

Treasurer's Instruction No	1401
Title	Confidentiality of Government Contracts
Effective date	1 July 2015
Objective and Background	Provides instructions on the procedures to be adopted to comply with the Government's Confidentiality Policy.
Version Number	7

Black letter (or bold) items within these Instructions are mandatory and other plain font items are instructional or for the purpose of providing guidance only.

For the purposes of this Instruction:

Confidentiality Provision 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.

Crown Law Officer means each of:

- (a) the Solicitor-General;
- (b) the Director of Public Prosecutions;
- (c) the Crown Solicitor;
- (d) the Assistant Solicitor-General;
- (e) any Assistant Director of Public Prosecutions; and
- (f) the Assistant Crown Solicitor.

The Government is committed to ensuring that government contracting is conducted in an open and transparent manner and that contracts to which the Crown is a party do not contain Confidentiality Provisions which might unduly fetter public scrutiny of those contracts.

The Government's policy in relation to confidentiality, effective from 15 February 2007, provides that contracts between the Crown and any other party must not contain Confidentiality Provisions.

However, a Head of Agency may approve, in accordance with this Instruction, the inclusion of a Confidentiality Provision in a contract entered into, negotiated or arranged by his or her Agency.

If it is intended to include a Confidentiality Provision in a contract, application is to be made during the contract negotiation stage by the officer responsible for the negotiation of the contract to the appropriate Head of Agency.

Applications to include a Confidentiality Provision are to be assessed on a case-by-case basis. Approval to include a Confidentiality Provision must not be given otherwise than strictly in accordance with the terms of this Instruction.

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.

(1) Except as provided for in Clause (2), this Instruction applies to all contracts entered into between the Crown and any other party.

This includes an assignment of an existing contract or a novation of a contract by agreement between the parties.

(2) This Instruction does not apply to:

- (a) a contract in existence prior to 15 February 2007;**
- (b) a novation of a contract that occurs by exercise of a contractual entitlement to novate in existence on 15 February 2007;**
- (c) a Confidentiality Provision in a contract that relates to information protected under the *Personal Information Protection Act 2004 (Tas)*, that is itself included in a contract;**
- (d) a Confidentiality Provision in a contract that relates to information protected under the *Privacy Act 1988 (Cwlth)*, that is itself included in a contract;**
- (e) 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**
- (f) contracts of employment under the *State Service Act 2000 (Tas)*.**

For contracts that result from a procurement process, Instruction 1401 should be read in conjunction with Instructions 1124 and 1229.

(3) A contract must not contain a Confidentiality Provision unless expressly approved under clause (4).

Except where approval has been given to include a Confidentiality Provision in accordance with this Instruction, it is recommended that, 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) any party may publish or otherwise disclose any part or parts of the contents of the contract without reference to any other party.

For contracts arising from a procurement process, reference should also be had to the requirements contained in Instructions 1124 and 1229.

For suitable wording for all contracts, Crown Solicitor's advice should be sought.

(4) For contracts entered into on or after 15 September 2012, the inclusion of a Confidentiality Provision may be approved by a Head of Agency where:

- (a) 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**
- (b) the provisions of the contract sought to be made confidential are specifically identified; and**
- (c) the disclosure of the provisions of the contract would cause unreasonable detriment to the Crown or another party to the contract; and**

Guidance and information in relation to determining whether disclosure would cause 'unreasonable detriment' is located in *Guidelines for determining requests for confidentiality in accordance with the Crown Contracts Confidentiality Policy* located on the Treasury website at www.treasury.tas.gov.au under Publications.

(d) confidentiality, in part or in whole, is in the public interest.

In determining whether the inclusion of a Confidentiality Provision is in the public interest, reference should be made to the public interest tests contained in section 30A of the *Audit Act 2008* and Schedule 1 of the *Right to Information Act 2009*. Further guidance and information is located in *Guidelines for determining requests for confidentiality in accordance with the Crown Contracts Confidentiality Policy* located on the Treasury website at www.treasury.tas.gov.au under Publications.

(5) The approval of the Head of Agency pursuant to clause (4) above must be recorded in writing prior to the contract being entered into by the parties. Head of Agency approval cannot be given after the contract has been made except:

- (a) in exceptional circumstances; and**
- (b) where advice is provided by a Crown Law Officer, in writing, that the relevant Confidentiality Provisions are in the best interests of the Crown.**

If a Confidentiality Provision is included in a contract otherwise than in accordance with this Instruction, the Crown must not breach that Confidentiality Provision as such a

breach may nevertheless give rise to a claim against the Crown by another party to the contract. If any officer or employee of the State Service believes that a Confidentiality Provision has been included in a contract otherwise than in accordance with this Instruction, he or she must immediately refer the matter to a Crown Law Officer.

A Head of Agency, in his or her absolute discretion, may decide that some of the provisions referred to in an application for confidentiality are to be disclosed even if approval is given for other provisions to be kept confidential.

The Head of Agency may impose a limit on the period of confidentiality where it is considered possible to do so.

If a request for confidentiality is not approved, or if a request is approved but in terms not acceptable to either party, that party may either withdraw from the negotiations or waive their confidentiality requirements.

- (6) Where approval is granted, the terms of the contract must be drafted to give effect to the decision of the Head of Agency, including any decision on any limit on the period of confidentiality, and to clearly identify approved confidentiality provisions. Crown Law advice must be sought.**
- (7) Agencies must prepare and maintain appropriate and auditable records regarding approvals pursuant to clause (4).**

Heads of Agencies may choose to include compliance with the requirements of the Crown Contracts Confidentiality Policy in its internal audit program to assist in ensuring compliance with the Government's requirements.

REPORTING REQUIREMENTS

- (8) Information on executed contracts containing Confidentiality Provisions as a result of approval by a Head of Agency must be disclosed on the Agency's website.**

Further details on reporting requirements is located in *Guidelines for determining requests for confidentiality in accordance with the Crown Contracts Confidentiality Policy* located on the Treasury website at www.treasury.tas.gov.au under Publications.

- (9) All such contracts must be reported in the relevant Agency's Annual Report. Details to be included in the Annual Report, for each such contract, as a minimum are:**
 - (a) the names of the parties; and**
 - (b) the date of approval by the Head of Agency of the inclusion of the Confidentiality Provision.**

DISCLOSURE – CONTRACTS VALUED AT OVER \$2 MILLION

For disclosure requirements in relation to contracts arising from a procurement process, refer to Instructions 1110 and 1212. For disclosure requirements in relation to all other contracts refer to Instruction 1402.