

Crown Contracts Confidentiality Policy

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Title: Crown Contracts Confidentiality Policy

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Important Note: this policy applies to **all** contracts entered into by inner-Budget agencies and those instrumentalities required to comply with the Treasurer's Instructions issued in accordance with the *Financial Management and Audit Act 1990*.

Definitions

Confidentiality Provision(s) means a provision which, if included in a contract to which the Crown is a party, would restrict or prohibit the capacity of any party to that contract to lawfully disclose any term of, or other information in, or concerning the contents of, that contract.

Head of Agency has the same meaning as that contained in the *Financial Management and Audit Act 1990*.

The Policy

As part of the State of the State Address delivered on 26 September 2006, the Premier announced the introduction of a policy to change the presumption in relation to confidentiality clauses in contracts entered into by the Crown.

The confidentiality policy, effective from 15 February 2007, provides that contracts between the Crown and any other party must not contain *Confidentiality Provisions*. However, from 15 September 2012 a *Head of Agency* may approve, in accordance with Treasurer's Instruction 1401, the inclusion of a *Confidentiality Provision* in a contract entered into, negotiated or arranged by his or her Agency.

The prohibition on the inclusion of *Confidentiality Provisions* applies only to the terms and conditions of the contract itself, including annexures or schedules. The restriction on *Confidentiality Provisions* does not apply to:

- (a) pre-contract information which passes between the parties in order to enable the contract to be performed; or
- (b) the services or products that flow from the performance of the contract, including information that is brought into existence pursuant to the contract.

The policy also requires contracts valued at more than \$2 million to be made publicly available.

Treasurer's Instruction 1401 provides general instructions on the procedures to be adopted to comply with the policy and the requirement for approval by a *Head of Agency* of the inclusion of a *Confidentiality Provision*. Instruction 1402 sets out the requirement to make publicly available all contracts valued at more than \$2 million other than those that arise from a procurement process.

Additional confidentiality requirements specific to procurement contracts are contained in Instructions 1124 and 1229. Requirements for making publicly available contracts that arise from a procurement process (including contracts that arise as a result of an approved direct or limited submission sourcing process under Instructions 1114 or 1217) valued at more than \$2 million are contained in Instructions 1110 and 1212.

The Treasurer's Instructions are located on the [Treasury website](#).

Application of the Policy

The policy applies to all contracts entered into between the Crown and any other party. "All contracts" includes purchase agreements, grants, licences, funding arrangements, leases, an assignment of a contract and a novation of a contract.

The Policy does not apply to:

- a contract in existence prior to 15 February 2007;
- a novation of a contract which occurs as a result of a contractual entitlement to novate in existence on 15 February 2007;
- a *Confidentiality Provision* in a contract that relates to information protected under the *Personal Information Protection Act 2004* (Tas) or the *Privacy Act 1988* (Cwlth), that is itself included in a contract;
- a *Confidentiality Provision* included in a contract to comply with an obligation under a statute or to comply with an order of a Court; or
- contracts of employment under the *State Service Act 2000*.

It is recommended that, except where approval has been given to include a *Confidentiality Provision*, where possible, all contracts to which the Crown is a party state that:

- (a) the terms and conditions of the contract are not confidential as between the parties or any of them; and
- (b) that any party may publish or otherwise disclose any part or parts of the contents of the contract without reference to any other party.

See Instruction 1401(3).

Crown Solicitor advice should be sought for suitable wording for all contracts.

When procuring goods and or services (including building and construction/roads and bridges), all Request for Quotation and Request for Tender documents must contain, in the conditions of tender/quotation, information on the Government's policy position on confidentiality. If a formal tender or quotation process is not undertaken (such as when a supplier is engaged by way of a direct/limited submission sourcing process pursuant to Instruction 1114 or 1217, a contract extension pursuant to Instruction 1115(2) or pursuant to Instruction 1127, 1216 or 1231), then during negotiations with the preferred supplier, the supplier must be advised, in writing, of the Government's policy position on confidentiality. See Instructions 1124 and 1229.

Approvals to include Confidentiality Provisions

Approval to allow Confidentiality Provisions in a contract may be given by a relevant Head of Agency but only strictly in accordance with the provisions of Instruction 1401(4).

Guidance information in relation to determining whether Confidentiality Provisions are appropriate together with information on reporting on contracts where approval is granted is located in Guidelines for determining requests for confidentiality in accordance with the Crown Contracts Confidentiality Policy. This publication is located on the Purchasing website at www.purchasing.tas.gov.au under Resources.

Where approval for inclusion of Confidentiality Provisions has been given by a Head of Agency, the agency must ensure that the contract has been drafted to give effect to the decision and to identify the provisions. Crown Law advice must be sought. See Instruction 1401(6).

Agencies should note that information relevant to such approvals may be required to be disclosed by law, for example under the Right to Information Act 2009.

Providing access to procurement contracts valued at over \$2 million

Agencies are required to make publicly available all contracts arising from a procurement valued at over \$2 million on the Tender’s website (www.tenders.tas.gov.au).

The publication must occur within 10 working days of the date that all parties sign the actual written contract or the date that signed counterparts are exchanged or in cases where there is a period of due diligence or specific conditions that need to be satisfied before the contract is formally finalised, the date that the contract is completed. (Note in most cases, the contract will be completed on the date it is executed by both parties. However, some contracts, particularly those relating to the sale of assets, may contain clauses that provide for a period of due diligence, or may be conditional on certain conditions being satisfied. In these cases, it would be inappropriate for the contract to be made publicly available, as the contract may not proceed. Completed does not mean the completion of the delivery of goods and/or services provided under the contract.)

The \$2 million threshold is to be calculated inclusive of possible options to extend but exclusive of GST. If a procurement valued at more than \$2 million results in multiple contracts being awarded, all contracts, regardless of value, must be published.

The contract(s) should be uploaded on the ‘Contracts Awarded’ section of the Tenders website in either Word (.doc or .docx) or PDF (.pdf) format. The date of execution and the names of the executing parties should be typed into the relevant sections of the contract before publishing. For example:

Executing parties [signed Tony Ferrall]
Date of Execution [15 February 2015]

For contracts containing Confidentiality Provisions as a result of approval under Instruction 1401(4), the confidential information is to be removed from the document before it is provided whether this be by means of publishing the document or otherwise. The date that the confidential information will be available is to be inserted in place of the removed information. For example:

Confidential until [...am/pm on201....]

The contracts will be published when the 'Awarded Contracts' notice is published and will be linked to that notice.

Where publishing the documents is not practicable

If publishing a copy of the contract on the Tenders website is not practicable, contact details for an officer able to provide access to the relevant documents on request must be placed in the 'Contract Documents' field of the 'Contracts Awarded' section of the Tenders website.

This may occur where the contract contains large diagrams or plans etc. In such cases, agencies may provide copies of documents or access to physical inspection of the documents at the Agency's offices as considered appropriate.

Note: For contracts containing *Confidentiality Provisions* as a result of approval under Instruction 1401(4), the confidential information is to be removed from the document before access is provided as set out above.

Providing access to non-procurement contracts valued at over \$2 million

All other non-procurement Government contracts valued at over \$2 million are to be made publicly available on the relevant agency's website within 10 working days of the date that all parties sign the actual written contract or the date that signed counterparts are exchanged or in cases where there is a period of due diligence or specific conditions that need to be satisfied before the contract is formally finalised, the date that the contract is completed. (Note in most cases, the contract will be completed on the date it is executed by both parties. However, some contracts, particularly those relating to the sale of assets, may contain clauses that provide for a period of due diligence, or may be conditional on certain conditions being satisfied. In these cases, it would be inappropriate for the contract to be made publicly available, as the contract may not proceed. Completed does not mean the completion of the delivery of goods and/or services provided under the contract.)

When determining whether a contract is valued at more than \$2 million, the value of all potential extensions is to be taken into account. GST should not be taken into consideration when determining the value.

The contract should be published on the agency's website in either Word (.doc or .docx) or PDF (.pdf) format. The date of execution and the names of the executing parties should be typed into the relevant sections of the contract before publishing. For example:

Executing parties [signed Tony Ferrall]
Date of Execution [15 February 2015]

For contracts containing *Confidentiality Provisions* as a result of approval under Instruction 1401(4), the confidential information is to be removed from the document before it is provided whether this be by means of publishing the document or otherwise. The date that the confidential information will be available is to be inserted in place of the removed information. For example:

Confidential until [.....am/pm on201....]

Where publishing the documents is not practicable

If publishing a copy of the contract is not practicable, a summary of the contract together with contact details for an officer able to provide access to the relevant documents on request must be placed on the relevant agency's website.

This may occur where the contract contains large diagrams or plans etc.

The summary of the contract should include such information as:

- parties to the contract;
- a description of the contract;
- the commencement date and term of the agreement including whether any options to extend are included;
- value of the contract; and
- any other information that the relevant agency feels is necessary to properly summarise the contract.

In such cases, agencies may provide copies of documents or access to physical inspection of the documents at the Agency's offices as considered appropriate.

Note: For contracts containing *Confidentiality Provisions* as a result of approval under Instruction 1401(4), the confidential information is to be removed from the document before access is provided as set out above.

Providing access to contracts valued at or under \$2 million

Only contracts valued at over \$2 million will need to be published on relevant websites. Contracts valued at or under \$2 million will be publicly available, but through normal processes under the *Right to Information Act 2009*.

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