

CHAPTER 1

BACKGROUND

Introduction

1.1 In June 2001, the Senate agreed to a procedural order of continuing effect for the production of lists of departmental and agency contracts (Senate order).¹ In effect, the Senate order requires departments and agencies to publish on the Internet lists of contracts to the value of \$100 000 or more with statements of reasons for any confidentiality clauses or claims.² The full Senate order is set out at Appendix 1.

Referral

1.2 As currently drafted, paragraph (7) of the Senate order provides:

The Finance and Public Administration Committee consider the ongoing operation of the order and report on development from time to time.

1.3 On 10 December 2013, the Senate, noting paragraph (7) of the Senate order, referred the following matter to the Senate Finance and Public Administration References Committee (committee) for inquiry and report by 14 May 2014:

The operation of the Senate order for departmental and agency contracts, including:

- a) developments in the online reporting on contracts (including AusTender) which may be relevant to enabling departments and agencies to meet the requirements of the order;
- b) the role of, and reporting by, the Auditor-General under the order; and
- c) any other related matters.³

Background to the Senate order⁴

1.4 The Senate order was introduced in response to an increase in the use of outsourcing arrangements for operations, which had been previously provided solely by government. The outsourcing of functions resulted in a rapid expansion of government contracts and a simultaneous rise in claims that government contracts, or

1 See, *Journals of the Senate*, No. 192, 20 June 2001, pp 4358-4359.

2 *Oggers' Australian Senate Practice*, H. Evans and R. Laing, Eds, 13th Edition, 2012, p. 562.

3 *Journals of the Senate*, No. 9, 10 December 2013, p. 307.

4 The information in this section is drawn from previous committee reports on the development and operation of the Senate order. See, Senate Finance and Public Administration References Committee, *Commonwealth contracts: a new framework for accountability. Final report on the inquiry into the mechanism for providing accountability to the Senate in relation to government contracts*, September 2001, p. 3; Senate Finance and Public Administration References Committee, *Departmental and agency contracts: Report on the first year of operation of the Senate order for the production of lists of departmental and agency contracts*, December 2002, p. 1.

part thereof, were confidential, in particular commercially confidential. The use of confidentiality clauses in government contracts has the potential to impede scrutiny and accountability of government expenditure.

1.5 The Senate order is designed to address two concerns:

- that significant contracts for services or goods should be available and accessible for scrutiny; and
- that confidentiality provisions should be valid, appropriate and warranted in application and usage.

Context of inquiry

1.6 Prior to the referral of the inquiry, the chair received letters from the Minister for Finance (Minister), Senator the Hon Mathias Cormann, and the Auditor-General, Mr Ian McPhee PSM, regarding the operation of the Senate order. The committee has published both letters on its website.⁵

Letter from the Minister for Finance

1.7 In December 2013 the Minister wrote to the chair seeking the committee's support to update the whole-of-government guidance for agencies to meet the Senate order. The guidance – Financial Management Guidance No. 8 *Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts* (also referred to as 'FMG 8') – is issued by the Department of Finance (Finance) and was last updated in 2004.

1.8 The Minister referred to the Australian National Audit Office's (ANAO) most recent annual review of the Senate order, which suggested the whole-of-government guidance be updated to enable agencies to reference AusTender when complying with the Senate order. The Minister explained:

This [update to the whole-of-government guidance] would reduce duplication in procurement contract reporting by agencies.

...

The proposed update to guidance will reflect efficiencies and process changes since the 2004 revisions [to the guidance]. Specifically, agencies will now provide a link to an AusTender report for the relevant reporting period while grants, non-procurement contracts and any other contracts not captured by AusTender would still be reported.⁶

5 Senate Finance and Public Administration References Committee website, at: www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Senate_order.

6 Correspondence from Minister for Finance, Senator the Hon Mathias Cormann, to Senator the Hon Kate Lundy, Chair, Senate Finance and Public Administration References Committee, dated 2 December 2013.

AusTender

1.9 AusTender is the government's procurement information system, providing a central web-based facility for:

- publishing of all publicly available government Approaches to Market (ATMs), Annual Procurement Plans (APPs), Multi-Use Lists (MULs), standing offer arrangements and contracts awarded;
- electronic distribution of ATM documentation and addenda; and
- secure lodgement of tender responses.⁷

1.10 The Commonwealth Procurement Rules require *Financial Management and Accountability Act 1997* (FMA Act) agencies to report procurement contracts valued at or above \$10 000 on AusTender within 42 days of entering the arrangement.⁸

Whole-of-government guidance

1.11 Finance publishes guidance to assist agencies to meet the Senate order requirements.⁹ This guidance includes:

- background to the Senate order and the government's policy on compliance with the order;¹⁰
- a process chart for compliance with the Senate order;
- details on the format and content of internet listing for the purposes of the Senate order, including templates for agencies to use for the internet listing;
- an explanation of what constitutes a 'contract', including discussion on what are 'probably'¹¹ and 'probably not'¹² contracts for the purposes of the Senate order; and

7 AusTender, Help webpage, at: www.tenders.gov.au/?event=public.help.list (accessed 9 April 2014).

8 Department of Finance, *Submission 2*, p. 3. See also Commonwealth Procurement Rules, 1 July 2012, paragraph 7.16.

9 Financial Management Guidance No. 8 *Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)*, January 2004, at: www.finance.gov.au/publications/fmg-series/08-listing-of-contract-details.html (accessed 9 April 2014).

10 The government's policy states that compliance with the requirements of the Senate order is subject to: guidelines on the scope of public interest immunity to determine whether information regarding individual contracts will be provided; non-disclosure of information contrary to the *Privacy Act 1988*; and refinements to arrangements and processes for FMA Act agencies to meet the requirements of the Senate order.

11 The following are discussed under the heading *Probably 'contracts' for the purposes of the Senate order*: arrangements under which goods and services have been procured; dealings with interests in land; purchase order; agreements between Australian Government bodies that are separate legal entities; funding agreements; Public Service Act employment contracts.

- information on identification and treatment of confidential contract information.

Letter from the Auditor-General

1.12 In November 2013, the Auditor-General wrote to the chair requesting the committee consider changes to the Senate order in respect of the annual compliance audits:

The [Senate] Order has proven effective in achieving greater transparency in contractual arrangements entered into by Australian Government agencies...[T]he ANAO has conducted 15 audits of the [Senate] Order since it was introduced, showing a decline in the use of confidentiality provisions and a consequential improvement in access to information. In the most recent audit covering the 2012 calendar year, only four per cent of contracts were reported as containing confidentiality provisions.¹³

1.13 The Auditor-General continued:

Given this trend, it would be appreciated if the Committee was willing to review the need for annual compliance audits. Matters relating to confidentiality would continue to be addressed within the context of the ANAO's audit of Government procurement and grants more generally. If the Committee were to adopt this approach, the ANAO would table a final report on 2013 compliance with the [Senate] Order in September 2014.¹⁴

Other contract reporting requirements

1.14 In addition to the Senate order, government agencies are subject to other reporting obligations which may cover the same information as required by the Senate order.

1.15 As noted above, the Commonwealth Procurement Rules require agencies to report procurement contracts valued at or above a specified value on AusTender within 42 days of entering the arrangements.

1.16 In addition, agencies' annual reports must include a summary statement detailing:

- the number of new consultancy services contracts let during the year;
- the total actual expenditure on all new consultancy contracts let during the year (inclusive of GST);

12 The following are discussed under the heading of *Probably not 'contracts' for the purposes of the Senate order*: standing offer arrangement; heads of agreement/ letter of intent; purchase order; agency agreement; non-enforcement agreement between bodies that are separate legal entities; gift/ grant; employment arrangements; statutory appointments.

13 Correspondence from Mr Ian McPhee, Auditor-General of Australia, to Senator the Hon Kate Lundy, Chair, Senate Finance and Public Administration References Committee, dated 29 November 2013.

14 Correspondence from Mr Ian McPhee, Auditor-General of Australia, to Senator the Hon Kate Lundy, Chair, Senate Finance and Public Administration References Committee, dated 29 November 2013.

- the number of ongoing consultancy contracts that were active in the reporting year; and
- the total actual expenditure in the reporting year on the ongoing consultancy contracts (inclusive of GST).¹⁵

Previous committee reports

1.17 The committee has considered the ongoing operation of the Senate order on two previous occasions.

Report on the first year of operation of the Senate order

1.18 In December 2002 the committee reported on the first year of the operation of the order. The committee made 17 recommendations to clarify the wording of the order 'not only to minimise any additional actions that might be required of agencies in terms of compliance with the order, but also to assist interpretation and therefore provide for greater efficiency regarding compliance'.¹⁶ The committee also made recommendations in relation to specific issues raised:

- the definition of a contract;
- commercial confidentiality;
- reporting requirements;
- agencies covered under the order; and
- presentation and disclosure.¹⁷

Second report on the operation of the Senate order¹⁸

1.19 In February 2007 the committee tabled its second report on the operation of the Senate order. The committee's second report included consideration of a proposal by Finance that, from 1 July 2007, AusTender – which at the time of the inquiry had not been fully implemented and tested – should be the single reporting mechanism for procurement contracts.

1.20 Finance also suggested that as the relevant procurement information will be available through AusTender, the Senate consider revoking the Senate order.

15 See Department of Prime Minister and Cabinet, *Requirements for Annual Reports for Departments, Executive Agencies and FMA Act bodies* (approved by the Joint Committee of Public Accounts and Audit), 24 June 2013, p. 13.

16 Senate Finance and Public Administration References Committee, *Departmental and agency contracts: Report on the first year of operation of the Senate order for the production of lists of departmental and agency contracts*, December 2002, p. 35.

17 See, Senate Finance and Public Administration References Committee, *Departmental and agency contracts: Report on the first year of operation of the Senate order for the production of lists of departmental and agency contracts*, December 2002, Recommendations pp i-iv.

18 This inquiry was conducted under the auspices of the Senate Standing Committee on Finance and Public Administration. For the purposes of this report 'committee' means either the Senate Finance and Public Affairs References Committee or the Senate Standing Committee on Finance and Public Administration.

1.21 The committee recommended the Senate order be retained. While it saw AusTender as potentially improving the completeness and accuracy of information available on contracts, the committee also had several concerns, specifically:

- 'the history of large scale information projects...cautions against sweeping change until new systems have proven themselves';¹⁹
- AusTender would not report on non-procurement contracts and therefore if the order was revoked it 'would result in a reduction in transparency of government contracts';²⁰ and
- the promised improvements in data integrity cannot be assumed as a given. Data integrity has continued to be a challenge and data quality under the revised system needs to be tested.²¹

1.22 The committee was open to the AusTender system superseding departmental and agency homepages as the source where required contract information could be accessed.²²

Conduct of inquiry

1.23 The committee received submissions from Finance and the ANAO. The committee also received correspondence from the Clerk of the Senate, Dr Rosemary Laing, dated 8 January 2014. A full list of submissions, correspondence and additional documents is at Appendix 2 and are available on the committee's website at www.aph.gov.au/senate_fpa.

1.24 The committee held a public hearing at Parliament House in Canberra on 14 February 2014, where officers from Finance and the ANAO appeared. A full list of witnesses who appeared at this public hearing is at Appendix 3.

1.25 Following the public hearing, the chair, on behalf of the committee, sought advice from the Clerk. A copy of the Clerk's advice, dated 6 March 2014, is also available on the committee's website.

19 Senate Standing Committee on Finance and Public Administration, *Departmental and agency contracts: Second report on the operation of the Senate order for the production of lists of departmental and agency contracts (2003-06)*, February 2007, p. 42.

20 Senate Standing Committee on Finance and Public Administration, *Departmental and agency contracts: Second report on the operation of the Senate order for the production of lists of departmental and agency contracts (2003-06)*, February 2007, p. 42.

21 Senate Standing Committee on Finance and Public Administration, *Departmental and agency contracts: Second report on the operation of the Senate order for the production of lists of departmental and agency contracts (2003-06)*, February 2007, p. 36.

22 Senate Standing Committee on Finance and Public Administration, *Departmental and agency contracts: Second report on the operation of the Senate order for the production of lists of departmental and agency contracts (2003-06)*, February 2007, p. 42.