DAFF advised that it expects the use of this revised checklist will be mandated through amendments to its Chief Executive Instructions (CEI).

**4.19** In summary, consistent with previous Senate Order audits, there was limited evidence that the four agencies documented their considerations of contractors’ requests to include confidentiality provisions in contracts. Relevant documentation need not be lengthy but should address the significant factors that were taken into account in the decision to include such provisions. Documentation practices could include for example, a contract manager’s written response to a supplier’s request for information to be kept confidential, or a file note recording consideration of a supplier’s request for information to be kept confidential. Such practices would assist agencies to make more considered decisions to include confidentiality provisions in contracts.

## Confidentiality provision review processes

**4.20** In previous Senate Order audits, the ANAO identified that agencies had not consistently reviewed the inclusion of confidentiality provisions in contracts. Reviews are particularly important during contract preparation when assuring the appropriateness of confidentiality provisions. Review may also be used during the term of contracts to assess the ongoing relevance of confidentiality provisions. In some instances confidentiality provisions are no longer valid once certain milestones stipulated in the contract are met. The ANAO recommended in the 2008–09 Senate Order audit, that agencies:

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<sup>68</sup> *ibid.*, pp. 46–47.

<sup>69</sup> *ibid.*, p. 47.

implement review measures to assess the appropriateness of decisions to include confidentiality provisions in contracts and provide suitable feedback to staff involved in procurement.<sup>70</sup>

**4.21** The Federal Court was directly involved in the 2008–09 Senate Order audit and subsequently implemented review measures to assess the appropriateness of the inclusion of confidentiality provisions at the draft contract stage. AusAID's, FaHCSIA's<sup>71</sup> and the Federal Court's CEIs or procurement policies require draft contracts to be reviewed by the agency's CPU.<sup>72</sup> Further, FaHCSIA's and the Federal Court's CPUs review confidentiality provisions at this time.

**4.22** The ANAO considers FaHCSIA's review process of draft contracts to be better practice as the CPU:

- uses a 'Contract Review Checklist' when undertaking reviews of contracts. This checklist includes a section which stipulates that requests for confidential information from service providers must meet the Confidentiality Test criteria, as set out in Financial Management Guidance (FMG) No 3;
- advises the relevant contract manager when they have identified issues with the use of confidentiality provisions. This is also the main feedback mechanism to business/line area staff regarding procurement and the requirements of the Order; and
- liaises closely with, and seeks expert procurement advice from, FaHCSIA's legal unit.

**4.23** Unlike the other three agencies, AusAID's contract templates do not provide for the use of confidentiality provisions. When considering the use of confidentiality provisions contract managers are required to consult with AusAID's legal advisers to develop a non-standard contract. To provide an

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<sup>70</sup> ANAO Audit Report No.5 2008–09, *The Senate Order for Departmental and Agency Contracts (Calendar Year 2007 Compliance)*, p. 21.

<sup>71</sup> FaHCSIA's revised *Procurement Policy* launched in February 2010, for the first time mandated these reviews.

<sup>72</sup> In the case of the Federal Court, the Contract Manager is heavily involved in the contract negotiation stage of national contracts and within this role advises contractors that requests for specific confidentiality provisions must meet the Confidentiality Test in FMG 3.

increased level of assurance of the appropriateness of the use of confidentiality provisions, the ANAO suggests that AusAID's CPU start assessing confidentiality provisions as part of existing reviews of draft contracts, in cases where non-standard contracts have included the use of confidentiality provisions.

**4.24** DAFF's CPU does not review draft contracts or the inclusion of confidentiality provisions. Contract managers are encouraged to seek advice from its legal unit if contracts are to include specific confidentiality provisions. The legal unit provides sufficient guidance to contract managers during contract drafting.

**4.25** None of the audited agencies had implemented mechanisms to review the use of confidentiality provisions during a contract's term. Although, FaHCSIA has advised it is currently developing a trigger in its FMIS for contract managers to review and report on the confidentiality provisions within the contract and determine if they remain relevant.

**4.26** Deliberations on the use of confidentiality provisions may be strengthened by an appropriate level of review at the contract preparation stage. Depending on each agency's procurement management arrangements, these reviews could be undertaken by the CPU or legal unit.

## Staff awareness of Senate Order requirements

**4.27** Staff awareness of their obligations regarding the Senate Order requirements supports the appropriate use and reporting of confidentiality provisions. In previous audits the ANAO recommended that agencies raise staff awareness levels to better meet the requirements of the Order, by:

- embedding in their relevant policies and practices FMG 3 guidance and instructions; and
- providing suitable training and guidance to staff (particularly staff responsible for the negotiation of contracts and compilation of the

contract listings) on these policies and practices and the requirements of the Order.<sup>73</sup>

**4.28** AusAID, DAFF and FaHCSIA were involved in the three Senate Order audits which contained these recommendations. As indicated below, FaHCSIA fully implemented, and AusAID and DAFF partially implemented, the recommendations.

## **Policy and guidance material**

**4.29** All four audited agencies had CEIs or other forms of guidance and procedures on procurement. The extent to which these materials include information regarding the requirements of the Order and, in particular FMG 3 and the Confidentiality Test criteria, varied. DAFF's and FaHCSIA's procurement policies and guidelines contained detailed information on the Senate Order requirements and the Confidentiality Test. AusAID's CEIs, contracting policies and guidelines, however, did not mention the Senate Order reporting requirements or contain the Confidentiality Test. Staff are likely to have a greater understanding of their obligations regarding the use of confidentiality provisions if AusAID included the requirements of the Order in its policy and guidance material.

**4.30** The Federal Court's procurement policy and guidance documents contained limited details about the Order and FMG 3. The Federal Court's management arrangements, together with the small number of contracts containing confidentiality provisions it manages, do not necessitate the development and dissemination of detailed policy and guidance documents in these regards.

**4.31** DAFF made significant improvements to its guidance since it was audited in 2006–07. The 2006–07 audit observed as better practice the inclusion of detailed guidance in some agencies' contract registers on the use and recording of confidentiality. DAFF recently rolled out enhancements to the guidance in its contract register and has developed a procurement information sheet on the use of confidentiality provisions for DAFF contract managers.

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<sup>73</sup> ANAO Audit Report No.11 2005–06, *The Senate Order for Departmental and Agency Contracts (Calendar Year 2004 Compliance)*; ANAO Audit Report No.5 2006–07, *The Senate Order for Departmental and Agency Contracts (Calendar Year 2005 Compliance)*; and ANAO Audit Report No.6 2009–10, *The Senate Order for Departmental and Agency Contracts (Calendar Year 2008 Compliance)*.



DAFF's guidance to staff is now better aligned with the ANAO's recommendations.

### *Tender documentation*

**4.32** It is important for potential tenderers to be informed upfront about the Australian Government's procurement accountability requirements. In previous Senate Order audits, the ANAO identified as better practice Request For Tender (RFT) documentation that clearly stipulated that the confidentiality criteria contained in FMG 3<sup>74</sup> are relevant to any decisions on issues of confidentiality.<sup>75</sup>

**4.33** DAFF's, FaHCSIA's and the Federal Court's standard RFT documents clearly state that suppliers' requests for confidentiality are assessed by the agency in accordance with FMG 3. AusAID's standard tendering documents do not specifically refer to the use of the confidentiality criteria disseminated by Finance for treating contracting information as confidential. The ANAO suggests that AusAID outline in its RFT document that requests for specific confidentiality provisions will be assessed in accordance with FMG 3.

**4.34** FaHCSIA requires tenderers seeking confidentiality provisions to specifically identify the information in the RFT and articulate the reasons for the information to be kept confidential. The ANAO considers FaHCSIA's model better practice as it assists agency staff to make more considered assessments of the appropriateness of the use of confidentiality provisions.

## **Training**

**4.35** Agencies use training to increase staff awareness of the Order and consequently, improve the accuracy and completeness of their contract listings. Each of the audited agencies provided procurement training to relevant staff in business/line areas. AusAID's, FaHCSIA's and the Federal Court's procurement training courses and forums appropriately outlined the Senate Order reporting requirements, including the Confidentiality Test and that for confidential information to be classified correctly, it must meet the Test criteria.

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<sup>74</sup> Department of Finance and Deregulation, *Guidance on the Confidentiality of Contractors' Commercial Information* (FMG 3), February 2003.

<sup>75</sup> ANAO Audit Report No.5 2006–07, *The Senate Order for Departmental and Agency Contracts (Calendar Year 2005 Compliance)*, p. 32.

Further, FaHCSIA's CPU gives advice to staff, mainly via email, regarding the use and management of confidentiality provisions in contracts.

**4.36** DAFF however, provided minimal training to staff regarding contract confidentiality, particularly in relation to the Order. The department would benefit from providing information to staff in these regards as part of its procurement training. The training would increase staff awareness of the requirements of the Order and enhance the quality of DAFF's Senate Order data.

## Conclusion

**4.37** Overall, the four agencies selected for the follow-up component of the audit had generally made good progress in implementing recommendations related to data entry and systems controls, and guidance and training for staff related to the Order.

**4.38** The agencies had made less progress in implementing recommendations pertaining to the considered use of confidentiality provisions in contracts, through adequate supporting documentation and reviews at the time of contract preparation. There are a range of practices agencies may adopt to support these considerations, such as:

- including a section in each contract that contains confidentiality provisions, indicating the location of the confidential information in the contract and the reasons this information is considered to be confidential (see paragraphs 2.9 to 2.11);
- substantiating the reasons for agreeing to contractors' requests to include confidentiality provisions through documentation practices (see paragraphs 4.13 to 4.19); and
- assessing the appropriateness of confidentiality provisions as part of reviews of draft contracts (see paragraphs 4.20 to 4.26).

**4.39** Agencies should tailor these suggested practices to fit with their procurement management arrangements.

## Recommendation No.2

**4.40** The ANAO recommends that agencies assess whether their contract preparation processes support adequate consideration of the appropriate use of confidentiality provisions in contracts.

## **Agencies' responses**

### *AusAID*

**4.41** AusAID agrees with ANAO's Recommendation No.2. AusAID is committed to improving its business processes and will review its contracting practices to assess if confidentiality provisions in its contracts are adequately supported.

### *DAFF*

**4.42** Agreed.

### *FaHCSIA*

**4.43** Agree. FaHCSIA regularly reviews all components of procurement and contract management policy, procedures, guidance and templates. In addition, with a centralised Procurement Advisory Unit, FaHCSIA considers that it has adequate processes in place to support the appropriate use of confidentiality provisions in contracts.

### *Finance*

**4.44** Agreed. Finance is revising its guidance to assist agencies to better understand their reporting obligations. Further, the potential for use of standard terms and conditions for procurements under \$80,000 to improve compliance is being considered by Finance. Using standard terms and conditions would enable agencies to more accurately and efficiently report on confidentiality clauses in such contracts.

### *Federal Court*

**4.45** Agreed.

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Ian McPhee

Auditor-General

Canberra ACT

22 September 2010



# Appendices



## Appendix 1: Agency responses

The four agencies subject to the follow-up component of the audit, together with the Department of Finance and Deregulation, were invited to comment on the proposed audit report in accordance with the provision of section 19 of the *Auditor-General Act 1997*. Appendix 1 contains the comments received.

The agencies' responses to each of the recommendations have been included in the body of the report under the sub-heading 'Agencies' responses' directly following each recommendation.

### Australian Agency for International Development

AusAID found the audit to be beneficial. The audit identified a number of areas where the Agency can improve its systems and practices.

ANAO made several specific suggestions about enhancing AusAID's application of confidentiality provisions through contract review processes, improved policies and guidelines, and changes to the Agency's standard tendering documents. AusAID accepts and will now begin working on these suggestions.

### Department of Agriculture, Fisheries and Forestry

The department supports the recommendations in the proposed audit report and notes that the recommendation to consolidate procurement reporting obligations will reduce the reporting burden on agencies. The proposed change may assist external stakeholders to better understand the government's contractual activities and avoid the confusion caused by the numerous reporting mechanisms which occur at different stages through the contract life cycle.

The department will carefully consider the audit recommendations, findings and conclusions to ensure that we continue to improve our contract preparation and management processes, including the appropriate use and reporting of confidentiality clauses. The report offers useful guidance on better practices in other agencies and the department will take the opportunity to review and, if appropriate, implement those practices into our processes.

I acknowledge that the department has a more decentralised model in comparison to other agencies and, as a result, we face greater challenges to equip officers involved in contract development and management with the

necessary knowledge and skills. To meet these challenges we will continue to improve our processes and support networks including amending our standard request for tender and contract templates to provide further guidance on the appropriate use of confidentiality clauses, and similarly we will review the need for structured training.

## **Department of Families, Housing, Community Services and Indigenous Affairs**

Overall, FaHCSIA considers that this report is well targeted and has made sound recommendations which the Department supports. In addition, FaHCSIA looks forward to being party to consultations as part of implementing these recommendations.

It is pleasing that FaHCSIA's policy and guidance material as well as its review practices were found to reflect better practice. In addition to this, FaHCSIA is currently enhancing its financial management information system to further strengthen its policies, procedures and guidance through electronic governance and auditable workflows.

FaHCSIA notes paragraph 26 of the report and will review its processes to identify where improvements can be made.

## **Department of Finance and Deregulation**

The multiple and overlapping procurement contract reporting requirements imposed on Australian Government agencies create unintended complexities and unnecessary red tape. Since 2005, Finance has proposed that AusTender should be the sole procurement reporting requirement for Australian Government Agencies. AusTender provides searchable reports on all procurement contracts over \$10,000 within six weeks of the contract being entered into. As such, AusTender provides superior timeliness, transparency, accountability and useability to the Senate Order's biannual written report on contracts over \$100,000. Finance will continue to work with Australian Government agencies, the ANAO and relevant Parliamentary committees to rationalise procurement reporting requirements and to improve the accuracy and completeness of the procurement contract information available through AusTender.

Finance has published a range of guidance materials to assist agencies to comply with the variety of procurement and contract reporting obligations. As each reporting obligation has different elements, albeit sourced from the same



data, the guidance materials differ in purpose and coverage. Finance is updating and consolidating the guidance material to better enable agencies to understand their different procurement and contract reporting requirements. AusTender also has a function that enables the Senate Order to be published through AusTender.

## **Federal Court of Australia**

The Federal Court of Australia acknowledges the findings of the ANAO audit, and it agrees with the recommendations and suggestions proposed in the report.

## Appendix 2: Recommendations made in previous five Senate Order audits

Year of audit	Follow-up agencies audited	Recommendations
2005–06	FaHCSIA	<ul style="list-style-type: none"> <li>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.</li> <li>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.</li> <li>The ANAO recommends that agencies ensure adequate documentation of the reasons for agreeing to identify specified information in contracts as being confidential.</li> </ul>
2006–07	AusAID DAFF	<ul style="list-style-type: none"> <li>The ANAO recommends that agencies improve the accuracy and completeness of their contract listings by: <ul style="list-style-type: none"> <li>implementing controls to assist in confirming that contract listings are complete and accurate. This could include, for example, reconciling the contract listing details to other relevant sources of information, such as FMIS records or to AusTender; and</li> <li>developing quality assurance processes to improve the accuracy of the contract listing.</li> </ul> </li> <li>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.</li> </ul>
2007–08	-	<ul style="list-style-type: none"> <li>The ANAO recommends that agencies improve the accuracy and completeness of their Internet listings by: <ul style="list-style-type: none"> <li>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</li> <li>developing quality assurance processes to improve the accuracy of the Internet listing.</li> </ul> </li> </ul>

Year of audit	Follow-up agencies audited	Recommendations
2008–09	Federal Court of Australia	<ul style="list-style-type: none"> <li>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.</li> </ul>
2009–10	-	<ul style="list-style-type: none"> <li>To assist agencies to meet the requirements of the next and any subsequent Senate Orders, the ANAO recommends that they:               <ul style="list-style-type: none"> <li>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</li> <li>provide suitable training and guidance to staff on these policies and procedures.</li> </ul> </li> </ul>

Source: ANAO.

## Appendix 3: Contract analysis sample

1. Table A 1 shows the number of contracts and the number of contracts listed as containing confidentiality provisions in agencies' Senate Order contract listings for calendar year 2009 by agency size category.<sup>76</sup>

**Table A 1**

### Reported use of confidentiality provisions in 2010

Categories	Agencies	Contracts included in calendar year 2009 Senate Order listings	Contracts listed as containing confidentiality provisions
Material–Departments of State	19	23 483	1356 (6%)
Material–Other	23	15 241	1011 (7%)
Small	61	1810	325 (18%)
<i>Sub-total</i>	<i>103</i>	<i>40 534</i>	<i>2692 (7%)</i>
Water Entitlements	1	1392	1392 (100%)
<b>Total</b>	<b>103<sup>77</sup></b>	<b>41 926</b>	<b>4084 (10%)</b>

Source: ANAO analysis of agencies' contract listings.

2. Agencies' contract listings were stratified by agency size category (Material–Departments of State, Material–Other and Small). The ANAO selected a random sample of 165 of the 4084 contracts listed as containing confidentiality provisions from each category. The proportion of contracts selected from each category reflected the proportion of the total number of contracts reported to contain confidentiality provisions managed by agencies in each category.<sup>78</sup>

<sup>76</sup> The assessment of materiality is based on the audited financial statements of those entities for the financial year. 'Material entities comprise 99% of the revenues, expenses, assets and liabilities of Australian Government bodies, including bodies controlled by the Commonwealth, such as those under the CAC Act that are not part of the Commonwealth itself...Departments of State are material agencies, regardless of their size, on the basis that they are "material in nature".' Source: Department of Finance and Deregulation, *List of Australian Government Bodies and Governance Relationships*, 3<sup>rd</sup> edn, Australian Government, Canberra, 2009, p. 635.

<sup>77</sup> The Department of the Environment, Water, Heritage and the Arts is included in the Material–Department of State and Water entitlements categories.

<sup>78</sup> Small agencies, for example, manage 12 per cent of the contracts reported by all agencies as containing confidentiality provisions therefore 12 per cent of the contract analysis sample were contracts managed by small agencies.

Initial sampling was skewed by the large number of water entitlements contracts reported to contain confidentiality provisions, therefore water entitlements contracts were removed from the Material–Department of State category and a separate random sample of water entitlements contracts was selected (see Table A 2).

**Table A 2**

**Contract analysis sample**

Categories	Agencies	Sample of contracts listed as containing confidentiality provisions	
	No.	No.	%
Material–Departments of State	12 (of 19)	72 (of 1356) <sup>79</sup>	5
Material–Other	11 (of 23)	63 (of 1011)	6
Small	10 (of 61)	20 (of 325)	6
<i>Sub-total</i>	<i>33 (of 103)</i>	<i>155 (of 2692)</i>	<i>6</i>
Water Entitlements	1 (of 1)	10 (of 1392)	1
<b>Total</b>	<b>33 (of 103)</b>	<b>165 (of 4084)</b>	<b>4</b>

Source: ANAO.

3. The ANAO examined 150 of the requested sample of 165 contracts that agencies indicated contained confidentiality provisions in their contract listings. The Department of Education, Employment and Workplace Relations (DEEWR) managed ten of the requested contracts. Concurrent with the ANAO's contract request, DEEWR was in the process of reviewing the confidentiality provisions for all contracts it listed as containing confidentiality provisions (3126 contracts) in response to the calendar year 2008 Senate Order compliance audit. Following the review, DEEWR issued a revised listing with seven contracts listed as containing such provisions. As none of the requested contracts were listed as containing confidentiality provisions in the revised listing, the ANAO did not examine these contracts. An additional five 'contracts' listed in agencies' contract listings were found to be non-contractual arrangements, such as court settlements

<sup>79</sup> The Department of Climate Change did not publish a contract listing for the calendar year 2009. The ANAO included the 87 contracts reported to be operating in 2009 from its calendar year 2008 listing.

and agreements between agencies and therefore were also not examined.<sup>80</sup>

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<sup>80</sup> This assessment is based on the FMG 8 definition of contracts which does not consider agency agreements to be contracts. Department of Finance and Deregulation, *Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)* (FMG 8), January 2004, p. 12.

## Appendix 4: The Confidentiality Test

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

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

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

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