

TREASURER'S INSTRUCTION
FINANCIAL MANAGEMENT ACT 2016
CONTRACTS - DISCLOSURE AND CONFIDENTIALITY IN GOVERNMENT
CONTRACTING

EFFECTIVE DATE

1 July 2019

SCOPE

This Treasurer's Instruction applies to all Agencies listed in Column 1 of Schedule 1, Part 1 in the *Financial Management Act 2016*.

APPLICATION

The requirements in relation to confidentiality apply to all *contracts* except for:

- a novation of a *contract* which occurs as a result of a contractual entitlement to novate in existence prior to 15 February 2007;
- a *contract* that contains a *confidentiality provision* that relates to information protected under the *Personal Information Protection Act 2004* (Tas) or the *Privacy Act 1988* (Cth), that is itself included in a contract;
- a *contract* that contains a *confidentiality provision* required to comply with an obligation under a statute or to comply with an order of a Court;
- *contracts* of employment under the *State Service Act 2000* (Tas); or
- *contracts* between agencies listed in Column 1 of Schedule 1, Part 1 of the *Financial Management Act 2016* (Tas).

All *contracts* includes, but is not limited to, *contracts* arising from a *procurement*, grants, licences, funding arrangements, goods leases, *real property* leases, assignments of existing *contracts*, *contracts* involving sale or purchase of *real property*, *contract* variations and novations of *contracts*. It also includes *contracts* between an Agency and another Crown entity such as a Government Business Enterprise or State-Owned Company.

OBJECTIVE

To provide information on confidentiality in Government contracting.

INSTRUCTION

Interpretation and Definitions

Refer to Treasurer's Instruction PF-6 for general definitions.

Confidentiality provisions in contracts

- 1.1 *Contracts* between the *Crown* and any other party must not contain a *confidentiality provision* unless the Accountable Authority approves inclusion of such a clause or a class exemption previously approved by the Accountable Authority in accordance with clause 1.3 applies.
- 1.2 The Accountable Authority is permitted to approve the inclusion of a *confidentiality provision* where:
 - 1.2.1 the other party to the *contract* requests confidentiality or, where the *Crown* requires confidentiality; and
 - 1.2.2 the provisions of the *contract* sought to be made confidential are specifically identified; and
 - 1.2.3 either the information is commercially sensitive or the disclosure of the provisions of the *contract* would cause unreasonable detriment to the *Crown* or another party to the contract.
- 1.3 The Accountable Authority is permitted to approve inclusion of a *confidentiality provision* for a class of *contracts* where the class of *contracts*:
 - 1.3.1 contains, or will contain, information which is commercially sensitive or the disclosure of the provisions of the *contract* would cause unreasonable detriment to the *Crown* or another party to the contract; and
 - 1.3.2 are anticipated to arise on a regular basis during the course of an agency's normal business.
- 1.4 Approval by the Accountable Authority must be granted prior to a *confidentiality provision* being included in a contract.
- 1.5 Auditable records regarding approvals under either clause 1.2 or clause 1.3 must be prepared and maintained and information on such *contracts*, when entered into, must be disclosed on the Agency's website and in the Agency's Annual Report.

Access to contracts valued at over \$2 million

- 1.6 Except as provided in clause 1.7, information in relation to all *contracts* valued at over \$2 million together with a copy of the *contract* (appropriately redacted *contract* where approval for a confidentiality provision has been granted) must be made publicly available as follows:

- 1.6.1 for *contracts* arising from a *procurement process* (including purchase orders) - on the *Tenders website*;
- 1.6.2 for non-procurement *contracts* that are otherwise not publicly available - on the contracting Agency's website.
- 1.7 Where publishing the *contract* is not practicable, a summary of the *contract* together with contact details for an officer able to provide access to the *contract* must be provided on the required website (refer clause 1.6).
- 1.8 Information in relation to *contracts* referred to in clauses 1.6.1 and 1.6.2 must be uploaded to the required website within 10 working days of:
 - 1.8.1 the date that all parties sign the written *contract*;
 - 1.8.2 the date that signed counterparts are exchanged; or
 - 1.8.3 in cases where there is a period of due diligence, there exists conditions precedent to *contract* formation or conditions precedent to *contract* performance, the date that the completed *contract* is formed or the date that a duty to perform arises.
- 1.9 At a minimum, *contracts* must be made publicly available for the entire term of the *contract* including the term of any exercised option(s) to extend.

Confidentiality in procurement processes

- 1.10 All potential suppliers must be advised, in writing, of confidentiality requirements prior to entering into *contracts* as follows:
 - 1.10.1 where a *competitive procurement process* is undertaken - prior to submitting responses through the conditions of tender/quotation; and
 - 1.10.2 where a tender or quotation process is not undertaken (such as when a supplier is engaged by way of a direct/limited submission sourcing process or a *contract* extension etc) - in writing, during the negotiation stage.
- 1.11 Information provided by a supplier submitting a tender or quote (or other response to a *procurement*) must be treated as confidential until the preferred supplier is selected and a *contract* is awarded.
- 1.12 After a *contract* is awarded, information provided during the *procurement* by each unsuccessful supplier, must continue to be treated as confidential.

ADDITIONAL GUIDANCE

Further information in support of this Treasurer's Instruction can be found in the Contracts Better Practice Guidelines.