

CROWN CONTRACTS CONFIDENTIALITY POLICY

FREQUENTLY ASKED QUESTIONS

What is the purpose of this Policy?

The purpose of the Policy is to ensure that government contracting is conducted in an open and transparent manner and that unnecessary confidentiality provisions do not fetter scrutiny of government contracts. Underlying this purpose is the right of the public to know how government money is being spent and the government's accountability for the use of public money.

What does the Policy do?

The Policy provides that contracts between the Crown and any other party must not contain confidentiality provisions. The Policy also provides that contracts valued at more than \$2 million are to be made publicly available on an appropriate 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.

Where disclosure of the provisions of the contract would cause unreasonable detriment to the Crown or another party to the contract and confidentiality is in the public interest, the inclusion of confidentiality provisions may be approved by a relevant Head of Agency. Any contracts that include confidentiality provisions will be reported on the relevant agency's website.

What contracts are impacted by the Policy?

All contracts entered into by the Crown on or after 15 February 2007. "All contracts" includes, but is not limited to, contracts for supply of goods and services, contracts relating to maintenance and construction, grants, funding arrangements, leases, contracts involving real property, assignments of an existing contract and novations of a contract as a result of an agreement between the parties, which occurs on or after 15 February 2007.

Does the Policy apply to the product or output of the contract?

The Policy only applies to the terms and conditions of the contract itself (including annexures or schedules). It does not apply to:

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

What information needs to be included in a contract (and what is therefore liable to 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 also be necessary to include pricing methodology (eg 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 Crown Solicitor.

Where appropriate, approval to include a confidentiality provision is able to be sought by the relevant agency officer from his or her Head of Agency.

How does the Policy impact on intellectual property?

The Policy is not intended to place at risk the intellectual property of parties. Intellectual property will usually be protected through careful preparation of the specification; the requirements and process of the contract negotiations or the Request for Tender/Quotation (for procurement); the drafting of the contract; or by the relevant agency officer seeking approval to include a confidentiality provision from his or her Head of Agency.

How does the process of obtaining approval for a confidentiality provision work?

A Head of Agency may approve, in accordance with Treasurer's Instruction 1401(4), the inclusion of a confidentiality provision in a contract entered into, negotiated or arranged by his or her Agency. Applications will be considered, on a case by case basis where:

- another party to the contract requests confidentiality or a Crown Law Officer has certified, in writing, that there are good and sufficient reasons for the Crown to maintain confidentiality; and
- the provisions of the contract sought to be made confidential are specifically identified; and

- the disclosure of the provisions of the contract would cause unreasonable detriment to the Crown or another party to the contract; and
- confidentiality, in part or in whole, is in the public interest.

Approvals may be restricted to certain provisions of a contract and/or subject to time restrictions.

Does approval to include a confidentiality provision have to be applied for on each and every occasion that confidential information is sought to be protected?

Yes, applications are to be assessed on a case by case basis.

What happens if the person or organisation contracting with the Crown wishes for approval to include a confidentiality provision to be sought but either the agency does not agree or the Head of Agency rejects the application?

The potential contractor will either need to waive its confidentiality requirements or withdraw from the contract negotiations. In the case of procurement where a tender or quotation process has been undertaken, the agency will then commence negotiations with the second ranked supplier. In the case of other contracts, the agency will commence negotiations with other persons who can meet the Crown's need.

Does the Policy apply to a purchase of land/sale of land contract?

Yes. The Policy covers all contracts and an agreement to buy or sell land is included.

Are liability agreements (eg payout or compensation agreements) covered by the Policy?

Yes. The Policy covers all contracts and an agreement to settle a liability or that provides for compensation is included.

Does the Policy extend to other government entities such as the Tasmanian Skills Institute, or the Resource Planning and Development Commission etc?

The Policy only applies to those entities required to comply with the Treasurer's Instructions (TIs) pursuant to the *Financial Management and Audit Act* (FMAA). It does not apply to Government Business Enterprises (GBEs), State Owned Companies (SOCs) or statutory authorities that are not subject to the FMAA.

However, some statutory authorities have agreements with their lead agencies in relation to compliance with the TIs and in such a case, it is a matter for that authority and their lead agency to determine whether the policy is to apply.

Does the \$2 million limit for publishing contracts on a website mean that contracts valued at \$2 million or less do not need to be publicly available?

No. All contracts to which the Crown is a party (unless approval for a confidentiality provision relevant to the entirety of the contract is granted) must be made publicly available. Only those contracts with a value of over \$2 million must be published on the relevant website.

What is the impact of the Policy on the Whole-of Government Information, Communication and Technology hardware contract (the CI50) and the GITC Head Agreements and Purchase Orders?

The Department of Treasury and Finance has varied, or renewed, all GITC Head Agreements to comply with the Policy.

Are submissions received from tenderers in response to a Request for Tender (RFT) or a Request for Quotation (RFQ) confidential?

Yes, all submissions are confidential throughout a procurement process. Submissions received from unsuccessful suppliers remain confidential even after the completion of the procurement process.

However, if the successful submission forms part of the resulting contract then it does not retain its confidentiality to the extent that it is reproduced in the contract.

Does the Policy apply to a contract between two Crown entities, for example the Tasmanian Skills Institute and the Crown (Department of Education)?

Yes. The Policy applies to all contracts entered into by the Crown unless they are a specifically excluded class of contracts. Contracts between the Crown are not specifically excluded therefore, the Policy applies.

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