

# FMA

Financial Management Act 2016

## Contracts

# Better Practice Guidelines

Title: Procurement Better Practice Guidelines (Contracts)

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ISBN: 978-0-7246-5506-9 (PDF)

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# Background

The *Financial Management Act 2016* provides for the management of the public finances of Tasmania in an economical, efficient and effective manner consistent with contemporary accounting standards and financial practices.

Treasurer's Instructions are issued under section 51 of the *Financial Management Act 2016* in respect of the principles, practices and procedures to be observed in the financial management of all agencies.

*Better Practice Guidelines* are intended to assist Accountable Authorities and responsible officers with their financial management responsibilities related to contracts. The Guidelines should be read in conjunction with the Treasurer's Instructions.

This *Better Practice Guideline* provides information to assist in understanding Treasurer's Instructions C-1 and C-2, which set out the principles that apply to the management of major accommodation leases, and disclosure and confidentiality in relation to government contracting.

## International Procurement Obligations

Tasmanian Government agencies are required to comply with procurement obligations set out in a number of international agreements. The *International Procurement Obligations* publication, available on the Purchasing website, sets out the mandatory requirements that relate to procurements covered by the international agreements. Please note that the *International Procurement Obligations* should be read in conjunction with the Treasurer's Instructions and *Better Practice Guidelines*, as they impose additional requirements agencies need to be aware of when undertaking covered procurements.

# Confidentiality Policy - all contracts

## General

*Treasurer's Instruction C-I Contracts - Disclosure and Confidentiality in Government Contracting applies.*

The Tasmanian Government is committed to ensuring that government contracting is conducted in an open and transparent manner and that its contracts do not contain confidentiality provisions that might prevent public scrutiny.

Treasurer's Instruction C-I sets out the Government's policy in relation to confidentiality in Government contracts. The policy provides that contracts between the Crown and another party must not contain a confidentiality provision unless the Accountable Authority has granted approval. It also requires agencies to make high value contracts publicly available.

The policy extends to all contracts, unless specifically excluded by Treasurer's Instruction C-I. The policy is **NOT** restricted to contracts arising from procurements.

## Prohibition on confidentiality provisions

The prohibition of the inclusion of confidentiality provisions applies to the terms and conditions of a contract itself (including annexures or schedules). It does not apply to:

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

Except where the inclusion of a confidentiality provision is approved, all contracts should state that the terms and conditions of the contract are not confidential and that either party may publish or otherwise disclose any part or parts of the contents of the contract without reference to any other party. The Office of the Crown Solicitor (OCS) is able to provide advice on suitable wording.

## Approval of confidentiality provisions

*Treasurer's Instruction C-I Contracts - Disclosure and Confidentiality in Government Contracting applies.*

### Approval and post-approval processes

Generally, applications for approval should be dealt with on a case-by-case basis. However, where appropriate circumstances exist and those circumstances may arise on a regular basis during the course of an agency's normal business, approval of confidentiality for a class of contracts is permitted.

Approval by the Accountable Authority is required prior to the inclusion of the confidentiality provision in a contract or any variation to a contract.

Agencies are responsible for determining how they structure internal processes to manage requests for confidentiality.

The Accountable Authority, in their absolute discretion, may decide to approve all or part of an application. Where a confidentiality provision is to be included:

- the contract should be drafted to give effect to the decision;
- a limit on the period of confidentiality should be imposed where it is considered practical to do so; and
- advice on appropriate contract drafting should be obtained from the OCS.

It is recommended that agencies consider including compliance with the requirements of the Government's confidentiality policy in the agency's internal audit program.

Note: Information relevant to requests may be disclosed when required by law, for example under the *Right to Information Act 2009*.

#### Commercial sensitivity of information

Commercially sensitive information:

- is information that if disclosed publicly, may undermine or unfairly prejudice the competitive position, commercial or economic interests of the supplier; and
- may include trade secrets, commercial production methods, or information that concerns the financial affairs of the supplier.

Generic information, information publicly available or information that is common knowledge would not be considered commercially sensitive.

Pricing information may meet the commercial sensitivity test, but generally only where profit margins, pricing or cost structures, rebates or guarantees would be revealed and revealing this information would result in prejudice or undermining of the commercial position or interests of the supplier. A supplier simply not wanting their competitors to know the price tendered is generally not sufficient.

Commercial sensitivity of information should be asserted and objectively demonstrated by the supplier. The information should be specifically identified, so it is capable of being redacted from the contract. A request for the entirety of a contract to be considered confidential would rarely meet commercial sensitivity requirements.

#### Unreasonable detriment

Given the extent of contracts covered by the Government's policy, the risk of damage or detriment is not necessarily limited to damage or detriment to commercial interests, although for commercial contracts this will often be the case.

Either the supplier or the Crown can assert that the release of specified information contained in the contract would cause unreasonable detriment to it or to another party. In order to show unreasonable detriment, the relevant party should be required to objectively demonstrate a real risk of damage or detriment.

## Rejected applications

If a request for confidentiality is rejected by the Accountable Authority, or approved but in terms not acceptable to the proposed supplier, the supplier may either waive their confidentiality requirements or withdraw from the negotiations.

## Reporting on contracts with approved confidentiality provisions

[Treasurer's Instruction C-1 Contracts - Disclosure and Confidentiality in Government Contracting](#), clause 1.5, applies.

It is a matter for an agency to determine what information relating to approvals is included on their website. However, it should include sufficient information for the contract to be clearly identified. For example:

- the names of the parties; and
- the date of approval of confidentiality, including information that indicates that the approval was a class approval if relevant.

Information on annual reporting is contained in Treasurer's Instruction FR-4 *Annual Reports*.

## Inclusion of a confidentiality provision without appropriate approvals

If a confidentiality provision has been included in a contract otherwise than in accordance with the policy, agencies should not release, publish or otherwise provide access to the confidential information as this may amount to a breach of the contract and may give rise to a claim against the Crown. If a confidentiality provision has been included in a contract otherwise than in accordance with the policy, the agency should seek advice from the OCS.

## Publishing or providing access to high value contracts

The second limb of the Government's confidentiality policy requires agencies to make publicly available high value contracts. A high value contract is a contract valued at more than \$2 million. Generally, these will be required to be published either on the agency website (non-procurement contracts) or on the Tenders website (contracts arising from a procurement process).

Non-procurement contracts that are otherwise publicly available, such as leases registered against title at the Lands Titles Office, do not need to be published.

The requirements of Treasurer's Instruction C-1, clause 1.5, to report the contract even if it contains a confidentiality provision, will still apply.

## Valuing a contract

When determining whether a contract is valued at more than \$2 million, the value of all potential extensions should be taken into account. Where multiple contracts arise from one activity, the value of all such contracts should be taken into account. In both cases, GST should not be taken into consideration when determining the value.

## Publication relating to contracts arising from a procurement

For contracts arising from a procurement process (other than purchase orders), the contract is to be uploaded to the Tenders website and attached to the relevant Contract Award notice (required by Treasurer's Instruction PF-5 *Procurement Framework - Accountability and Reporting*) or where it is impracticable to do so, contact details of an officer who can provide access to the document provided.

When publication of a contract is to occur it should be uploaded in a format that is readily accessible such as Microsoft Word (.doc or .docx) or Adobe PDF (.pdf) format. The signatures of parties should be removed and the date of execution and the names of the executing parties be typed or handwritten into the relevant sections of the contract. For example:

[signed <first name> <surname>]

[15 February 2019]

Where confidentiality has been approved, the confidential information should be removed from the document before it is published. However, if there is a time limit on the confidentiality, the date when the confidential information will be available should be inserted in place of the removed information. For example:

Confidential until [12.00am on 31 March 2023]

### Purchase orders

For purchase orders with a value of more than \$2 million, a copy of the applicable purchase order, with approved confidentiality provisions removed, or relevant contract information should be provided in electronic form, via the Tenders System Administrator, for publication on the Tenders website.

The Tenders System Administrator can be contacted by phone on 03 6166 4100 or by email at [tenders@treasury.tas.gov.au](mailto:tenders@treasury.tas.gov.au).

## Publication relating to non-procurement contracts

For all other contracts, the information to be published on the agency website should be sufficient to clearly identify the contract and may include:

- the parties to the contract;
- the name or a description of the contract;
- the commencement date of the contract or date that the contract was awarded or signed; and
- the term of the contract, (where applicable) including whether any options to extend are included.

A link to the contract or agency contact details for access to the contract, or both, should be provided. Where the contract is to be published, it is recommended that the same format and redacted information recommendations as above be applied.

## When publication is not practical

Publication of a contract may not be practical in some cases. For example, where the contract contains large diagrams or plans. In such circumstances and where physical access to a contract is requested, agencies can either provide copies of documents or provide for physical inspection of the documents at the agency's offices, as appropriate.

Confidential information should be removed prior to access being provided.

## Contracts with a value less than \$2 million

While the Treasurer's Instructions only require contracts valued at over \$2 million to be published or made available, agencies are reminded that contracts valued at or under \$2 million may also be required to be made publicly available through normal processes under the *Right to Information Act 2009*.

## Frequently asked questions

### What information needs to be included in a contract - what may be made publicly available?

All information, to the extent that it is necessary to create the required binding obligations, must be included in a contract. For example, pricing will be an important and necessary component of a contract and in some cases, it may be necessary to include pricing methodology (for example, for the purposes of future price reviews or the assessment of periodic or part payments).

However, within the requirement to create a binding enforceable contract, there is scope for agencies and suppliers to negotiate the types of information that will need to be included in a contract and to the extent that it is agreed, that public access should be restricted. In this regard, agencies should seek advice from the OCS.

### Does the policy affect intellectual property?

The policy is not intended to risk intellectual property of parties. For procurement activities, intellectual property will usually be protected through careful preparation of the specification; the drafting of the contract; or by approval of a confidentiality provision.

### Does the policy extend to agreements between Crown entities?

The policy does not apply to contracts between two entities required to comply with Treasurer's Instructions issued pursuant to the Financial Management Act.

The policy does extend to contracts between an entity required to comply with Treasurer's Instructions and a Government entity that is not covered by the Financial Management Act.

The policy does not apply to contracts entered into by Government Business Enterprises, State-owned Companies or statutory authorities and entities not covered by the Financial Management Act.

# Confidentiality in procurement processes

*Treasurer's Instruction C-1 Contracts - Disclosure and Confidentiality in Government Contracting applies.*

The template procurement documentation prepared by the OCS (available on the [Purchasing website](#)) contains relevant clauses relating to the Government's confidentiality policy. Where the templates are not used, advice should be obtained from the OCS on appropriate wording to be included in either documentation or letters or emails seeking a quote.

The Treasurer's Instruction provides for confidentiality of information:

- during the process for all participants; and
- after the completion of the process, for unsuccessful suppliers.

However, information provided by the successful supplier that forms part of a resulting contract will not retain its confidentiality to the extent that it is reproduced in the contract unless approval is granted to include a confidentiality provision.

# Major Office Accommodation Leases

Treasurer's Instruction C-1 *Contracts - Major Office Accommodation Leases* applies.

## General

An agency's operational and management objectives are not to be the sole consideration in office accommodation planning. Adapting organisational and service delivery mechanisms may be required to meet the overall whole-of-Government office accommodation management objectives.

The Government's objectives, as set out in the Treasurer's Instruction, are:

- maximisation of occupation and utilisation of existing Crown owned office accommodation;
- maximisation of occupation and utilisation of existing Crown leased office accommodation; and
- compliance with the requirements above in the take up of lease options and end of lease renewals.

In addition to the requirements in Treasurer's Instruction C-2, agencies should be aware of any applicable requirements contained in Treasurer's Instruction FC-19 *Leases* and Australian Accounting Standard AASB 16 *Leases*.

## Centralised office management by Treasury

While the Department of Treasury and Finance will coordinate major office accommodation leases on behalf of tenant agencies, each tenant agency is responsible for the day-to-day management of leases and associated facilities management.

Any budgetary implications relating to the assigning of tenancies by Treasury will be managed through the normal budgetary management processes.

If, during the term of a lease, a tenant agency is restructured or part of a tenant agency reallocated to another agency, then any lease obligations of the restructured or reallocated tenant agency are transferable to the new agency.

## Relocation of agencies

Relocation of tenant agencies should result in a whole-of-government gain and benefit, with consideration being given to both the proposed relocation and the possible need to backfill space being vacated.

Generally, office accommodation relocation will not be considered in situations where the tenant agency has been in place for less than five years, unless the Secretary of the Department of Treasury and Finance is satisfied that there are exceptional circumstances to support the relocation.

