

## **CHAPTER 3**

### **COMMITTEE VIEW**

3.1 The committee strongly supports the continuation of the Senate order for the production of lists of departmental and agency contracts (Senate order). Since the introduction of the Senate order there has been a significant decrease in the proportion of government contracts containing confidentiality provisions – from 24 per cent in the 2001-02 financial year to four per cent in the 2012 calendar year.

3.2 The committee's third report into the operation of the Senate order has been narrowly focussed on two matters: the use of AusTender to comply with the order; and an assessment of the ongoing role of the Auditor-General in auditing compliance with the Senate order.

3.3 In forming its recommendations the committee has sought to ensure that the culture of transparency and openness in relation to government contracts, which has developed during the period of operation of the Senate order, is maintained.

#### **AusTender**

3.4 The Minister for Finance is seeking the committee's support to update the whole-of-government guidance developed by the Department of Finance (Finance) to enable agencies to reference AusTender when complying with the Senate order. Currently this guidance is contained in Financial Management Guidance No. 8 *Guidance on the Listing of Contract Details on the Internet (Meeting the Senate order on Departmental and Agency Contracts)* (FMG 8).

3.5 The committee encourages initiatives which remove the duplication of agencies' reporting functions. However, in the context of this inquiry, the primary consideration for the committee is ensuring that the proposed AusTender reports are capable of complying with the Senate order.

3.6 Specifically, the Senate order requires that Ministers table a letter advising a list of contracts has been placed on the Internet, with access to the list through the department's or agency's homepage. The committee understands the reference to a 'list of contracts' to mean a compiled list of the agencies contracts in accordance with paragraph (2) of the Senate order.

3.7 The demonstration of AusTender during the public hearing failed to show that AusTender is capable of producing reports that comply with the Senate order. AusTender requires a user to manually input the requirements in paragraph (2) of the Senate order – with respect to dates, agency and contract value – and subsequently generates a list of contracts which meets those parameters. Essentially, a user must perform their own search to extract a list of contracts which meets the requirements of the Senate order from all the other data in AusTender.

3.8 In the committee's view requiring Senators to perform their own searches in AusTender in order to generate the list of contracts undermines the intent of the Senate order to improve transparency. For AusTender reports to comply with the Senate order, the committee's expectation is that there is access to a pre-generated list

of contracts for agencies. Ideally, there would be individual reports for agencies and not a single report of a compilation of all reportable contracts from all reporting agencies. Until this occurs the committee cannot support agencies using AusTender as it currently operates as a means to comply with the Senate order.

3.9 The committee notes the subsequent assurance by the Minister for Finance that AusTender will be modified so Senate order reports will be pre-generated, that is compiled for individual agencies without users needing to set search parameters. However, the committee has not had the opportunity to view this capability. Therefore, the committee requires that Finance provide the committee with a link to a prototype AusTender webpage with agencies' compiled Senate order reports for the 2013-14 financial year. This link should be provided to the committee by 1 September 2014. The committee will then consider whether this modification to AusTender complies with the Senate order.

3.10 Subject to the caveat that the committee is satisfied that AusTender is able to produce reports which comply with the Senate order, the committee provides the following discussion and recommendations with a view to supporting agencies being able to use AusTender for a trial period of 18 months from 1 January 2015 to meet Senate order reporting obligations.

#### ***Finance guidelines***

3.11 In order to facilitate the 18-month trial of AusTender as a mechanism for agencies to comply with the Senate order, the committee supports updating FMG 8. However, given the committee's reservations about the use of AusTender set out above, the committee recommends Finance provide the revised version of FMG 8 to the committee in draft form by 1 September 2014 for consideration and approval by the committee.

#### **Recommendation 1**

**3.12 The committee recommends the Department of Finance provide to the committee by 1 September 2014:**

- **a link to a prototype of the AusTender website with agencies' compiled Senate order reports for the 2013-14 financial year; and**
- **a copy of the revised version of Financial Management Guidance No. 8 *Guidance on the Listing of Contract Details on the Internet (Meeting the Senate order on Departmental and Agency Contracts)* in draft form.**

3.13 Paragraph (1) of the Senate order requires that a Minister's letter of advice state that a list of contracts has been placed on the Internet with access to the list through the department's or agency's homepage. The committee does not propose amending this wording in the Senate order prior to the trial. The committee envisages that for the purposes of the trial, agencies will provide a link to AusTender via the homepages, in addition to the link where non-procurement contracts are listed.

3.14 It is the committee's intention to review the operation of AusTender and its use by agencies to comply with the Senate order at the end of the 18-month trial period. At that time, should the committee take the view that a permanent move be

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made for agencies to use AusTender to report contracts pursuant to the Senate order, the committee will also consider whether the Senate order should be amended to:

- refer to AusTender as a means for agencies to comply with the Senate order;
- provide that any future amendments to FMG 8 (or other Finance guidance to agencies which is relevant to the Senate order) should be considered and approved by the committee; and
- accommodate the Minister's proposal for the Senate order to capture contracts 'published' in the six month reporting period, rather than contracts 'active' during the past 12 months.

### ***Data integrity***

3.15 The committee notes with concern the findings in the Auditor-General's annual reports on compliance with the Senate order on problems with data integrity in respect of agencies reporting pursuant to the Senate order and on AusTender. The committee is also mindful of Finance's position – while assuring the committee of the robustness of data in AusTender – that the integrity of data in AusTender is the responsibility of individual agencies.

3.16 However, the Clerk of the Senate makes an important point that the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) will strengthen the legislative obligations on the agency's head with respect to the accuracy of reporting of data. Further, the committee agrees with the conclusion of the Clerk that the reputational damage that comes as a result of inadequate administrative practices should provide a sufficient incentive for heads of agencies to ensure contract data is accurately reported.

3.17 The committee also believes that there is some validity to Finance's position that a reduced reporting burden will assist improving data quality, that is, allowing agencies to report Senate order contracts using AusTender will increase the accuracy of reporting.

3.18 Following the completion of the 18-month trial, the committee intends to examine closely the performance of agencies using AusTender.

### ***Non-procurement contracts***

3.19 The committee notes that AusTender can only be used to comply with the Senate order in respect of procurement contracts. All other non-procurement contracts required to be reported pursuant to the Senate order will need to be reported using the current mechanism, that is, a list which is accessed via a link on individual agencies' homepage.

3.20 The committee also notes that Finance is currently developing the 'AusGrant' site which, in future, may have some role in fulfilling the reporting requirement for the Senate order in respect of some non-procurement contracts.

### ***New reporting threshold for AusTender***

3.21 The committee would like to put on the record its reservations about implications for the transparency in lifting the reporting threshold AusTender has on contracts valued between \$10 000-\$20 000.

3.22 The committee notes the evidence of Mr John Sheridan, First Assistant Secretary, Technology and Procurement Division, Department of Finance, that contracts that fall in the range of \$10 000-\$20 000 represent 0.7 per cent by value of total contracts.<sup>1</sup> However, the committee acknowledges that lifting the reporting threshold for AusTender to \$20 000 will not impact on compliance with the Senate order due to its reporting threshold of \$100 000.

### ***Title for AusTender reports***

3.23 AusTender contains a vast amount of information which is able to be viewed using a number of categories. It is important that information pursuant to the Senate order is user-friendly and visible on the AusTender website. In the committee's view, while the current title of the Senate order report on AusTender – 'Senate Order on Confidentiality in Procurement Contracts' – is reasonably clear, the committee agrees with the Clerk of the Senate that the report title, could be more explicit.

## **Recommendation 2**

**3.24 The committee recommends the Department of Finance amend the title of the report in AusTender to 'Agency reports complying with the Senate order on procurement contracts and use of confidentiality provisions'.**

### **Amendment of the Senate order**

3.25 During the course of the inquiry the committee reached the conclusion that there are some aspects of the Senate order which should be amended. These matters are discussed below. The committee accepts with gratitude the offer of the Clerk to assist with the drafting of amendments to the Senate order.

### ***Role of the Auditor-General***

3.26 The committee agrees with the Auditor-General that, in terms of the inappropriate use and reporting of confidential clauses in contracts by agencies 'we are over the worst'.<sup>2</sup> The committee is therefore sympathetic to the Auditor-General's view that the need for ongoing annual audits of compliance with the Senate order has diminished.

3.27 However, given the trial of changes to compliance with the Senate order in respect of AusTender, the committee is reluctant to move directly to a model whereby the Auditor-General will monitor compliance with the Senate order through the ANAO's audit of programs more generally. In the committee's view, the oversight by the Auditor-General will be critical in the committee's assessment of the success

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1 See Finance and Public Administration Legislation Committee, *Additional Estimates Hansard*, 25 February 2014, p. 101.

2 *Committee Hansard*, 14 February 2014, p. 13.

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(or otherwise) of agencies' reporting pursuant to the Senate order during the 18-month trial of AusTender.

3.28 The committee therefore prefers a phased approach to changing the role of the Auditor-General. This phased transition would see the Auditor General perform biennial audits for the next four years. That is, the committee expects that the Auditor-General will table a report no later than 30 September 2014 pursuant to the current Senate order. The committee then recommends that the Senate order be amended to reflect that the Auditor-General will table two subsequent reports no later than 30 September 2016 and 30 September 2018.

### ***Certification by Ministers***

3.29 While the committee is recommending the annual audit of compliance by the Auditor-General be phased out, the committee believes that there should be some form of quality assurance mechanism contained within the Senate order as an incentive for agencies to use confidentiality provisions appropriately.

3.30 To this end, the committee believes that the proposal by the Clerk, that Ministers be required to certify in the letters tabled pursuant to paragraph (1) of the Senate order, that none of the contracts in the list include inappropriate confidentiality provisions as measured against the guidance issued by Finance, is appropriate.

### ***Public Governance, Performance and Accountability Act 2013***

3.31 The committee accepts the advice of the Clerk of the Senate that the Senate order will need to be amended to reflect recent legislative changes as a result of the PGPA Act, specifically the reference to an 'agency' being an *Financial Management and Accountability Act 1997* (FMA Act) agency.

3.32 In the previous two reports on the operation of the Senate order the committee has recommended that the order be expanded to cover *Commonwealth Authorities and Companies Act 1997* (CAC Act) bodies. That recommendation was rejected by the government on both occasions on the basis that CAC Act bodies operate under a different legislative scheme to FMA Act agencies. The PGPA Act will bring CAC Act bodies and FMA Act agencies under the same legislative scheme, therefore removing the reason for not extending the operation of the order to CAC Act bodies. The committee therefore supports the order being extended to cover all Commonwealth entities under the PGPA Act.

### ***Technical matter***

3.33 Finally, the committee believes that other technical aspects of the Senate order, for example the committee's name in paragraph (7) of the order, would benefit from review and updating.

**Recommendation 3**

**3.34 The committee recommends that the Senate order be amended:**

- **to provide that, following the tabling of the Auditor-General's report pursuant to paragraph (5) of the Senate order in 2014, the Auditor-General conduct an audit of compliance with the Senate order biennially for the next four years with reports due no later than 30 September 2016 and 30 September 2018;**
- **to provide that in the letter of advice tabled pursuant to paragraph (1) of the Senate order, that Ministers must certify that none of the contracts included in the list contain inappropriate confidentiality provisions as measured against the Department of Finance's guidance;**
- **to reflect legislative changes as a result of the *Public Governance Performance and Accountability Act 2013*, so the Senate order applies to Commonwealth entities; and**
- **with respect to any further technical aspects of the Senate order which are found, in consultation between the Clerk of the Senate and the committee, to require amendment.**

**Senator Kate Lundy**

**Chair**