

ACCESS TO CONTRACTORS' RECORDS

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1. INTRODUCTION

It will come as no surprise that I begin my remarks by saying that the outsourcing and privatisation of much of the public sector over the last six or so years has brought with it a number of opportunities as well as different risks. One of the most challenging issues that has faced my Office and, I am sure, many others¹, is that of access to contractor records and other information relevant to public accountability. This matter is of concern not only to Auditors-General, but also to public agencies in their role as contract managers, Ministers as decision-makers and to the Parliament when scrutinising public sector activities.

My Office has experienced problems in accessing contractor information both through audited agencies and in direct approaches to private sector providers. Several audits and parliamentary inquiries² have focussed closely on what public accountability means in the context of contract management, third party service providers and commercially-based public activities.

I see one of my roles as raising the Parliamentary awareness of these issues; encouraging agencies to facilitate access for both their own and the ANAO's accountability obligations; and to help achieve better understanding by the private sector about the accountability mechanisms that overlay the process of doing business with government.

2. LEGISLATIVE POWER OF ACCESS AND THE USE OF CONTRACTUAL PROVISIONS

As part of his/her statutory duty to the Parliament, the Auditor-General may require access to records and information relating to contractor performance. The Auditor-General's legislative information-gathering powers are set out in Part 5 of the *Auditor-General Act 1997*. These powers are broad but they do not include access to contractors' premises to obtain information.

In September 1997, my Office drafted model access clauses (reflecting the provisions of the *Auditor-General Act 1997*) which were circulated to agencies for the recommended insertion in appropriate contracts. These clauses give the agency and my Office access to contractors' premises and the right to inspect and copy documentation and records associated with the contract.

The primary responsibility for ensuring there is sufficient access to relevant records and information pertaining to a contract lies with agency heads. This responsibility is mandated in section 44 of the *Financial Management and Accountability Act 1997* which states clearly that a Chief Executive must manage the affairs of the Agency in a way that promotes proper use (meaning efficient, effective and ethical use) of the Commonwealth resources for which the Chief Executive is responsible.

For accountability measures to be effective, it is critical that agencies closely examine the nature and level of information to be supplied under the contract and the authority to access contractors' records and premises as necessary to monitor adequately the performance of the contract. I stress 'as necessary' because we are not advocating carte blanche access. Audit access to premises would not usually be necessary for 'products' or 'commodity type services' provided in the normal course of business.

The ANAO considers its own access to contract related records and information would generally be equivalent to that which should reasonably be specified by the contracting agency in order to fulfil its responsibility for competent performance management and administration of the contract. The inclusion of access provisions within the contract for performance and financial auditing is particularly important in maintaining the thread of accountability with Commonwealth agencies' growing reliance on partnering with the private sector and on contractors' quality assurance systems. In some cases, such accountability is necessary in relation to Commonwealth assets, including records, located on private sector premises.

The Joint Committee of Public Accounts and Audit (JCPAA) subsequently recommended that the Minister for Finance make legislative provision for such access.³ The Government response to that report stated that its '*preferred approach is not to mandate obligations, through legislative or other means, to provide the Auditor-General and automatic right of access to contractors' premises*' and that '*the Government supports Commonwealth bodies including appropriate clauses in contracts as the best and most cost effective mechanism to facilitate access by the ANAO to a contractor's premises in appropriate circumstances.*'

The response also stated that the *Commonwealth Procurement Guidelines* would '*be amended to emphasise the importance of agencies ensuring they are able to satisfy all relevant accountability obligations, including ANAO access to records and premises.*'

While noting the Government's response, the ANAO continues to encourage the use of contractual provisions as the key mechanism for ensuring agency and ANAO access to contractor's records for accountability purposes. The ANAO is currently in discussions with the Department of Finance and Administration to review the content of the standard access clauses and intend to write again to agencies recommending the use of the clauses once this consultation process is complete.

3. PARLIAMENTARY SCRUTINY OF OUTSOURCED ARRANGEMENTS

Public sector agencies and Auditors-General are not the only parties concerned with the issue of access to information. Parliaments have become increasingly concerned with what they perceive as impediments to fulfilling their right to scrutinise administrative functions that are managed through outsourced arrangements. One of the most critical issues in this area has been that of commercial-in-confidence information.

Commercial-in-confidence information

Situations have arisen where performance data relevant to managing a contract is held exclusively by the private sector. Also, private sector providers have made, on many occasions, claims of commercial confidentiality that seek to limit or exclude data in agency hands from wider parliamentary scrutiny. Thus accountability can be impaired where outsourcing reduces openness and transparency in public administration.

The Australasian Council of Auditors-General released a statement of Principles for Commercial Confidentiality and the Public Interest⁴. Of particular concern to Auditors-General has been the insertion of confidentiality clauses in agreements/contracts which can impact adversely on Parliament's 'right to know' even if they do not limit a legislatively protected capacity of an Auditor-General to report to Parliament. For example, the then Auditor-General of Victoria commented that:

*... the issue of commercial confidentiality and sensitivity should not override the fundamental obligation of government to be fully accountable at all times for all financial arrangements involving public moneys.*⁵

This view has been echoed in almost every audit jurisdiction, for example, as the then Chairman of the Tasmanian Public Accounts Committee stated:

*Maintaining secrecy by confidentiality clauses in contracts is adverse to the Parliament's right to know. Confidentiality clauses should not, therefore, be used in contracts unless there are specific approvals for them by the Parliament itself.*⁶

I am sensitive to the need to respect the confidentiality of genuine 'commercial-in-confidence' information. This requires an understanding of the commercial imperatives in a competitive market environment. In my own experience, I have found that, almost without exception, the relevant issues of principle can be explored in an audit report without the need to disclose the precise information that could be regarded as commercial-in-confidence. In this way, the Parliament can be confident it is informed of the substance of the issues that impact on public administration. It is then up to the Parliament to decide the extent to which it requires additional information for its own purposes. This view is supported by the Victorian Public Accounts and Estimates Committee in a landmark report last year which recommended:

*'5.6 Commercial-in-Confidence should not prevent Auditor-General and Ombudsman from disclosing information where they assess its disclosure to be in the public interest'*⁷

The Chairman of that Committee recently reiterated that a variety of options exist for dealing with commercially sensitive material and that, where genuine reasons exist, it is possible to take a middle ground between unrestricted access or total confidentiality⁸. The Chairman went on to note that the only Committee recommendations rejected outright

related to the disclosure of information contained in tenders (as opposed to contracts) and the conferral of the Ombudsman of an extended oversight role in relation to commercial in confidence claims⁹.

Commercial confidentiality concerns have also been addressed by a number of Commonwealth Parliamentary inquiries.¹⁰ Recently, the Senate Finance and Public Administration References Committee, in its *Inquiry into the Mechanism for Providing Accountability to the Senate in Relation to Government Contracts* addressed a motion that had been put before the Senate by Australian Democrat Senator Andrew Murray. Senator Murray's motion sought to achieve greater transparency of government contracting through passage of a Senate Order that would require:

- the posting on agency web sites of lists of contracts entered into, indicating whether they contain confidentiality clauses and, if so, the reason for them;
- the independent verification by the Auditor-General of those confidentiality claims; and
- the requirement for Ministers to table letters in the Senate chamber on a six-monthly basis indicating compliance with the Order.

The Committee's report noted that, at almost every estimates hearing, information is denied Senators on the grounds that it is commercially confidential. The Committee considered that this creates a situation where:

Without recourse to an independent arbiter acceptable to both sides, this results in an impasse unsatisfactory to all. In many cases the confidentiality claim may be correct but, without seeing the information, senators are unable to judge the veracity of the assertion of confidentiality. Nor are they able to assess the level of financial risk to which the Commonwealth may be exposed by the use of confidential clauses, if they are denied access to contracts.¹¹

Senator Murray's motion can be taken as a further indication of Parliament's frustration with insufficient accountability reporting associated with government contracting and a belief that commercial-in-confidence provisions are used excessively and unnecessarily in contracts.

During the ANAO's appearance at the Committee's public hearings on this Inquiry on 12 May 2000, the Deputy Auditor-General offered to conduct a performance audit on the use of confidential contract provisions. This offer was accepted by the Committee and, once the audit is completed, the Committee will report again on the Senate motion. I have commenced the audit and expect to table the report in Parliament in mid 2001. The audit is seeking to:

- assess the extent of guidance on the use of confidentiality clauses in the context of commercial contracts at a government wide level or within selected agencies;

- develop criteria that could be used to determine whether information in a commercial contract is confidential, and what limits on disclosure should apply; and
- assess the appropriateness of agencies' use of confidentiality clauses and the effectiveness of the existing accountability and disclosure arrangements for the transparency of contracts entered into by the Commonwealth.

Other potential impediments to Parliamentary access

As a result of one of my audit reports (Report No.9 2000-01, *Implementation of Whole of Government Information Technology [IT] Infrastructure Consolidation and Outsourcing Initiative*), the federal Finance and Public Administration References Committee initiated an inquiry into the Government's IT outsourcing initiative. An independent reviewer, Mr Richard Humphry AO, was employed to undertake a review of this issue. The report from the 'Humphry review' was provided to the Minister for Finance and Administration, Mr John Fahey, on 30 December 2000.

During the Committee's hearings, on 7 February 2001, Mr Humphry was asked to provide to the Committee copies of the submissions he received. Mr Humphry stated that the Australian Government Solicitor had advised him that the submissions did not form part of Commonwealth records and, therefore, were not covered by the Archives Act and remained the property of those who had written them. Based on that advice, Mr Humphry had returned all submissions to their respective authors.

The Department of Finance and Administration also stated that it had received similar legal advice from another firm. The Committee expressed disappointment that the Commonwealth had commissioned and paid for the review but was not able to access the submissions.

4. CONCLUDING REMARKS

While efforts continue to be made in all jurisdictions to achieve adequate access to contractors' records, Audit Offices have an important role in ensuring that, in circumstances where government services are being provided by the private sector, public sector accountability is not circumvented or reduced because of agency apathy, sloppy contractual drafting or differing standards of record-keeping and accountability in the private sector.

Sometimes access will be required to private sector premises particularly where Government assets, including information, are involved. This cannot be a 'grace and favour' arrangement and needs at least the force of suitable contract clauses, if not a legislative requirement. No one wants to resort to precepts or subpoenas to obtain adequate access for public accountability purposes. Unfortunately, inquiries by Public Accounts Committees have revealed that, often, refusal to provide access originates more

from public servants than from private sector firms, notably on matters classified as commercial-in-confidence. It is hoped that such action is more about perceptions of proper process, even if sometimes misguided, than about avoiding personal accountability. The Chairman of the Victorian Parliamentary Public Accounts and Estimates Committee, quoted earlier, has observed that:

The evidence presented to my Committee made it clear that increased commercialisation of government activities and services has led to a divided perception within the public sector of the need for, and importance of, public accountability.¹²

It is becoming more accepted that the onus of proof is clearly on those seeking to restrict access to public information to justify these decisions rather on those arguing for access. In this respect the Chairman of the JCPAA recently reiterated an accountability framework recommended by his Committee including the following key principles:

- *that all contract management staff must have the highest regard for public and parliamentary accountability, and accept, in the first instance, that all government contracts will be subject to full public scrutiny; and*
- *if it can be shown that public access to a government contract is not in the Commonwealth's best interest then a claim can be made to exclude certain clauses of a contract from public access but not the entire contract.*

If Commonwealth agencies maintain that part of a contract must be confidential then they must give reasons to the parliament. The Committee therefore, recommended that all CEOs under the FMA Act should, whenever claiming commercial-in-confidence, issue a certificate stating which parts of a contract and why these parts are to be withheld.¹³

We are basically talking about accountability for performance and the necessary assurance required for all stakeholders that they can be confident proper processes and actions are in place to provide that accountability. And that is the responsibility of both management and audit, preferably in a complementary partnership which reflects their joint, as well as, separate roles. And that is what both Parliament and citizens expect.

NOTES AND REFERENCES

- ¹ The South Australian Auditor-General noted in his report for the year ended 30 June 2000 to the House of Assembly, fourth session, forty-ninth Parliament (Part A Audit Overview p. 205) tabled on 4 October 2000 that:

‘It is essential that the private sector provides considering projects involving the storage, processing and security of government information and systems, be advised at an early stage of both government agency and Auditor-General rights in regard to access and audit. This matter requires due contractual and legal consideration by the Government and its agencies to ensure the adequacy of safeguards over the security, integrity and control of government information and processes, and to accommodate the Auditor-General’s statutory audit responsibilities.’
- ² The issue was given particular prominence in ANAO Report No.22 1992-93 *New Submarine Project*, ANAO Report No.31 1994-95 *Defence Contracting*, Joint Committee of Public Accounts, Report 337 *A Focus On Accountability: Review of Auditor-General’s Reports*, ANAO Report No.34 1997-98, *New Submarine Project* and Joint Committee of Public Accounts and Audit Report 368, *Review of Audit Report No. 34, 1997-98, New Submarine Project Department of Defence*.
- ³ Joint Committee of Public Accounts and Audit 1999, ‘*Review of Audit Report No. 34, 1997-98, New Submarine Project Department of Defence*’. Report 368, June, p. xiv:

‘**Recommendation 5:** *The Committee recommends that the Minister for Finance make legislative provision, either through amendment of the Auditor-General Act or the Finance Minister’s Orders, to enable the Auditor-General to access the premises of a contractor for the purpose of inspecting and copying documentation and records directly related to a Commonwealth contract, and to inspect any Commonwealth assets held on the premises of the contractor, where such access is, in the opinion of the Auditor-General, required to assist in the performance of an Auditor-General function. (paragraph 6.20).*’
- ⁴ Australasian Council of Auditors-General 1997, *Statement of Principles: Commercial Confidentiality and the Public Interest*, Canberra, November.
- ⁵ Ches Baragwanath, 1996, citing his Report on the 1990-91 Finance Statement.
- ⁶ Schulze, Peter, MLC, Chairman, Tasmanian Public Accounts Committee, 1999. *Commercial Confidentiality – Striking the Balance – A Contributing Paper*, 1999 Australasian Council of Public Accounts Committees, 5th Biennial Conference, Perth, WA, 21-23 February.
- ⁷ Victorian Public Accounts and Estimates Committee 2000, *Inquiry into Commercial in Confidence Material and the Public Interest*, Report No. 35, Melbourne, March.
- ⁸ Loney Peter MP, 2001. *Commercial-in-Confidence - Striking the Right Balance*. 6th Biennial ACPAC Conference, 4-6 February, Canberra, p. 5.
- ⁹ *Ibid.*, p. 7.
- ¹⁰ See Joint Committee of Public Accounts and Audit (JCPAA) 2000, *Contract Management in the Australian Public Service*, Canberra: Parliament of the Commonwealth of Australia, [October 2000]; Senate Finance and Public Administration References Committee (SFPARC) 2000, *Inquiry into the mechanism for providing accountability to the Senate in relation to Government contracts*, Canberra [Online] Available: http://www.aph.gov.au/senate/committee/fapa_ctte/acnt_contract/contract.pdf, [7 December 2000]; JCPAA 1999, *Corporate Governance and Accountability Arrangements for Commonwealth Government Business Enterprises* (R.E. Charles, Chairman), Report 372, JCPAA,

Canberra, December; SFPARC, 1998, *Inquiry into Contracting Out of Government Services-Second report*; and SFPARC 1997, *Contracting Out of Government Services—First Report: Information Technology*, Canberra, November.

¹¹ SFPARC 2000, *Inquiry into the Mechanism for Providing Accountability to the Senate in Relation to Government Contracts*, SFPARC, Canberra, June, p.7.

¹² Loney Peter MP, 2001. *Op.cit.*, p. 9

¹³ Charles Bob MP, 2001. *The Impact of Devolution*. Address to the Australasian Council of Public Accounts Committees, 6th Biennial Conference, 4-6 February, Canberra, pp. 15-16.