



Our Ref: 4868-04

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Standing Committee on Estimates and  
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Dear Mr Warner

**RESEACH CONDUCTED BY THE AUDITOR GENERAL AS DISCUSSED WITH THE  
COMMITTEE ON 16 MARCH**

At the Committee's hearing with the Auditor General on 16 March, the Chair asked the Auditor General if he was "... aware of anywhere in the world where there is constant disclosure regimes around government contracts so that as they are signed, they are made public..." (p10 of the transcript).

Mr Murphy advised that he was not specifically aware of such regimes, though he was familiar with an arrangement whereby the Australian National Audit Office had an annual role of reviewing government contracts for clauses that were overly restrictive and then publishing the results. Mr Murphy offered to undertake some research into the issue.

Our research indicates that the types of arrangements mentioned by the Chair do exist in some jurisdictions. For instance:

- "Some countries now publish contracts proactively, including the federal governments of Colombia, the United Kingdom, Slovakia, and Georgia"<sup>1</sup>
- The UK government has required since January 2011 that all new central government contracts be published in full<sup>2</sup>.

Contract disclosure in NSW and Victoria also goes some of the way envisaged by the Chair.

In NSW the *Government Information (Public Access) Act 2009* (GIPA Act) requires agencies to "make the government information that is its 'open access information' publically available unless there is an overriding public interest against disclosure of the information" (sec. 6). Open access information includes the "agency's register of government contracts" (sec. 18).

The GIPA Act applies to all public sector agencies. All contracts with a value of \$150 000 and upwards must be included in the contracts register.

<sup>1</sup> Publishing Government Contracts: Addressing Concerns and Easing Implementation - CGD Working Group on Contract Publication - 2014

<sup>2</sup> Procurement and contracting transparency requirements: Guidance. Published by the Cabinet Office, March 2011

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Division 5 of the GIPA Act specifies the information that must be entered into an agency's government contracts register depending on whether the contracts are classified as class 1, class 2 or class 3 contracts (see Attachment 1). The contracts register must include a copy of all class 3 contracts. However, this requirement is subject to some confidentiality matters in sec. 32.

A Premier's Memorandum (No. 2007-01) provides guidance to agencies on contract disclosure obligations.

In Victoria there is a *Contract Management and Contract Disclosure Policy* issued by the Victorian Government Purchasing Board. It includes mandatory requirements for disclosing contracts for "all Victorian Government departments and any public bodies (referred to as 'organisations') that are subject to the supply policies of the Victorian Government Purchasing Board (VGPB)".

The policy (see Attachment 2) requires organisations to disclose key details for contracts exceeding \$100 000 on a contract publishing system. For contracts exceeding \$10 million the policy states:

*Organisations must disclose full contract information for contracts with an estimated value exceeding \$10 million (including GST) on a contract publishing system. Only trade secrets or genuinely confidential business information will be withheld from voluntary disclosure, along with material which if disclosed would seriously harm the public interest. The Government will be guided by the criteria established by Parliament in the Freedom of Information Act 1982.*

*Organisations are to develop protocols and procedures for approving exemptions from disclosure.*

Full contract information includes a copy of the contract.

Mr Murphy, in his evidence to the Committee, referred to the work of the Australian National Audit Office (ANAO). The ANAO carries out annual audits of confidentiality provisions in contracts as a consequence of the 2001 *Senate Procedural Order of Continuing Effect: Departmental and Agency Contracts*.

The Senate Order has its origins in a view that the use of confidentiality clauses in government contracts has the potential to impede scrutiny and accountability for government expenditure.

The Senate Order requires Ministers to confirm that agencies have published on their websites, contract lists containing the required information (See Attachment 2 for an example of a contract list). The Senate Order also requests the Auditor General to annually examine a number of the contracts reported to contain confidentiality provisions and to report any inappropriate use of these provisions. The most recent report was on 18 September 2014 (ANAO Report No.1 2014-15 Performance Audit).

I note that the Finance and Public Administration References Committee has recently recommended that the ANAO's annual audit be phased-out. This phase-out process will involve two biennial reports. This recommendation may have been in response to the Commonwealth Auditor General's submission to the inquiry where he stated:

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*Since 2011 the ANAO's audits have not made any new recommendations regarding the inappropriate use of confidentiality provisions. As access by Parliament and the public to Australian Government contract information is now less likely to be impeded by unsupportable claims of commercial sensitivity or confidentiality, I consider that the need for specific annual Senate Order audits has diminished.*

I hope this information will be of assistance. Should you require further information, please contact me on 6557 7543.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Glen Clarke', with a long horizontal flourish extending to the right.

GLEN CLARKE  
DEPUTY AUDITOR GENERAL  
24 March 2015

Attach (2)

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## Attachment 1

### Government Information (Public Access) Act 2009 No 52 [NSW]

#### Division 5 Government contracts with private sector

##### 27 Register of government contracts valued at \$150 000 or more

- (1) An agency is to keep a register of government contracts (its **government contracts register**) that records information about each government contract to which the agency is a party that has (or is likely to have) a value of \$150 000 or more (**class 1 contracts**).
- (2) Information about a class 1 contract must be entered in the register within 45 working days after the contract becomes effective.
- (3) A contract **becomes effective**:
  - (a) when it is entered into by or on behalf of the agency concerned, or
  - (b) if the contract contains a provision to the effect that one or more conditions are to be met before the obligations of the parties under the contract are enforceable - when the condition or conditions have been met (and not when the contract is entered into by the agency).

##### 28 Value of contract

The **value** of a contract is whichever of the following values is appropriate to the kind of contract concerned:

- (a) the total estimated value of the project,
- (b) the total estimated value of the goods or services over the term of the contract,
- (c) the value of the real property transferred,
- (d) the rent for the term of the lease.

##### 29 Information to be entered in register—class 1 contracts

The following information about a class 1 contract is to be entered in the government contracts register:

- (a) the name and business address of the contractor,
- (b) particulars of any related body corporate (within the meaning of the *Corporations Act 2001* of the Commonwealth) in respect of the contractor, or any other private sector entity in which the contractor has an interest, that will be involved in carrying out any of the contractor's obligations under the contract or will receive a benefit under the contract,
- (c) the date on which the contract became effective and the duration of the contract,
- (d) particulars of the project to be undertaken, the goods or services to be provided or the real property to be leased or transferred under the contract,
- (e) the estimated amount payable to the contractor under the contract,
- (f) a description of any provisions under which the amount payable to the contractor may be varied,
- (g) a description of any provisions with respect to the renegotiation of the contract,
- (h) in the case of a contract arising from a tendering process, the method of tendering and a summary of the criteria against which the various tenders were assessed,
- (i) a description of any provisions under which it is agreed that the contractor is to receive payment for providing operational or maintenance services.

### **30 Additional information for class 2 contracts**

(1) Additional information is required to be entered in the government contracts register for class 1 contracts to which any of the following paragraphs applies (**class 2 contracts**):

- (a) there has not been a tender process, the proposed contract has not been made publicly available and the terms and conditions of the contract have been negotiated directly with the contractor,
- (b) the proposed contract (whether or not made publicly available) has been the subject of a tendering process and the terms and conditions of the contract have been substantially negotiated with the successful tenderer,
- (c) the obligations of one or more parties under the contract to maintain or operate infrastructure or assets could continue for 10 years or more,
- (d) the contract involves a privately financed project as defined by guidelines published by the Treasury (as in force from time to time),
- (e) the contract involves a transfer of a significant asset of the agency concerned to another party to the contract in exchange for the transfer of an asset to the agency.

(2) The additional information required to be entered in the register for class 2 contracts is as follows:

- (a) particulars of future transfers of significant assets to the State at zero, or nominal, cost to the State, including the date of their proposed transfer,
- (b) particulars of future transfers of significant assets to the contractor, including the date of their proposed transfer,
- (c) the results of any cost-benefit analysis of the contract conducted by the agency,
- (d) the components and quantum of the public sector comparator if used,
- (e) if relevant, a summary of information used in the contractor's full base case financial model (for example, the pricing formula for tolls or usage charges),
- (f) if relevant, particulars of how risk, during the construction and operational phases of a contract to undertake a specific project (such as construction, infrastructure or property development), is to be apportioned between the parties, quantified (where practicable) in net present-value terms and specifying the major assumptions involved,
- (g) particulars as to any significant guarantees or undertakings between the parties, including any guarantees or undertakings with respect to loan agreements entered into or proposed to be entered into,
- (h) particulars of any other key elements of the contract.

### **31 Register to include copy of class 3 contract**

If a class 2 contract has (or is likely to have) a value of \$5 million or more (a **class 3 contract**), the register must include a copy of the class 3 contract.

### **32 Confidential information not required to be included in register**

(1) A requirement of this Division to include information or a copy of a contract in the government contracts register does not require the inclusion of:

- (a) the commercial-in-confidence provisions of a contract, or
- (b) details of any unsuccessful tender, or
- (c) any matter that could reasonably be expected to affect public safety or security, or

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- (d) a copy of a contract, a provision of a contract or any other information in relation to a contract that is of such a nature that its inclusion in a record would result in there being an overriding public interest against disclosure of the record.

(2) If an agency does not include a copy of a contract in the register, or includes only some of the provisions of a contract in the register, because of this section, the agency must include in the register:

- (a) the reasons why the contract or those provisions have not been included in the register, and
- (b) a statement as to whether it is intended that the contract or those provisions will be included in the register at a later date and, if so, when it is likely that they will be included, and
- (c) if some but not all of the provisions of the contract have been included in the register, a general description of the types of provisions that have not been included.

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## **Attachment 2**

### **Victorian Government Purchasing Board Contract management and contract disclosure policy Version 1 (February 2013)**

*(Extract)*

#### **Contract disclosure**

Contract disclosure, including disclosure of variations, ensures high standards of probity and transparency in government procurement.

#### **Mandatory requirements**

##### **Contract disclosure**

Organisations must disclose the key details for contracts (excluding contracts under head agreements), with a total estimated value exceeding \$100 000 (including GST) within 60 days of the award of a contract on a contract publishing system.

##### **Disclosure relates to:**

individual procurement contracts; and head agreements such as state purchase contracts (SPC) and sole entity purchase contracts (SEPC);

##### **Key details for disclosure include:**

###### **Contract details:**

contract number;  
contract title;  
type of contract;  
total estimated value of contract or SPC/SEPC;  
start date and current term of contract; and category.

###### **Organisation details:**

organisation;  
contact person;  
contact number; and email address.

###### **Supplier details:**

name of supplier; and Australian Business Number or Australian Company Number.

Organisations must disclose full contract information (includes a copy of the contract) for contracts with an estimated value exceeding \$10 million (including GST) on a contract publishing system. Only trade secrets or genuinely confidential business information will be withheld from voluntary disclosure, along with material which if disclosed would seriously harm the public interest. The Government will be guided by the criteria established by Parliament in the *Freedom of Information Act 1982*.

Organisations are to develop protocols and procedures for approving exemptions from disclosure.

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