

Confidentiality in Government Contracts: Senate Order for Entity Contracts (Calendar Year 2015 Compliance)

[Across Entities](#)

© Commonwealth of Australia 2016

ISSN 1036–7632 (Print)

ISSN 2203–0352 (Online)

ISBN 978-1-76033-183-2 (Print)

ISBN 978-1-76033-184-9 (Online)

Except for the content in this document supplied by third parties, the Australian National Audit Office logo, the Commonwealth Coat of Arms, and any material protected by a trade mark, this document is licensed by the Australian National Audit Office for use under the terms of a Creative Commons Attribution-NonCommercial-NoDerivatives 3.0 Australia licence. To view a copy of this licence, visit

<http://creativecommons.org/licenses/by-nc-nd/3.0/au/>.

You are free to copy and communicate the document in its current form for non-commercial purposes, as long as you attribute the document to the Australian National Audit Office and abide by the other licence terms. You may not alter or adapt the work in any way.

Permission to use material for which the copyright is owned by a third party must be sought from the relevant copyright owner. As far as practicable, such material will be clearly labelled.

For terms of use of the Commonwealth Coat of Arms, visit the *It's an Honour* website at <http://www.itsanhonour.gov.au/>.

Requests and inquiries concerning reproduction and rights should be addressed to:

Senior Executive Director
Corporate Management Branch
Australian National Audit Office
19 National Circuit
BARTON ACT 2600

Or via email:

communication@anao.gov.au.





Canberra ACT
27 September 2016

Dear Mr President
Dear Mr Speaker

The Australian National Audit Office has undertaken an independent performance audit across entities titled *Confidentiality in Government Contracts: Senate Order for Entity Contracts (Calendar Year 2015 Compliance)*. The audit was conducted 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 to the Parliament.

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

Yours sincerely

A handwritten signature in black ink, which appears to read 'Grant Hehir', is positioned above the typed name.

Grant Hehir
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, financial statement audits and assurance reviews 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.

For further information contact:
Australian National Audit Office
GPO Box 707
Canberra ACT 2601

Phone: (02) 6203 7300
Fax: (02) 6203 7777
Email: ag1@anao.gov.au

ANAO audit reports and information about the ANAO are available on our website:
<http://www.anao.gov.au>

Audit Team

Lachlan Fraser
Luke Josey
Jess Scully
Esther Ooi
Jay Stoker
Edel Kairouz

Contents

Summary and recommendations.....	7
Background	7
Conclusion	7
Supporting findings.....	8
Summary of entity responses	10
1. Background	13
The Senate Order.....	13
Senate Order Guidance.....	14
Previous audits of Senate Order compliance	15
Audit Approach	15
2. Use of confidentiality provisions	17
How has the reported use of confidentiality provisions in Australian Government contracts changed over time?.....	17
Were confidentiality provisions used appropriately in the sample of contracts?.....	19
Did entities include parliamentary disclosure and ANAO access clauses?	25
Were recommendations from previous Senate Order audits implemented by the entities?.....	26
3. Ministers' letters and accuracy of contract information	27
Did Ministers table their letters of advice in the Senate by 29 February 2016?.....	28
Did the content of the Ministers' letters comply with the content requirements of the Senate Order including outlining excluded contracts?	28
Did the content of the lists comply with the content requirements of the Senate Order?	29
Did the relevant entities provide an estimated cost of compliance?	31
How was Senate Order and AusTender information complied and quality assured?.....	32
Appendix 1 Entity responses	37
Appendix 2 Senate Procedural Order of Continuing Effect 13: Entity Contracts.....	42
Appendix 3 Previous ANAO audit reports on the Senate Order.....	44

Summary and recommendations

Background

1. The *Senate Procedural Order of Continuing Effect: Entity Contracts* (the Senate Order/the Order) is based on the principle that parliamentary and public access to government contract information should not be prevented, or restricted, through the use of confidentiality provisions, unless there is sound reason to do so.¹ Successive governments have agreed to comply with the Senate Order and have required entities to put in place suitable procedures to support Ministers to comply with it.

2. The Order requires Ministers to table letters of advice that all entities which they administer have placed on the Internet lists of contracts² valued at \$100 000 or more, by no later than two calendar months after the end of each financial and calendar year. These lists are to:

- include the details of each contract which has not been fully performed or which has been entered into during the previous 12 months; and
- indicate whether the contracts contain confidentiality provisions or other requirements of confidentiality, and a statement of the reasons for the confidentiality.

3. To support the Order, the Auditor-General has annually examined a number of the contracts reported to contain confidentiality provisions, and reported any inappropriate use. The Auditor-General has also examined and reported on contracts excluded from the listing.

4. This is the ANAO's first audit of compliance since the Order was amended to allow the reporting of procurement contracts via AusTender for the purposes of the Order.³ In amending the Order the Senate also requested that two further compliance reports be provided by the Auditor-General, this report and a further report in 2018.

Conclusion

5. Confidentiality provisions in government contracts can impede accountability and transparency in government purchasing. The reported use of confidentiality provisions in contracts across all entities in 2015 was the lowest proportion of contracts (three per cent) since the commencement of the Order in 2001. Despite the low proportion of contracts reported as containing confidentiality provisions, specific confidentiality provisions in contracts have continued to be incorrectly used and reported. Errors in application and reporting relate to

1 Commonwealth of Australia, Senate Hansard, Senate Order on Government and Agency Contracts: Government Response, pp.26668–26669, Monday 27 August 2001.

2 For the purposes of the Senate Order, the term 'contract' applies to all forms of Government agreements, based on their legal status, rather than the name given to the arrangement. This includes procurement contracts, lease arrangements, sales contracts and certain grants, funding agreements and employment contracts.

3 Introduced in September 2007, AusTender is the Australian Government's web-based procurement information system for the centralised publication of Australian Government business opportunities, annual procurement plans, multi-use lists, contracts and entity agreements, available from <https://www.tenders.gov.au/> [accessed July 2016].

insufficient assessment of contracts including a lack of documentation of assessments of suppliers' claims against the Confidentiality Test. The audit also found that processes to capture information about basic contract details and the reporting of confidentiality provisions were inadequate. Only 19 per cent of contracts sampled were accurately reported in AusTender.

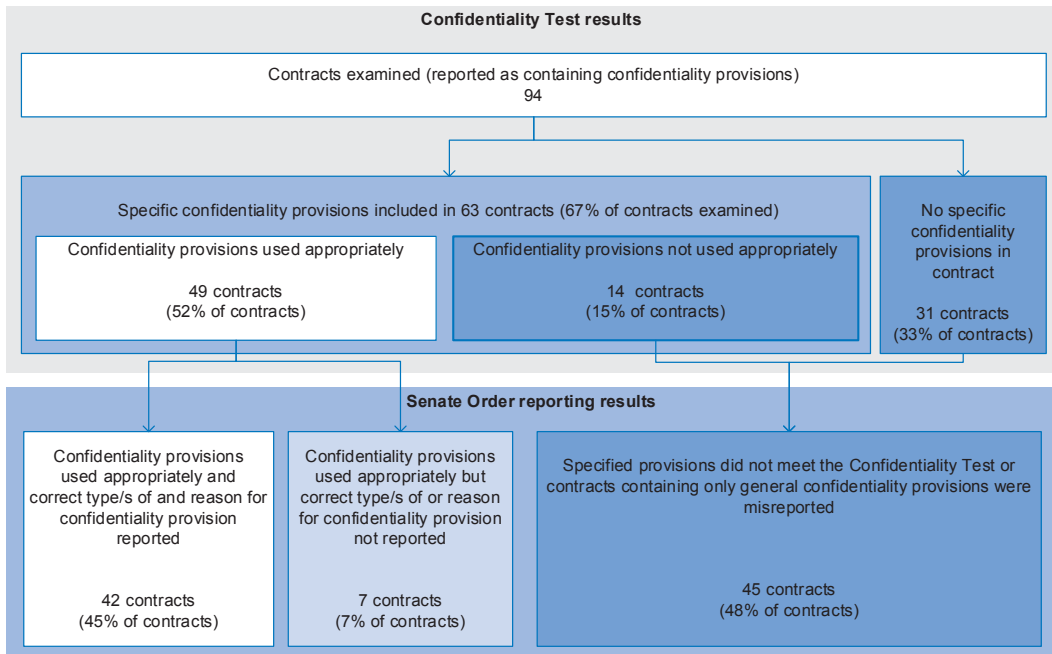
Supporting findings

Use of Confidentiality Provisions (Chapter 2)

6. In the calendar year 2015 there were 42 947 contracts reported across all entities with a combined value of \$243.3 billion. 1290 contracts with a value of \$24.7 billion were listed as containing confidentiality provisions, three per cent of the total contracts reported and 10 per cent of total contract value. This is a reduction compared to the 2014 calendar year reporting period and consistent with the broader downward trend since the commencement of the Senate Order.

7. In the sample of contracts, the ANAO found that for 48 per cent of the contracts, the use of confidentiality provisions did not comply with the guidance or the contracts did not contain specific confidentiality provisions and were therefore misreported. The result of the analysis of the sample of contracts is shown in Figure S.1.

Figure S.1: Contract analysis result: appropriateness of the use and reporting of confidentiality provisions



Source: ANAO analysis.

8. The audited entities were not able to consistently provide appropriate documentation supporting their assessment of suppliers' claims against the Confidentiality Test, and reasons for agreeing for the information to remain confidential.

9. In the 2015–16 Senate Order audit, the ANAO made a recommendation for Finance to amend the *Commonwealth Procurement Rules* (CPRs) to include the Confidentiality Test or refer more directly to the requirement for its use; to which Finance agreed. The recommendation has not been implemented. Finance has advised that updates to the CPRs are expected to be published in mid-2017.

10. Of the 140 confidential and non-confidential contracts examined by the ANAO, 69 per cent contained parliamentary disclosure clauses, and 79 per cent included ANAO access clauses. This result represents a moderate decline on 2014 results which found 98 per cent of contracts sampled contained appropriately worded parliamentary disclosure clauses, and 97 per cent included ANAO access clauses in contracts.

Ministers' Letters and Accuracy of Contract Information (Chapter 3)

11. In order for Ministers to comply with the Senate Order, entities are expected to support their Minister by publishing listings in accordance with the content and timing requirements. This audit found that entities did not always meet these requirements and Ministers could be better supported. In 2015 the ANAO observed:

- the timeliness of Ministers' letters has decreased compared to previous years, with letters relating to only 60 entities (65 per cent) provided to the Senate for tabling by the due date. This is the lowest result since 2011;
- overall 11 entities reported excluded contracts in 2015. A sample of these contracts found all those reviewed had been excluded for appropriate reasons. One of the audited entities had excluded contracts without advising of the exclusion in their Ministers' letter;
- 41 entities did not identify whether they did or did not have non-procurement contracts, and therefore did not meet the Senate Order requirements;
- although 89 per cent of entities provided a link to AusTender from their website, the majority did not do so directly from their home page, as instructed by the Senate Order; and
- from a sample of 140 confidential and non-confidential procurement contracts on AusTender only 19 per cent of the contracts sampled were correctly reported.

12. The 2015 changes to the Senate Order provided for entities to use a complying report on AusTender to report procurement contracts. Consequently the compliance cost estimate should not include any cost with respect to procurement contracts. This change has significantly reduced entities' overall cost of complying with the Senate Order.

13. Each of the audited entities compiled their listings for procurement contracts using AusTender. AusTender listings for the Department of Agriculture and Water Resources, the Department of Foreign Affairs and Trade and Health reflect contracts on a whole of life basis (incorporating amendments into original contract notices). Defence reports each contract and contract amendment individually (as separate AusTender contract notices). Defence is part of a whole of government project which is underway to update SAP-based (enterprise resource planning software) financial systems and improve their reporting functionality.

Summary of entity responses

Department of Agriculture and Water Resources

The Department agrees with the overall findings in the ANAO report and will implement additional measures to improve compliance when assessing confidentiality provisions.

Department of Defence

Defence acknowledges the findings contained in the audit report on Confidentiality in Government Contracts: Senate Order for Entity Contracts (Calendar Year 2015 Compliance).

The Department of Defence places a high priority on strengthening its compliance with the requirements of the Senate Order. The ANAO audit process and the audit report have delivered additional information that will enable Defence to further build upon the progress it has made in recent years. This includes enhancing its systems, training and controls to promote compliance without the need for inefficient and high cost manual reporting.

Defence remains committed to compliance with the Senate Order to promote transparency of its contracts through AusTender reporting. As part of this commitment, Defence is taking the technical lead in a Department of Finance whole-of-government project to streamline and improve AusTender functionality. This includes system aspects to support improved contract confidentiality compliance reporting. Defence appreciates the information provided by this audit and will work with the Department of Finance and other agencies to strengthen AusTender functionality to support improved cost-effective contract reporting compliance in the future.

Department of Foreign Affairs and Trade

The Department of Foreign Affairs and Trade acknowledges and agrees with the findings in the audit report. The audit process was a valuable exercise and the feedback provided by the ANAO will assist DFAT to continue improving compliance with the Senate Order.

Department of Health

The Department agrees with the findings in the proposed report. The treatment and reporting of confidentiality provisions in contracts will be improved through a procurement transformation project that is scheduled to be completed by July 2017.

Audit Findings

1. Background

The Senate Order

1.1 The *Senate Procedural Order of Continuing Effect: Entity Contracts* (the Senate Order/the Order) was introduced in 2001 to improve public access to information about government contracting.⁴ The main principle on which the Senate Order was based is that parliamentary and public access to government contract information should not be prevented, or otherwise restricted, through the use of confidentiality provisions, unless there is sound reason to do so. Successive governments have agreed to comply with the Senate Order and have required entities to put in place suitable procedures to support Ministers to comply with it.⁵

1.2 Under the Senate Order, Ministers must table letters of advice for entities they administer in the Senate. The letters of advice are to confirm that these entities have published, on their websites, lists containing the following information⁶, as set out in paragraph (2)(a)–(d) of the Order:

- (a) each contract⁷ entered into by the entity which has not been fully performed or which has been entered into during the previous 12 months, and which provides for a consideration to the value of \$100 000 or more;
- (b) the contractor, the amount of the consideration, the subject matter of each such contract, the commencement date of the contract, the duration of the contract, the relevant reporting period and the twelve-month period relating to the contract listings;
- (c) whether each such contract contains provisions requiring the parties to maintain confidentiality of any of its provisions, or whether there are any other requirements of confidentiality, and a statement of the reasons for the confidentiality; and
- (d) an estimate of the cost of complying with [the] order and a statement of the method used to make the estimate.

1.3 To support the Order, the Senate requested the Auditor-General examine a number of the contracts reported to contain confidentiality provisions, and report any inappropriate use of these provisions annually. In addition, the Senate also requested the Auditor-General examine a number

4 At the time of introduction, the Order was known as the *Senate Procedural Order of Continuing Effect: Departmental and Agency Contracts*. The Order is reproduced at Appendix 2.

5 Commonwealth of Australia, Senate Hansard, Senate Order on Government and Agency Contracts: Government Response, pp.26668–26669, Monday 27 August 2001.

6 For the purposes of the Senate Order a list may be a complying report on AusTender for procurement contracts and an entity is required to provide access to this via a link from its home internet page. If the entity has contracts to report other than procurement contracts, there must be a dedicated link to a list of such contracts from the entity's home page in addition to any link to AusTender.

7 For the purposes of the Senate Order, the term 'contract' applies to all forms of Government agreements, based on their legal status, rather than the name given to the arrangement. This includes procurement contracts, lease arrangements, and sales contracts and certain grants, funding agreements and employment contracts.

The Senate, Finance and Public Administration References Committee, *Departmental and Agency Contracts: Report on the on the first year of operation of the Senate order for the production of lists of departmental and agency contracts*, 12 December 2002, pp. 16 and 36.

of contracts reported to have been excluded from entities' Senate Order contract listings and report on whether those contracts were appropriately excluded.⁸

Senate Order Guidance

1.4 The Department of Finance (Finance) is responsible for providing entities with guidance on complying with the Senate Order as part of its broader responsibility for procurement policy, including the appropriate use of confidentiality provisions. The Finance publication *Resource Management Guide No. 403—Meeting the Senate Order on Entity Contracts* (RMG 403)⁹ provides guidance to support entities in developing and presenting their Senate Order contract listings. Further, Finance's whole-of-government guidance *Buying for the Australian Government, Confidentiality Throughout the Procurement Cycle* (the Guidance)—contains the Confidentiality Test, which is designed to assist entities to determine the appropriate inclusion of confidentiality provisions in contracts. The Test consists of four criteria, all of which must be met for a supplier's commercial information to be considered confidential. These are:

- the information to be protected must be specifically identified;
- the information must be commercially 'sensitive';
- disclosure would cause unreasonable detriment to the owner of the information or another party; and
- the information was provided under an understanding that it would remain confidential.¹⁰

1.5 The Senate Order is one of a number of mechanisms to promote transparency in Australian Government contracting. Other mechanisms include the reporting on AusTender¹¹ of procurement and consultancy contracts, the production of lists of grants—as well as the publication of grants on entities' websites—and the presentation of summary contract information in entities' annual reports.¹²

8 Where an entity has excluded contracts from its listing, or has not fully complied with the requirements of the Senate Order, the Minister's letter is to advise the basis for the exclusion and when (where applicable) full compliance will be achieved. *The Senate Order for Entity Contracts* (the Senate Order), paragraph (3).

9 RMG 403 was issued in August 2015 and replaced the Senate Order guidance: Financial Management Guidance No. 8, *Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)*.

10 Department of Finance (Finance), *Buying for the Australian Government, Confidentiality throughout the Procurement Cycle: Practice, Awarding a Contract*, paragraph 9 [Internet], available from <<http://www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/contract-issues/confidentiality-procurement-cycle/practice.html>> [accessed July 2016].

11 Introduced in September 2007, AusTender is the Australian Government's web-based procurement information system for the centralised publication of Australian Government business opportunities, annual procurement plans, multi-use lists, contracts and entity agreements, available from <<https://www.tenders.gov.au/>> [accessed July 2016].

12 Australian Government, *Requirements for Annual reports - for Departments, Executive Agencies and other non-corporate Commonwealth entities*, Prime Minister and Cabinet, 2015.

Previous audits of Senate Order compliance

1.6 This audit is the nineteenth in a series of audits and fulfils the Senate's request for the Auditor-General to provide a report on entities' compliance with the Order by September 2016. Previous audits of Senate Order compliance and audit recommendations since 2002–03 are listed in Appendix 3. These recommendations have commonly encouraged entities to improve their use and reporting of confidentiality provisions in contracts by:

- strengthening approaches used to identify and record confidential contract information; and
- improving the accuracy and quality of publicly reported contract information.

1.7 The annual audit of Senate Order compliance is to be phased out following amendments made to the Senate Order in May 2015. The Auditor-General will conduct one further audit on entity compliance with the Senate Order, by 30 September 2018.

Audit Approach

1.8 The objective of the audit was to assess the appropriateness of the use and reporting of confidentiality provisions in a sample of Australian Government contracts. The ANAO's assessment was based on the following criteria:

- entities published contract listings on their websites and Ministers' letters were tabled in accordance with the timing and content requirements of the Senate Order;
- confidentiality provisions were used appropriately in a sample of contracts which were reported by the selected entities to contain confidentiality provisions¹³; and
- the selected entities accurately reported contract information, including the use of confidentiality provisions, in the contract listings and on AusTender.¹⁴

1.9 As at 1 February 2015, there were 92 entities to which the Senate Order applied.¹⁵ All of these entities were included for the purposes of the overall audit analysis (criteria (a)). The entities selected for detailed contract analysis (criteria (b) and (c)) were the:

- Department of Agriculture and Water Resources (Agriculture);
- Department of Defence (Defence);
- Department of Foreign Affairs (DFAT); and
- Department of Health (Health).

13 The ANAO drew a sample of 100 contracts from the audited entities with reported confidentiality provisions. Of these, six contracts were not able to be provided to the ANAO for review.

14 In addition to the sample of 100 contracts with reported confidentiality provisions, a further 50 contracts reported by the audited entities not to contain confidentiality provisions were selected and reviewed for accuracy. Of the 50 contracts, three were not able to be provided to the ANAO for review in the timeframe of the audit, and one had been reported in error.

15 There were 92 entities subject to the Senate Order, however one entity was exempted by its Minister, and two entities did not publish a listing or statement. This includes the Australian National Preventive Health Agency and the Australian Secret Intelligence Service. The Australian National Preventive Health Agency has been functionally subsumed by the Department of Health, but legislation to abolish it has not been passed by the Parliament.

1.10 Table 1.1 shows the number and value of the contracts reported in the audited entities' 2015 procurement contract listings and the percentage of those contracts reported as containing confidentiality provisions.

Table 1.1: Summary of procurement contract information reported by the audited entities in the 2015 calendar year Senate Order listings

	Agriculture	Defence	DFAT	Health
Total number of procurement contracts reported	306	12 246	1 111	657
Total value (\$ millions) of procurement contracts	\$ 1 100	\$ 107 287	\$ 7 171	\$ 2 284
Percentage of procurement contracts reported as containing confidentiality of provisions	3.6%	4.0%	1.3%	3.5%
Number of the contracts reported as containing confidentiality of provisions sampled in each entity, and contract value in millions	10 \$320.8	60 \$147.2	10 \$168.2	20 \$360.0
Number of the contracts <u>not</u> reported as containing confidentiality of provisions sampled in each entity, and contract value in millions	10 \$4.6	20 \$139.8	10 \$7.7	10 \$2.7
Total number of contracts (confidential and non-confidential) sampled in each entity and total contract value in millions	20 \$325.3	80 \$287.0	20 \$175.9	30 \$362.6

Source: ANAO analysis.

1.11 The audit was conducted in accordance with the ANAO's auditing standards at a cost to the ANAO of approximately \$373 371.

2. Use of confidentiality provisions

Areas examined

This chapter examines the reported use of confidentiality provisions in Australian Government contracts over time, and the appropriateness of the use and reporting of specific confidentiality provisions in a sample of contracts.

Conclusion

The reported use of confidentiality provisions in contracts across all entities is the lowest proportion of contracts (three per cent) since the commencement of the Order.

Despite the low proportion of contracts reported as containing confidentiality provisions, specific confidentiality provisions in contracts continue to be incorrectly used and reported in 2015.

The result of this audit and previous audits indicate that entities need to do more to improve performance with respect to assessing and reporting on the use of confidentiality provisions.

Areas for improvement

This audit is the nineteenth in a series of Senate Order audits. While the level of confidentiality provisions in contracts has decreased, this audit indicates that overall compliance with the Senate Order is still not being achieved.

In the context of persistent poor compliance found in ANAO Senate Order audits, Finance could consider its regulatory stance to ensure that individual entities provide quality information to the Parliament.

2.1 To determine whether confidentiality provisions in contracts had been used appropriately and reported correctly, the ANAO examined:

- the reported use of confidentiality provisions in contracts over time based on each entity's Senate Order listings; and
- the use of confidentiality provisions in a sample of the audited entities' contracts.

2.2 The inclusion of parliamentary disclosure and ANAO access clauses in the sample of contracts was also examined.

How has the reported use of confidentiality provisions in Australian Government contracts changed over time?

In the calendar year 2015 there were 42 947 contracts reported across all entities with a combined value of \$243.3 billion. 1290 contracts with a value of \$24.7 billion were listed as containing confidentiality provisions, three per cent of the total contracts reported and 10 per cent of total contract value. This is a reduction compared to the 2014 calendar year reporting period and consistent with the broader downward trend since the commencement of the Senate Order.

2.3 The unjustified use or incorrect reporting of confidentiality provisions in government contracts can reduce transparency through: preventing the release of contract information; and potentially misinforming the Parliament and the public about government contract information that they can access. A summary of the number and value of contracts, and the reported use of

confidentiality provisions in entities' contract listings for the 2012–2015 calendar years is provided at Table 2.1.

Table 2.1: Number and value of contracts and the reported use of confidentiality provisions, in entity contract listings 2012–2015

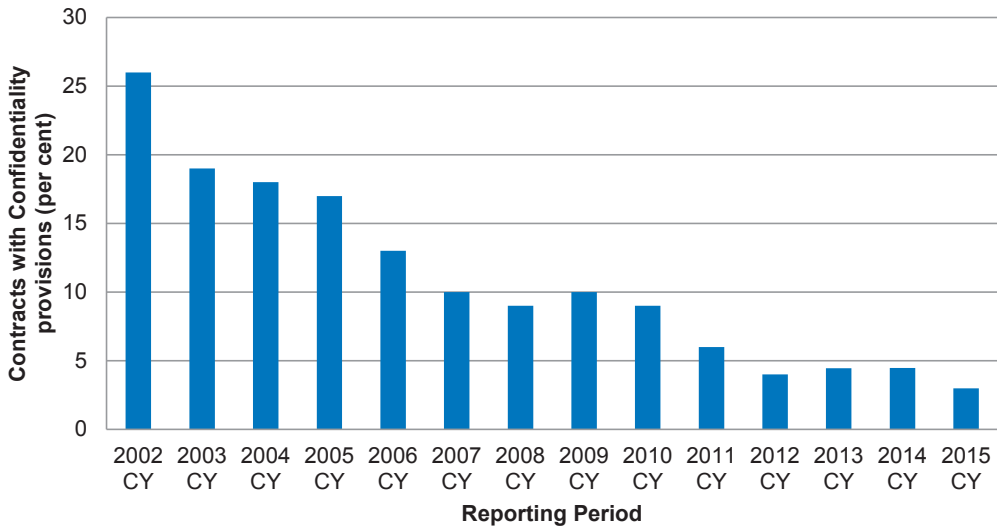
	2012	2013	2014	2015
Number of entities that published a contract listing or advised no relevant contracts had been entered into	98	101	92	89
Total number of contracts listed	42 536	30 696	41 469	42 947
Total value of contracts listed (billion)	\$199.7	\$189.2	\$216.3	\$243.3
Total number of contracts identified as containing confidentiality provisions	1 703	1 369	1 855	1 290
Total value of contracts with identified confidentiality provisions (billion)	\$21.9	\$16.9	\$30.9	\$24.7
Percentage of contracts with identified confidentiality provisions	4.0%	4.5%	4.5%	3.0%

Source: ANAO analysis.

Note: Entities are defined under the *Public Governance, Performance and Accountability Act 2013* and were previously defined under the *Financial Management and Accountability Act 1997*.

2.4 Across all entities' contract listings, the proportion of contracts reported to contain confidentiality provisions for the 2015 calendar year has remained low at 3.0 per cent. This is a reduction compared to the 2014 calendar year reporting period and consistent with the broader downward trend since the commencement of the Senate Order, as shown in Figure 2.1. The low level of reported use of confidentiality provisions indicates that scrutiny and accountability of government expenditure is less likely to be impeded by assertions of commercial sensitivity or confidentiality than when the Order was first introduced.

Figure 2.1: Proportion of contracts reported as containing confidentiality provisions: calendar years 2002–2015



Source: ANAO analysis.

Were confidentiality provisions used appropriately in the sample of contracts?

In the sample of contracts, the ANAO found that for 48 per cent of the contracts, the use of confidentiality provisions did not comply with the Guidance or the contracts did not contain specific confidentiality provisions and were therefore misreported.

The audited entities were not able to consistently provide appropriate documentation supporting their assessment of suppliers' claims against the Confidentiality Test, and reasons for agreeing for the information to remain confidential.

2.5 Entities are required to identify in their contract listings whether any of the listed contracts contain confidentiality provisions. The two types of provisions entities are to identify are described in *Resource Management Guide No. 403—Meeting the Senate Order on Entity Contracts* (RMG 403) as:

- those that make specific information contained in the contract confidential (referred to in the Order as 'provisions requiring the parties to maintain confidentiality of any of its provisions'; and
- those that protect the confidential information of the parties that may be obtained or generated in carrying out the contract but cannot be specifically identified when the contract is entered into (referred to in the Order as 'other requirements of confidentiality').

2.6 Table 2.2 outlines the differences between the two types of specific confidentiality provisions and provides examples of how they may be applied.

Table 2.2: Description of the two specific confidentiality provision types

Confidentiality provision type	Description	Example of the use and reporting of the provision type
Requires the parties to maintain the confidentiality of any contract provisions	Relates to specific confidential information that is actually contained in the contract	The contract specifies that pricing information in the contract is to remain confidential. The pricing information in the contract provides sufficient information to make a reasonable estimate of the supplier's profit margin. Senate Order contract listing details: <ul style="list-style-type: none"> • 'Yes' for 'provisions requiring the parties to maintain confidentiality of any of its provisions' provision type; and • 'internal costing/profit information' as the stated reason.
Other requirements of confidentiality	Relates to confidential information obtained or generated in performing the contract	The contract specifies that the results of a survey (or a research report) to be generated as part of the contract's performance are to remain confidential as disclosure would cause detriment. Contract listing details: <ul style="list-style-type: none"> • 'Yes' for 'other requirements of confidentiality' provision type; and • 'intellectual property' as the stated reason.

Source: ANAO representation of information contained in RMG 403.

2.7 Where possible, entities are to identify the reasons for the inclusion of confidentiality provisions under specific categories in the contract listings. Should a contract contain a confidentiality provision that does not fall within a specific category, entities are to identify the provision as 'other' and provide a reason for the inclusion of the provision. The standard reasons are provided in RMG 403 and include:

- trade secrets (includes intellectual property);
- internal costing/profit information;
- public interest;
- statutory secrecy provisions; and
- the Privacy Act 1988.

The appropriate use of confidentiality provisions in a sample of contracts

2.8 To assess the appropriateness of the use of confidentiality provisions for the purposes of this audit the ANAO reviewed a sample of contracts identified as containing confidentiality provisions. In order to undertake this assessment, the ANAO had regard to Finance's current guidance, *Buying for the Australian Government, Confidentiality throughout the Procurement Cycle* (the Guidance). The Confidentiality Test outlined in the Guidance establishes four criteria (as shown in Table 2.3), all of which must be met for a supplier's information to be considered confidential.

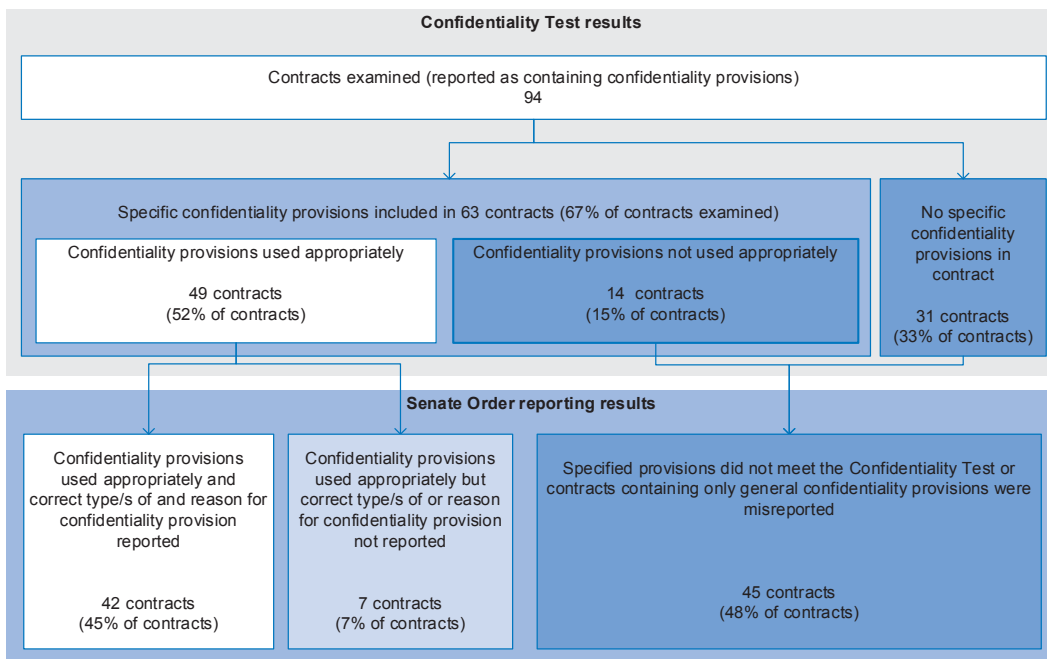
Table 2.3: The Confidentiality Test

<p>Criterion 1: The information to be protected is specifically identified</p> <p>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. However, where an entity contract may be used for future cooperative procurements entities generally should not include provisions that would prevent other Commonwealth agencies from accessing the terms and conditions, including pricing of the contract.</p>
<p>Criterion 2: The information is commercially 'sensitive'</p> <p>The information should not generally be known or ascertainable. The specific information must be commercially 'sensitive' and it must not already be in the public domain. A request by a potential supplier to maintain the confidentiality of commercial information would need to show that there is an objective basis for the request and demonstrate that the information is sensitive.</p>
<p>Criterion 3: Disclosure would cause unreasonable detriment to the owner of the information or another party</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>
<p>Criterion 4: The information was provided under an understanding that it would remain confidential</p> <p>This 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 entity has agreed to accept information on the understanding that it would remain confidential.</p>

Source: Finance, *Buying for the Australian Government, Confidentiality throughout the Procurement Cycle*, paragraph 9.

2.9 The ANAO selected a sample of 100 contracts that had been reported by the four audited entities in their procurement contract listings on AusTender, as containing provisions requiring the parties to maintain confidentiality of provisions. One entity, Defence, was unable to provide documentation for six contracts during the audit timeframe. Of the 94 contracts examined, only 45 per cent used and reported confidentiality provisions appropriately. The results of the ANAO's analysis, based on the application of the Confidentiality Test to the reported confidentiality provisions, are shown in Figure 2.2.

Figure 2.2: Contract analysis result: appropriateness of the use and reporting of confidentiality provisions



Source: ANAO analysis.

Note: Areas of incorrect reporting and/or use of confidentiality provisions are shown with dark blue shading.

Confidential information in the contract is specifically identified (Criterion 1 and Criterion 4 of the Confidentiality Test)

2.10 For a contract to be assessed as meeting Criterion 1 of the Test, at least one contract provision must specifically identify the information that is to be protected.¹⁶ In the audit sample, 63 of the 94 contracts identified specific information to be kept confidential.

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

2.11 The Confidentiality Test states that for information to be considered confidential it must be commercially sensitive and the disclosure of the information would cause detriment to the owner of the information or another party. This type of information would not normally be in the public domain. Examples of information that may be included in contracts requiring protection through the use of confidentiality provisions include:

- pricing information that would reveal a supplier's cost or profit margins;
- unique industrial processes, formulae, product mixes, customer lists, engineering and design drawings and diagrams, and accounting techniques;

¹⁶ The ANAO considers Criterion 4 to be met if Criterion 1 is met. This is based on an assumption that where a contract specifically identifies the information to be protected, and has been signed by both parties, then both parties understand and agree that the information is to remain confidential.

- personal information requiring protection under the *Privacy Act 1988*; and
- information of a nature that should be protected on the basis of public interest or under statutory secrecy provisions.¹⁷

2.12 The ANAO assessed the 63 contracts (from the sample of 94) which had specifically identified the information to be protected through the use of confidentiality provisions against Criteria 2 and 3 of the Confidentiality Test. Of these 63 contracts, 49 were assessed as meeting Criteria 2 and 3 of the Confidentiality Test. Of the 14 contracts assessed as not meeting these criteria:

- eight claimed protection of supplier internal costing/profit information, but the contracts did not contain pricing information which revealed the suppliers' internal costs or profit margins;
- one claimed confidentiality under the Privacy Act 1988, but did not contain information of a personal nature as described by the Act; and
- five claimed other reasons, including public interest.

Documenting reasons for contract confidentiality

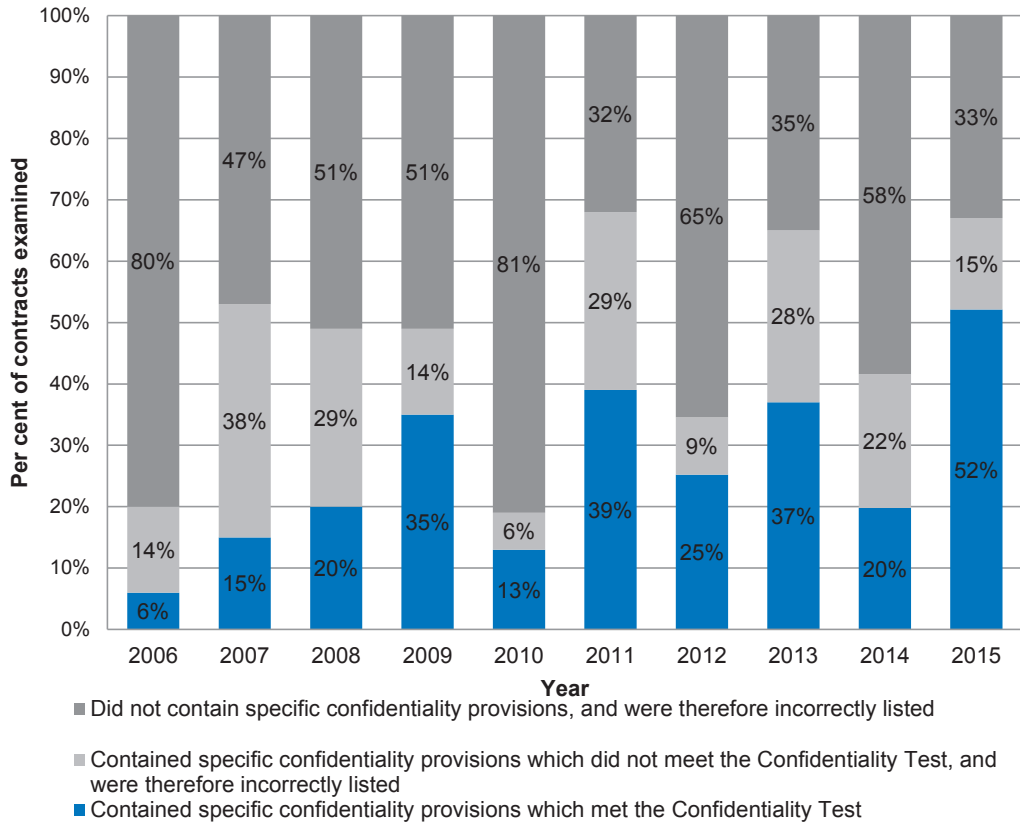
2.13 The Guidance advises that the entity's assessment of the supplier's claims and the reasons for agreeing to the inclusion of confidentiality provisions should be documented. For the majority (62 per cent) of contracts tested, the audited entities were not able to provide documentation supporting their assessment of suppliers' claims against the Confidentiality Test and reasons for agreeing for the information to remain confidential.

Trends in the use of confidentiality provisions

2.14 Each of the ANAO's audits of the Senate Order since 2006 have identified that fewer than 40 per cent of contracts examined have contained specific confidentiality provisions that met the Confidentiality Test criteria. In 2015, that percentage was approximately 52 per cent. The results of this audit of the Senate Order indicate that there continues to be a high degree of inappropriate use and misreporting by entities of the types of confidentiality provisions and reasons for their use.

17 Finance, *Resource Management Guide 403—Meeting the Senate Order on Entity Contracts*, 'Standard categories of confidentiality information,' pp. 9–10, Canberra.

Figure 2.3: Trends in the appropriate use of confidentiality provisions in contracts over time



Source: ANAO analysis.

Note: To allow comparison with previous years, this Figure refers only to the 94 contracts tested with confidentiality provisions reported.

Did entities include parliamentary disclosure and ANAO access clauses?

Of the 140¹⁸ confidential and non-confidential contracts examined by the ANAO, 69 per cent contained parliamentary disclosure clauses, and 79 per cent included ANAO access clauses. This result represents a moderate decline on 2014 results which found 98 per cent of contracts sampled contained appropriately worded parliamentary disclosure clauses, and 97 per cent included ANAO access clauses in contracts.

2.15 In entering into a contract, the Australian Government cannot provide an absolute guarantee of confidentiality. Legislation can require the Government to disclose information, regardless of any contractual obligations to maintain confidentiality. These may include disclosure of information consistent with the *Freedom of Information Act 1982* or disclosure of discoverable information that is relevant to a case before a court. In addition, entities may be required to facilitate the disclosure of, or access to, contractual information by the Parliament, its committees, and the Auditor-General to comply with accountability obligations. Accordingly, and as recommended in the *Commonwealth Procurement Rules (CPRs)*¹⁹, Australian Government contracts should contain clauses that advise suppliers, regardless of contract confidentiality, that:

- the disclosure of contract-related information may occur to the Parliament or parliamentary committees; and
- the ANAO can access a contractor's records and premises.

2.16 Of the 140 contracts examined by the ANAO, 69 per cent contained parliamentary disclosure clauses, and 79 per cent included ANAO access clauses (see Table 2.4). This result represents a moderate decline on 2014 results which found 98 per cent of contracts sampled contained appropriately worded parliamentary disclosure clauses, and 97 per cent included ANAO access clauses in contracts.

Table 2.4: Parliamentary and ANAO access clauses

Entity	No. of Contracts examined	Parliamentary disclosure clauses		ANAO access clauses	
		No.	%	No.	%
Agriculture	20	14	70	16	80
Defence	70	39	56	51	73
DFAT	20	18	90	18	90
Health	30	25	83	26	87
Total	140	96	69	111	79

Source: ANAO analysis.

18 The original sample was 150. Defence was unable to provide documentation for nine contracts (six confidential and three non-confidential) in the audit timeframe, and one contract notice was reported in error and could not be tested.

19 Finance, *Commonwealth Procurement Rules*, 1 July 2014, p.21.

Were recommendations from previous Senate Order audits implemented by the entities?

This audit is the nineteenth in a series of Senate Order audits. While the level of confidentiality provisions in contracts has decreased, this audit indicates that overall compliance with the Senate Order is still not being achieved.

In the context of persistent poor compliance found in ANAO Senate Order audits, Finance could consider its regulatory stance to ensure that individual entities provide quality information to the Parliament.

2.17 This audit is the nineteenth in a series of Senate Order audits. To date there have been 26 recommendations aimed at entities to improve their use and reporting of confidentiality provisions in contracts by strengthening approaches used to identify and record confidential contract information, and improving the accuracy and quality of publicly reported contract information. While the level of confidentiality provisions in contracts has decreased, this audit indicates that overall compliance with the Senate Order is still not being achieved.

2.18 Finance issues the Guidance for the Senate Order, however, when undertaking procurement an entity's first port of call is the CPRs. ANAO Report No.4 2015–16, included a recommendation for Finance to amend the CPRs to include the Confidentiality Test or refer more directly to the requirement for its use; to which Finance agreed.²⁰ The recommendation has not been implemented. Finance has indicated to ANAO, as part of this audit, that updates to the CPRs are expected to be published in mid-2017. As the entity responsible for AusTender and procurement policy, Finance has not necessarily taken a clear regulatory role with respect to the accuracy of contract reporting, with procurement data quality solely based on entity self-reporting. In the context of persistent poor compliance found in ANAO Senate Order audits, Finance could consider whether this is the appropriate regulatory stance to ensure that individual entities provide quality information to the parliament.

2.19 In ANAO Report No.4 2015–16, the ANAO recommended that entities implement procedures that require: a case-by-case assessment of supplier requests against the Confidentiality Test; and adequate documentation of the reasons for agreeing to keep specific information in contracts confidential. DFAT and Agriculture provided evidence to demonstrate that they had noted the recommendation and that a response had been implemented. Due to timing, improvements to entity guidance would not yet have been implemented in relation to contracts for the 2015 Senate Order.

20 ANAO Audit Report No.4, 2015–16, *Confidentiality in Government Contracts: Senate Order for Departmental and Entity Contracts (Calendar Year 2014)*, recommendation 1, p.17.

3. Ministers' letters and accuracy of contract information

Areas examined

All entities' Ministers' letters were reviewed for timeliness. Contract details published on AusTender were also compared to the details contained within the sampled contracts (confidential and non-confidential). The aim was to confirm whether the reported information met the requirements of the Senate Order on entity contracts.

Conclusion

In order for Ministers to comply with the Senate Order, entities are expected to support their Minister by publishing listings in accordance with the content and timing requirements. This audit found that entities did not always meet these requirements and Ministers could be better supported. In 2015 the ANAO observed:

- the timeliness of Ministers' letters has decreased compared to previous years, with letters relating to only 60 entities (65 per cent) provided to the Senate for tabling by the due date. This is the lowest result since 2011;
- overall 11 entities reported excluded contracts in 2015. A sample of these contracts found all those reviewed had been excluded for appropriate reasons. One of the audited entities had excluded contracts without advising of the exclusion in their Ministers' letter;
- 41 entities did not identify whether they did or did not have non-procurement contracts, and therefore did not meet the Senate Order requirements;
- although 89 per cent of entities provided a link to AusTender from their website, the majority did not do so directly from their home page, as instructed by the Senate Order; and
- from a sample of 140 confidential and non-confidential procurement contracts on AusTender only 19 per cent of the contracts sampled were correctly reported.

The changes to the Senate Order in 2015 allowed entities to meet the requirements of the Senate Order by linking to AusTender. These changes have also significantly reduced entities' overall cost of complying with the Senate Order.

AusTender listings for Agriculture, DFAT and Health reflect contracts on a whole of life basis (incorporating amendments into original contract notices). Defence reports each contract and contract amendment individually (as separate AusTender contract notices). Defence is part of a whole of government project which is underway to update SAP (enterprise resource planning software) based financial systems and improve their reporting functionality.

Did Ministers table their letters of advice in the Senate by 29 February 2016?

Ministers' letters relating to only 60 entities (65 per cent) were provided to the Senate for tabling by the due date. This is the lowest result since 2011.

3.1 The Senate Order requires letters from Ministers to be tabled twice a year advising that all non-corporate Commonwealth entities they administer have placed on the internet lists of contracts valued at \$100,000 or more (GST inclusive). The letters must be tabled within two months following each reporting period (by 31 August for financial year reporting and by 28 February (29 February in leap years) for calendar year reporting). The letters are intended to provide an accountability mechanism—informing the Parliament that entities have complied with the requirements of the Senate Order.

3.2 For the 2015 calendar year reporting period, Ministers' letters covering 60 entities (65 per cent) were received by the Senate for tabling on or before the due date 29 February 2016. Ministers' letters covering an additional nine entities were received within one week of the deadline. Letters covering six more entities were tabled up to one month after the deadline, and letters covering a further 16 entities were tabled more than one month late.²¹ The 65 per cent rate of compliance is the lowest since the 2011 calendar year which saw a 57 per cent rate of compliance, and continues the downward trend since 2013's peak of 92 per cent compliance for the calendar year reporting period.

Did the content of the Ministers' letters comply with the content requirements of the Senate Order including outlining excluded contracts?

Overall 11 entities reported excluded contracts in 2015. A sample review of the contracts found all had been excluded for appropriate reasons. One of the audited entities (Health) had excluded contracts without advising of the exclusion in their Minister's letter.

3.3 Under the Senate Order where an entity has excluded contracts from its listing²², the Minister's letter is to advise the basis for the exclusion.²³ In 2015, 11 entities noted they had excluded contracts from their listings. Additionally, Health had excluded contracts from their listing which was not disclosed in their Minister's letter.

3.4 As requested under the Order, the ANAO examined a number of contracts which had not been included in the list to assess whether the exclusion of these contracts complied with the Senate Order. A sample review of nine contracts, across two of the four audited entities (DFAT and Defence), found all had been excluded for appropriate reasons.

21 One entity was not covered by a Minister's letter.

22 There are circumstances where the Senate Order allows for certain contractual arrangements to be excluded from contract listings, including due to disclosure being contrary to public interest or the Privacy Act 1988 or statutory secrecy provisions.

23 The Senate, *The Senate Order for Entity Contracts* (the Senate Order), paragraph (3).

Did the content of the lists comply with the content requirements of the Senate Order?

Forty-one entities did not identify whether they did or did not have non-procurement contracts, and therefore did not meet the Senate Order requirements.

Although 89 per cent of entities provided a link to AusTender from their website, the majority did not do so directly from their home page, as required.

The ANAO's assessment of the accuracy of reporting of a sample of 140 confidential and non-confidential procurement contracts on AusTender found that only 19 per cent of the contracts sampled were considered to be correctly reported on AusTender.

3.5 The Senate Order was amended in May 2015 to allow for procurement contracts valued at or above \$100 000 to be reported by reference to a complying report on AusTender, the Australian Government's procurement information system.²⁴ To satisfy the requirement, a link to AusTender's Senate Order report from an entities home page is considered acceptable practice for the purposes of reporting procurement contracts.

3.6 For the 2015 calendar year reporting period, 79 entities (89 per cent) placed links on their website to either the AusTender home page or the AusTender Senate Order report page. These AusTender links were placed either on a "contracts" or "Senate Order" reporting page within the website itself, or inside a separate downloadable document listing the entity's non-procurement contracts. The remaining 10 entities did not reference AusTender as part of their internet listings. ANAO did not identify any entity that placed a relevant link on their website's home page, as required by the Order (part 2A).

3.7 Reporting of non-procurement contracts requires entities to place lists on their website identifying the contract details presented in Table 3.1.

24 Entities have been required to publish details of all procurement contracts and entity agreements valued at or above \$10 000 on AusTender since September 2007. As with the reporting requirements of the Senate Order, for each contract reported on AusTender, the entity must report the supplier, subject matter, period and total value (or estimated value) of the contract. Also like the Senate Order, AusTender requires entities to report the existence of confidentiality provisions in contracts and to identify the reasons for including such provisions. Department of Finance, *Resource Management Guidance 403: Meeting the Senate Order on Entity Contracts*, item 37, page 7.

Table 3.1: Template for contract listings

Contract details								
Contractor	Subject matter	Amount of consideration	Start date	Anticipated end date	Whether contract contains provisions requiring the parties to maintain confidentiality of any of its provisions (Y/N)	Reason(s)	Whether contract contains other requirements of confidentiality (Y/N)	Reason(s)

Source: Department of Finance, *Resource Management Guide No. 403—Meeting the Senate Order on Entity Contracts*, p 15.

3.8 For the 2015 calendar year reporting period, 35 entities (39 per cent of those that published a list) identified and reported a list of non-procurement contracts. A further 13 entities reported that no non-procurement contracts had been entered into. Forty-one entities did not identify whether they did or did not have non-procurement contracts, and therefore did not meet the Senate Order requirements.

3.9 Entity website listings of non-procurement contracts matched the Department of Finance’s recommended template in 33 cases. This represented 94 per cent of the sample when excluding the entities that stated they did not have non-procurement contracts to report.

3.10 Of the audited entities, all had placed a list on the website with all required details.

Accuracy of procurement reporting within audited entities

3.11 Reliance on AusTender for accountability makes it incumbent upon entities to ensure that information is correct and up-to-date. To assess the reliability of information published on AusTender the ANAO compared the accuracy of contract information reported for a sample of 140 contracts to actual contracts and supporting documentation. The 140 sample comprised the 94 contracts described in paragraph 2.9, which were reported to contain confidentiality provisions, and another 46²⁵ randomly selected contracts that were reported as not containing confidentiality provisions.

3.12 The assessment involved review of the basic contract details (contractor, subject matter, amount and period) as well as the correct identification of the type and reasons for confidentiality provisions. Based on these criteria, as shown in Table 3.2, only 19 per cent of the 140 contracts were considered to be correctly reported on AusTender.

25 The original non-confidential sample was 50, however Defence was unable to provide documentation for three non-confidential contracts in the audit timeframe, and one contract notice was reported in error and could not be tested.

Table 3.2: Accuracy of reported information—procurement contracts

	Agriculture	Defence	DFAT	Health	Total
Number of contract notices sampled	20	80	20	30	150
Number of contract notices reviewed	20	70	20	30	140
Contractor Name matched	20	70	20	30	140
Subject Matter matched	20	70	20	30	140
Start Date matched	10	33	10	25	78
End Date matched	13	31	13	23	80
Contract Value matched	13	35	14	19	81
Number of contracts for which all basic details were correctly reported on AusTender	6	22	5	17	50
Number of contracts for which the existence (or otherwise) of confidentiality provisions was correctly reported on AusTender	13	43	14	12	82
Number of contracts for which both the basic contract details and existence (or otherwise) of confidentiality provisions was correctly reported	3	14	3	7	27
Overall accuracy %	15%	20%	15%	23%	19%

Source: ANAO analysis.

Did the relevant entities provide an estimated cost of compliance?

The 2015 changes to the Senate Order provided for entities to use a complying report on AusTender to report procurement contracts. Consequently the compliance cost estimate should not include any cost with respect to procurement contracts. This change has significantly reduced entities' overall cost of complying with the Senate Order.

3.13 Under the Order, entities are required to provide an estimate of the cost of complying with the Senate Order for each listing along with an overview of the method used to reach the estimate. The estimate should be based upon the cost of the resources required to comply with the Senate Order. Given the 2015 changes to the Order and the use of AusTender reporting, the estimate should not include the cost of complying with the Senate Order with respect to procurement contracts. Despite this, 17 entities reported a cost of complying without reporting any non-procurement contracts. Each of the audited entities recorded a cost of compliance and justification in accordance with the Senate Order. Health had the highest reported cost of

compliance and advised that they have reduced requirements for manual reviews and expect this cost to decline.

Table 3.3: Cost of complying with the Senate Order

Description	Number of entities compliant with paragraph (2)(d) of the Order, and the reported cost of compliance			
	2012	2013	2014	2015
Number of entities that reported both the cost of compliance and method used to calculate the cost of compliance (when required to do so)	76	82	72	89
Total cost reported	\$168 699	\$274 607	\$237 124	\$127 303
Average cost per entity	\$2 082	\$3 156	\$3 162	\$1 430
	Agriculture	Defence	DFAT	Health
Cost of complying reported by the audited entities in 2015	\$3 000	\$6 563	\$16 823	\$27 190 ^(a)

Source: ANAO analysis.

Notes: (a) This is the highest reported cost of compliance.

How was Senate Order and AusTender information complied and quality assured?

Each of the audited entities compiled their listings for procurement contracts using AusTender. AusTender listings for Agriculture, DFAT and Health reflect contracts on a whole of life basis (incorporating amendments into original contract notices). Defence reports each contract and contract amendment individually (as separate AusTender contract notices). Defence is part of a whole of government project which is underway to update SAP based financial systems and improve their reporting functionality.

3.14 The audited entities had established procedures for recording and reporting contract information, including the information required by the Senate Order.²⁶ Entities relied on information being recorded accurately in AusTender at the time initial data entry.

3.15 Each of the audited entities had both procurement and non-procurement contracts in the calendar year. The compilation of the procurement contract listings involved extraction from the entities' Financial Information Management Systems (FMIS) and upload to AusTender. This process ranged from being highly automated to highly manual.

26 "[The] contractor, the amount of the consideration and the subject matter of each such contract, the commencement date of the contract, the duration of the contract, the relevant reporting period and the twelve-month period relating to the contract listings"
The Senate, *Procedural Order of Continuing Effect 13 – Entity contracts*, (2) (b).
"[Non-Corporate Commonwealth Entities (NCCes)] should report contracts where the whole-of-life amount of consideration will be \$100,000 or more (GST inclusive). Consideration refers to the full amount to be paid or received by the NCCe in return for goods and/or services over the life of the contract."
Finance Resource Management Guide No.403 – Meeting the Senate Order on Entity Contracts, paragraph 36, p.7.

3.16 AusTender listings for Agriculture, DFAT and Health reflect contracts on a whole of life basis (incorporating amendments into original contract notices). Defence reports each contract and contract amendment individually (as separate AusTender contract notices). This is due to Defence's system processes which result in contract amendments appearing on AusTender as unique entries. Defence is currently part of a whole of government project which is underway to update SAP based financial systems and improve their reporting functionality. Defence is the lead entity on the project. An overview of the project is at Box 1.

Box 1: SAP FGT Redevelopment Project

Most of the larger Government agencies use SAP's FMIS as the source system for reporting contracts to AusTender. The SAP software that facilitates the data extraction and uploads to AusTender is the SAP FGT. The FGT was developed in 2000 and is integrated with agencies' SAP systems. As a consequence of its age and the substantial functional and technical modification over the past 15 years, the SAP FGT is now at a point in its lifecycle where it is difficult to technically maintain. It is also problematic to enhance to meet new procurement data capture requirements. In addition, a redevelopment of the FGT represents an opportunity to address the variety of problems with the existing model.

The redevelopment proposes improvement in the ability to align SAP with AusTender information post publication and improved data quality through configurable data validation error/warning messages. These benefits should improve the quality of contract reporting, including for the Senate Order.



Grant Hehir
Auditor-General

Canberra ACT
27 September 2016

Appendices

Appendix 1 Entity responses



Australian Government
Department of Agriculture
and Water Resources

ACTING SECRETARY

Ref: EC16-000604

Ms Michelle Kelly
Group Executive Director
Australian National Audit Office
GPO Box 707
CANBERRA ACT 2601

Dear Ms Kelly

Thank you for your email of 12 August 2016 regarding the proposed audit report, 'Confidentiality in Government Contracts: Senate Order for Departmental and Entity Contracts' (Calendar Year 2015 Compliance) and for the opportunity to respond to the report.

The Department of Agriculture and Water Resources (the department) notes the ANAO's observation that processes can be strengthened to classify and report confidentiality provisions and we will continue to look for improvements in this area.

The Department provides the following formal entity response for inclusion in the audit report:

The Department agrees with the overall findings in the ANAO report and will implement additional measures to improve compliance when assessing confidentiality provisions.

Should you have any questions or require any further information, please do not hesitate to contact Emily Canning, Chief Finance Officer on 02 6272 4398 or emily.canning@agriculture.gov.au.

Yours sincerely

Lynn O'Connell

1 September 2016

T +61 2 6272 3933
F +61 2 6272 5161

18 Marcus Clarke Street
Canberra City ACT 2601

GPO Box 858
Canberra ACT 2601

agriculture.gov.au
ABN 24 113 085 695



Australian Government
Department of Defence

Mr Brendan Sargeant
Acting Secretary

Vice Admiral RJ Griggs AO CSC RAN
Acting Chief of the Defence Force

SEC/OUT/2016/221
CDF/OUT/2016/772

Dr Thomas Clarke
Executive Director
Australian National Audit Office
PO Box 707
Canberra ACT 2601

**AUSTRALIAN NATIONAL AUDIT OFFICE PERFORMANCE AUDIT -
CONFIDENTIALITY IN GOVERNMENT CONTRACTS: SENATE ORDER FOR
DEPARTMENTAL AND ENTITY CONTRACTS**

Thank you for your correspondence which contained the S19 Proposed Report for the subject audit.

Attached to this letter are Defence's Proposed Amendments, Editorials and Comments (Attachment 1), and the Agency Response (Attachment 2). These Attachments represent Defence's formal response to the Proposed Report.

We would like to take this opportunity to formally thank the ANAO for the time and resources they have allocated to the audit. While there are no formal recommendations for Defence, the report's findings will benefit Defence's current and future management and reporting of contracts.

Brendan Sargeant
Acting Secretary

RJ Griggs AO, CSC, RAN
Vice Admiral
Acting Chief of the Defence Force

7 September 2016

9 September 2016

Attachments:

1. Proposed Amendments, Editorials and Comments
2. Agency Response



Australian Government
Department of Foreign Affairs and Trade

Acting Secretary

Telephone: 02 6261 2472
Facsimile: 02 6273 2081
Email: peter.varghese@dfat.gov.au

File Number: 16/8479#27

17 August 2016

Michelle Kelly
Group Executive Director
Performance Audit
Australian National Audit Office
GPO Box 707
CANBERRA ACT 2601

Dear Ms Kelly

Thank you for your email dated 12 August 2016 regarding Australian National Audit Office (ANAO) – Confidentiality in Government Contracts: Senate Order for Departmental Entity Contracts (Calendar Year 2015 Compliance).

The Department of Foreign Affairs and Trade (DFAT) welcomes the findings of this report. The report will assist DFAT to further refine its approach in meeting the requirements of the Senate Order.

DFAT's summary response is provided in Attachment A.

I appreciate the professional approach the ANAO adopted in dealing with DFAT business groups during the audit process.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Gary Quinlan', is written over a horizontal line.

Gary Quinlan AO

R G Casey Building, Barton ACT 0221 www.dfat.gov.au



Australian Government
Department of Health

SECRETARY

// September 2016

Ms Michelle Kelly
Group Executive Director
Performance Audit
Australian National Audit Office
GPO Box 707
Canberra ACT 2601

Dear Ms Kelly

**Department of Health response to the Proposed Report – Confidentiality in Government
Contracts: Senate Order for Entity Contracts (Calendar Year 2015 Compliance)**

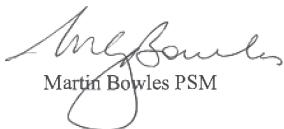
Thank you for providing the ANAO's proposed report under s.19 of the *Auditor-General Act 1997 on Confidentiality in Government Contracts: Senate Order for Entity Contracts (Calendar Year 2015 Compliance)*.

The Department agrees with the findings in the proposed report. The treatment and reporting of confidentiality provisions in contracts will be improved through a procurement transformation project that is scheduled to be completed by July 2017.

I would like to thank the ANAO for its professional and comprehensive audit of Confidentiality in Government Contracts.

If you have any further questions about the Department's response, please contact Kate Herden, A/g Assistant Secretary, Integrity Branch on (02) 6289 8190.

Yours sincerely



Martin Bowles PSM

GPO Box 9848 Canberra ACT 2601



Australian Government
Department of Finance

Jane Halton AO PSM
Secretary

Our Ref: SEC0013775

Ms Michelle Kelly
Group Executive Director
Performance Audit
Australian National Audit Office
GPO Box 707
CANBERRA ACT 2601

Dear Ms Kelly

Thank you for your email dated 12 August 2016, regarding the audit of Confidentiality in Government Contracts: Senate Order for Departmental and Entity Contracts (Calendar Year 2015 Compliance).

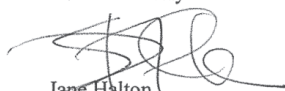
Finance is pleased to receive the section 19 report and would like to thank the Australian National Audit Office (ANAO) for the opportunity to respond. While I do not have any comments in relation to this audit, I will take this opportunity to provide an update on the status of recommendations specific to Finance from the previous Audit Report No. 4 2015-16 (Calendar year 2014 Compliance).

Finance has actioned all but one part of the recommendations (recommendation 1a). As part of the review of the Commonwealth Procurement Rules to be in place by 1 July 2017, Finance will expand on the existing reference to the guidance on *Confidentiality Throughout the Procurement* to note the guidance includes a 'Confidentiality Test'. In consultation with ANAO, the guidance has been strengthened as recommended to include examples of entity assurance mechanisms.

Finance will continue to encourage entities to implement appropriate quality assurance processes when uploading data to AusTender.

Should you have any queries please do not hesitate to contact Mr John Sheridan, First Assistant Secretary, Technology and Procurement Division on 6215 1501.

Yours sincerely



Jane Halton
Secretary
7 September 2016

One Canberra Avenue, Forrest ACT 2603 • Telephone 02 6215 3445
Internet www.finance.gov.au

Appendix 2 Senate Procedural Order of Continuing Effect 13: Entity Contracts

(1) There be laid on the table, by each minister in the Senate, in respect of each entity administered by that minister, or by a minister in the House of Representatives represented by that minister, by not later than 2 calendar months after the last day of the financial and calendar year, a letter of advice that:

(a) a list of contracts in accordance with paragraph (2) has been placed on the Internet, with access to the list through the entity's home page; and

(b) includes an assurance by the entity head that the listed contracts do not contain any inappropriate confidentiality provisions.

(1A) Order 1(b) takes effect from 1 July 2017.

(2) The list of contracts referred to in paragraph (1) indicate:

(a) each contract entered into by the entity which has not been fully performed or which has been entered into during the previous 12 months, and which provides for a consideration to the value of \$100 000 or more;

(b) the contractor, the amount of the consideration and the subject matter of each such contract, the commencement date of the contract, the duration of the contract, the relevant reporting period and the twelve-month period relating to the contract listings;

(c) whether each such contract contains provisions requiring the parties to maintain confidentiality of any of its provisions, or whether there are any other requirements of confidentiality, and a statement of the reasons for the confidentiality; and

(d) an estimate of the cost of complying with this order and a statement of the method used to make the estimate.

(2A) For the purposes of paragraph (1)(a) as it applies to procurement contracts only, access from an entity's home page may include a link to a complying report on AusTender. If an entity has contracts to report other than procurement contracts, there must be a dedicated link to a list of such contracts from an entity's home page in addition to any link to AusTender.

(3) If a list under paragraph (1) does not fully comply with the requirements of paragraph (2), the letter under paragraph (1) indicate the extent of, and reasons for, non-compliance, and when full compliance is expected to be achieved. Examples of non-compliance may include:

(a) the list is not up to date;

(b) not all relevant entities are included; and

(c) contracts all of which are confidential are not included.

(4) Where no contracts have been entered into by an entity, the letter under paragraph (1) is to advise accordingly.

(5) In respect of contracts identified as containing provisions of the kind referred to in paragraph (2)(c), the Auditor-General be requested to provide to the Senate, by not later than 30 September 2016 and 30 September 2018, a report indicating that the Auditor-General has

examined a number of such contracts selected by the Auditor-General, and indicating whether any inappropriate use of such provisions was detected in that examination.

(6) In respect of letters including matter under paragraph (3), the Auditor-General be requested to indicate in a report under paragraph (5) that the Auditor-General has examined a number of contracts, selected by the Auditor-General, which have not been included in a list, and to indicate whether the contracts should be listed.

(7) The Finance and Public Administration References Committee consider the ongoing operation of the order and report on relevant developments from time to time.

(8) This order has effect on and after 1 July 2001.

(9) In this order:

"complying report on AusTender" means a report in respect of an individual entity that meets the requirements of this order in respect of procurement contracts;

"entity" means a Commonwealth entity within the meaning of the *Public Governance, Performance and Accountability Act 2013*, but does not include a trading Public Non-financial Corporation as classified by the Australian Bureau of Statistics;

"inappropriate confidentiality provision" means a confidentiality provision that is not in accordance with guidance issued by the Department of Finance on compliance with this order and approved by the Finance and Public Administration References Committee; and

"previous 12 months" means the period of 12 months ending on either 31 December or 30 June in any year, as the case may be.

(9A) Until 1 July 2017, entity is taken to mean a non-corporate Commonwealth entity within the meaning of the *Public Governance, Performance and Accountability Act 2013*.

(20 June 2001 J.4358, amended 27 September 2001 J.4994, 18 June 2003 J.1881, 26 June 2003 J.2011, 4 December 2003 J.2851, 1 March 2007 J.3527, 14 May 2015 J.2601)²⁷

27 Parliament of Australia, *Senate Procedural Orders and Resolutions of the Senate of Continuing Effect, No. 13, Entity Contracts*. [Internet], last amended May 2015, available from <http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/standi ngorders/d00/Procedural_orders_of_continuing_effect/d05> [accessed July 2016].

Appendix 3 Previous ANAO audit reports on the Senate Order

Audit Report	Recommendation(s)
<p>Audit Report No.4 2015–16 (Calendar Year 2014 Compliance)</p>	<p>Recommendation No. 1 Paragraph 3.16</p> <p>To improve the appropriate use and reporting of confidentiality provisions in contracts by entities, the ANAO recommends the Department of Finance revises guidance for confidentiality in procurement by including:</p> <ul style="list-style-type: none"> • reference to the Confidentiality Test in the Commonwealth Procurement Rules; and • strengthen current guidance to include examples of entity assurance mechanisms. <p>Recommendation No. 2 Paragraph 3.20</p> <p>When considering requests to keep information contained in a contract confidential, the ANAO recommends that entities implement procedures that require:</p> <ul style="list-style-type: none"> • a case-by-case assessment of supplier requests against the Confidentiality Test; and • adequate documentation of the reasons for agreeing to keep specific information in contracts confidential.
<p>Audit Report No.1 2014–15 (Calendar Year 2013 Compliance)</p>	<p>Recommendation No. 1 Paragraph 3.22</p> <p>To provide for greater transparency and accountability in reporting on the use of confidentiality provisions in Australian Government contracts, the ANAO recommends that agencies improve practical support provided to staff to more accurately assess and report on confidentiality provisions in contracts.</p> <p>Recommendation No. 2 Paragraph 4.21</p> <p>To increase accuracy in reporting of contract information, the ANAO recommends that agencies improve data capture and reporting for their Senate Order contract listings and on AusTender.</p>
<p>Audit Report No.4 2013–14 (Calendar Year 2012 Compliance)</p>	<p>The report did not contain any recommendations but emphasised the need for agencies to improve the:</p> <ul style="list-style-type: none"> • identification and reporting on the use of confidentiality provisions, particularly pricing information and the difference between general and specific confidentiality provisions; • implement enhanced processes to support data capture, reporting; and • quality assurance of contract information.
<p>Audit Report No.4 2012–13 (Calendar Year 2011 Compliance)</p>	<p>The report did not contain any recommendations but emphasised the need for agencies to:</p> <ul style="list-style-type: none"> • better tailor guidance and training materials to help ensure that key processes, such as identifying the appropriate use of confidentiality provisions (particularly pricing information and the difference between general and specific confidentiality provisions), are commonly understood and applied; and • implement enhanced processes to support data capture, reporting and quality assurance.

Audit Report	Recommendation(s)
<p>Audit Report No.2 2011–12 (Calendar Year 2010 Compliance)</p>	<p>The report did not contain any recommendations but emphasised the need for agencies to improve the appropriate use and reporting of confidentiality provisions through better communication of the key requirements to agency staff and improving processes to support the accurate reporting of contract information.</p>
<p>Audit Report No.7 2010–11 (Calendar Year 2009 Compliance)</p>	<p>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 review opportunities to consolidate procurement reporting requirements, in conjunction with the department’s continuing focus on improving AusTender functionality.</p> <p>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.</p>
<p>Audit Report No.6 2009–10 (Calendar Year 2008 Compliance)</p>	<p>Recommendation No. 1 Paragraph 2.22 To assist agencies to meet the requirements of the next and any subsequent Senate Orders, the ANAO recommends that they:</p> <ul style="list-style-type: none"> • embed in their relevant policies and practices, the guidance and instructions in Financial Management Guidance 3, including the details of the four criteria test for confidentiality; and • provide suitable training and guidance to staff on these policies and procedures.
<p>Audit Report No.5 2008–09 (Calendar Year 2007 Compliance)</p>	<p>Recommendation No. 1 Paragraph 2.25 The ANAO recommends agencies implement review measures to assess the appropriateness of decisions to include confidentiality provisions in contracts and provide suitable feedback to staff involved in procurement.</p>
<p>Audit Report No.7 2007–08 (Calendar Year 2006 Compliance)</p>	<p>Recommendation No.1 Paragraph 4.23 The ANAO recommends that agencies improve the accuracy and completeness of their Internet listings by:</p> <ul style="list-style-type: none"> • implementing controls to assist in confirming that Internet listings are complete and accurate. This could include, for example, reconciling the Internet listing details to AusTender and other relevant sources of information such as Financial Management Information System records; and • developing quality assurance processes to improve the accuracy of the Internet listing.

Audit Report	Recommendation(s)
<p>Audit Report No.5 2006–07 (Calendar Year 2005 Compliance)</p>	<p>Recommendation No.1 Paragraph 2.35 The ANAO recommends that agencies improve the accuracy and completeness of their contract listings by:</p> <ul style="list-style-type: none"> • implementing controls to assist in confirming that contract listings are complete and accurate. This could include, for example, reconciling the contract listing details to other relevant sources of information, such as Financial Management Information System records or to AusTender; and • developing quality assurance processes to improve the accuracy of the contract listing. <p>Recommendation No.2 Paragraph 3.38 The ANAO recommends that agencies provide guidance to those staff responsible for negotiating contracts and completing the Senate Order contract listing, to improve the level of understanding of the Senate Order, particularly relating to the use of confidentiality provisions.</p>
<p>Audit Report No.11 2005–06 (Calendar Year 2004 Compliance)</p>	<p>Recommendation No. 1 Paragraph 2.35 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 Financial Management Information System.</p> <p>Recommendation No. 2 Paragraph 3.20 The ANAO recommends that agencies provide further guidance, together with training and/ or awareness raising sessions on the requirements of the Senate Order to all staff responsible for negotiating contracts.</p> <p>Recommendation No. 3 Paragraph 3.58 The ANAO recommends that agencies ensure adequate documentation of the reasons for agreeing to identify specified information in contracts as being confidential.</p>
<p>Audit Report No.10 2004–05 (Calendar Year 2003 Compliance)</p>	<p>The report did not contain any recommendations however noted a number of contracts had been inappropriately listed as there was no information that satisfied the criteria for protection as confidential information. In addition agencies should make sure that the policies are known, and acted upon, at all levels within the agency.</p>
<p>Audit Report No.31 2003–04 (Financial Year 2002–03 Compliance)</p>	<p>The report did not contain any recommendations however noted that agencies had difficulty identifying what information should be protected as confidential information, and found many instances where information was inappropriately identified as confidential information.</p>

Audit Report	Recommendation(s)
Audit Report No.5 2003–04 (Autumn 2003 Compliance)	The report did not contain any recommendations however noted that 'although agencies have made changes to their policies and procedures to address the issue of protecting contractual information as confidential, all agencies must continue efforts to ensure that their policies are both regularly reviewed to accord with Government policy, and reflected in their practices'.
Audit Report No.32 2002–03 (Spring 2002 Compliance)	The report did not contain any recommendations however noted that some claims of confidentiality were not appropriate as the information claimed to be confidential was not specified, or where it was specified, it did not satisfy the established criteria to make it confidential. In addition better communication of the established policies and procedures was required.
Audit Report No.8 2002–03 (Autumn 2002 Compliance)	<p>Recommendation No. 1 Paragraph 2.42</p> <p>To assist with the compilation of the Internet listing, the ANAO recommends that all FMA agencies, as appropriate:</p> <ul style="list-style-type: none"> • give priority consideration to establishing contract registers where the number of contracts makes it a practicable solution; and • implement quality assurance processes, as necessary, to ensure the completeness and accuracy of the contract information listed on the Internet. <p>Recommendation No. 2 Paragraph 3.24</p> <p>The ANAO recommends that all FMA agencies, as appropriate:</p> <ul style="list-style-type: none"> • review the standard forms of request for tender and contract to ensure contractors are made fully aware of the Commonwealth's governance and accountability requirements; • implement procedures which require a case-by-case consideration of requests for information in, or associated with, contracts to be treated as confidential; • provide guidance and training for procurement officers to assist them determine the appropriateness of claims of confidentiality made by potential contractors; and • establish a training and staff awareness program covering the new governance and accountability framework for contracting for all relevant staff.
Audit Report No.33 2001–02 Senate Order of 20 June 2001 (February 2002)	The report did not contain any recommendations but noted that development of processes and guidance by agencies underway at that time would assist in promoting the appropriate use of confidentiality provision in contracts.

Audit Report	Recommendation(s)
<p>Audit Report No.38 2000–01 The Use of Confidentiality Provisions in Commonwealth Contracts</p>	<p>Recommendation No. 1 Paragraph 5.24</p> <p>The ANAO recommends that agencies should include provisions in tender documentation that alert prospective tenderers or contractors to the implications of the public accountability responsibilities of agencies. The principle to be applied is that contractual provisions (and related matters) should be disclosed to Parliament and its committees unless there is a sound basis for their confidentiality.</p> <p>The effectiveness of this recommendation would be enhanced if high level advice to this effect is included in the next edition of the Commonwealth Procurement Guidelines</p> <p>Recommendation No. 2 Paragraph 5.36</p> <p>In the case of contracts that contain performance measures, the ANAO recommends that agencies have available data that would allow them, if requested, to provide summarised performance information on progress against relevant measures in contracts to parliamentary committees.</p>