

**2003**

**THE LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY**

**GOVERNMENT PROCUREMENT AMENDMENT BILL 2003**

**Explanatory Statement**

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## Government Procurement Amendment Bill 2003

### Overview

This Bill creates a single piece of procurement specific legislation by amending the *Government Procurement Act 2001* to incorporate the provisions of the *Public Access to Government Contracts Act 2000* and the *Government Contractual Debts (Interests) Act 1994* and repeals those two Acts. The Bill also specifies that the disposal goods and works is included within the definition of procurement.

The Bill addresses concerns that not all contracts with confidential information had previously been captured by the provisions of the *Public Access to Government Contract Act 2000*. It does this by requiring the notification of contracts valued at \$50,000 or more on a central register which will be accessible from a single website. The Bill also requires the reporting of relevant details to the Auditor-General when any of these notifiable contracts have text classified as confidential, regardless of the reason for such classification.

### OUTLINE OF PROVISIONS

**Clauses 1 and 2** are formal requirements. They deal with the short title of the Bill, and the commencement provisions.

**Clause 3** - amends the Government Procurement Act 2001

**Clause 4** – Section 3 applies the dictionary at the end of the Act to the entire Act and defines meaning of Territory entity for this act as:

- (a) an administrative unit or a Territory entity under the Auditor-General Act 1996; and
- (b) for an unincorporated Territory entity – includes a member of the entity acting on behalf of the Territory.

The University of Canberra and the University of Canberra College are excluded from the definition of Territory entity.

**Clause 5 – Procedure governing proceedings of board Section 19 (3).** The proposed section provides for the way in which Government Procurement Board meetings may be carried out.

**Section 19A** – Prescribes the constitution of the board and details how many members need to be present to carry out business in different situations, particularly in relation to consideration of specific procurement proposals defined in this section.

## **Part 3 - Notifiable contracts**

### **Division 3.1 – Preliminary**

**Section 23 – Non application of part to Territory owned corporations etc.** This specifies that this part of the Act does not apply to Territory owned corporations or any other Territory entity established under the Corporations Act.

**Section 24 – Definitions** provides definitions for part 3 and replaces Part 1 Section (3) of the *Public Access to Government Contracts Act 2000*.

**Section 25 – What is a notifiable contract.** This section replaces Part 1 Section (5) of the *Public Access to Government Contracts Act 2000*. It provides that written contracts with a total consideration of \$50,000 or more for the procurement of goods, services or works or the disposals of goods and works are notifiable contracts. It also provides that where an amendment increases the consideration under a contract above the specified amount, the contract becomes notifiable.

**Section 26 – Meaning of notifiable amendment** sets thresholds of \$20,000 or 10% of the total consideration payable (whichever is the greater) for notifying a contract amendment.

**Division 3.2 - Notifiable contracts register.** Prescribes that the Chief Executive must keep a register of notifiable contracts (the notifiable contracts register).

**Section 27 – Keeping of register** establishes the requirement for an electronic register of all notifiable contracts to be kept and maintained.

**Section 28 – Contents of Register** prescribes the minimum information that must be put on the notifiable contracts register for each notifiable contract.

**Section 29 - Public access to register** details the requirement for public access to the notifiable register to be from a website approved for that purpose and provided without charge.

**Section 30 – Territory entities to provide material for register** requires the Territory entity responsible for a notifiable contract or a notifiable contract amendment to enter the required information specified in Section 28 in the notifiable contracts register within 21 days after the contract or amendment becomes notifiable. It also requires that where there are material changes in the information provided under Section 28, for example, changes in the scope of the contract, that the register be updated.

### **Division 3.3 Availability of notifiable contracts**

**Section 31 – Public text of contracts to be made available.** This section replaces Part 2, 6 Section (1) of the *Public Access to Government Contracts Act 2000* and requires the public text of a notifiable contract or notifiable contract amendment to be made publicly available 21 days after the contract becomes notifiable, by either providing a printed copy of the public text on payment of a reasonable cost for reproduction or if available in an electronic form – by placing a copy of the text on a website prescribed under regulations for the Territory entity. This Section also specifies that the requirement to make public text available ends when the contract ends.

### **Section 32 – Making information and contracts available apart from pt 3**

This is a new section that explains that nothing in this Act is intended to prevent or discourage Territory agencies from making available information about government contracts other than in accordance with the Act.

**Section 33 – Entities not required to create electronic copies.** This section provides that if a Territory entity does not have a notifiable contract in electronic form, this part does not require the creation of an electronic copy of the contract.

### **Division 3.4 Confidential text**

**Section 34 – Notice of effect of div 3.4 to contracting parties** provides that this section applies if:

- (a) a party to the contract, including the Territory or a Territory entity, proposes that any part of the contract be confidential text; or
- (b) any part of the contract will be confidential text because of a requirement imposed under law that requires a party to the contract to keep the part confidential.

**Section 35 – Grounds for confidentiality of information** replaces Part 3 Section (13) of the *Public Access to Government Contracts Act 2000* and details the grounds under which a person may agree to a confidentiality clause. These grounds are:

- (a) the disclosure of confidential text to which the confidentiality clauses relates would -
  - (i) be an unreasonable disclosure of personal information about a person; or
  - (ii) disclose a trade secret; or
  - (iii) disclose information (other than a trade secret) having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed; or
  - (iv) be an unreasonable disclosure of information about the business affairs of a person; or
- (b) a requirement imposed under law requires a party to the contract to keep the text confidential.

However, the Territory must not agree to any part of the contract being confidential, if:

- (a) the substance of the information to which the clause relates is public knowledge; or
- (b) the effect of the proposal or agreement –
  - (i) would be to inappropriately restrict a Territory entity in the management or use of Territory assets; or
  - (ii) would not be in the public interest; or
  - (iii) would be to require the obligation of confidentiality to apply for longer than is reasonably necessary to protect the interest to which it relates.

**Section 36 - Model confidentiality clause required for confidential text.** This section replaces Part 3 Section (12) of the *Public Access to Government Contracts Act 2000* and provides that the text of a notifiable contract must not be made confidential text unless a confidentiality clause is included in the contract that incorporates the substance of the model confidentiality clause.

**Section 37 - Invalidity of non-complying confidentiality clauses** replaces Part 2 Section (14) of the *Public Access to Government Contracts Act 2000* and provides that the use of a confidentiality clause that requires the Territory to keep any part of a contract confidential will have no effect if it does not comply with Section 35 of the Act or contravenes the grounds for confidentiality of information listed in Section 34.

**Section 38 – Contracts and information to be given to Auditor-General** requires reportable contracts or amendments to confidential text of a contract to be made

available to the Auditor-General 21 days after the day the contract becomes a notifiable contract.

In addition it requires that within 21 days after the end of each reporting period the responsible Territory entity must give the Auditor-General a list of the following:

- (i) the reportable contracts that became notifiable contracts during the relevant period;
- (ii) the reportable contracts the confidential text of which was changed during the relevant period; or

a statement that no reportable contracts were made or changed during the relevant period.

The reporting period means each 6 month period ending on 31 March and 30 September. This section incorporates Part 2, Section (8A) of the *Public Access to Government Contracts Act 2000*.

**Section 39 – Auditor-General’s reporting obligations for contracts.** This section incorporates the provisions of Part 2 Section (9) of the *Public Access to Government Contracts Act 2000* and details the requirement for the Auditor-General to report, as soon as practical after the end of each reporting period, to the appropriate Legislative Assembly committee:

- (a) the information given to the Auditor-General under Section 38; and
- (b) any other information the Auditor-General considers appropriate.

### **Division 3.5 Other matters**

**Section 40 - Effect of disclosure of confidential information.** This replaces Part 4 Section (15) of the *Public Access to Government Contracts Act 2000* and details the effect of disclosing confidential information.

**Section 41 - Effect of disclosure laws.** This section provides that this part does not affect any other Territory law about the disclosure of documents or information.

**Section 42 – No liability for complying with pt3.** This section replaces Part 2 Section (10) of the *Public Access to Government Contracts Act 2000* and explains that the Territory is not civilly liable to another party to a reportable contract, or to anyone else, for anything done honestly under this part.

**Part 4 - Interest on commercial accounts.** Incorporates the requirements that were previously in the *Government Contractual Debts (Interest) Act 1994* on interest

that may be liable to be paid if a Territory entity does not pay a commercial account in full by the relevant date payable.

**Section 43 - Application of pt 4** provides that this section does not apply to a Territory owned corporation or body established under the Corporations Act. This part applies to contracts entered into by a Territory entity for the procurement of goods services and works unless there is consideration of at least \$10,000 and it is stated in the contract that this part does not apply.

**Section 44 - Definitions for pt 4** defines requirements for payment date, relevant date and commercial account.

**Section 45 - Interest on unpaid accounts** details when interest may become payable on a commercial account and specifies the level of interest is to be worked out on the Supreme Court rules, order 42A (interest on judgements).

**Section 46 - Exclusion of inconsistent contractual terms** invalidates any contract term that would remove the requirement from a contract valued at less than \$10,000 or where the term provides for the payment of interest on an unpaid commercial account that has been rendered under the contract.

**Section 47 - Availability of funds to pay interest** provides that interest is payable regardless of whether there is an appropriation for this purpose.

**Section 48 - Reporting of excluded contracts** requires that the responsible Chief Executive include in their entity's annual report a statement of the number of contracts that were excluded from the requirements of this part.

## **Part 5 Miscellaneous**

**Section 49 - Discounts for prompt payments** incorporates the existing requirement from Section 11 of the *Government Contractual Debts (Interest) Act 1994*. It requires that before a contract can be entered into, the best discount that can reasonably be obtained for the prompt payment of a commercial account rendered under the contract is available to the Territory.

**Section 50 – Responsible chief executive to ensure Act complied with** defines responsible chief executive and imposes their obligation to ensure the entity complies with the Act.

**Section 51 – Approved forms** provides that the Minister may approve forms for this Act and that those forms are notifiable instruments.

**Section 52 – Regulation-making power** provides that the Executive may make regulations for this Act. The regulations may prescribe offences for contraventions of the regulations and penalties for such contraventions.

**Section 53 – Review of Act** outlines the Minister’s obligations for the review of this Act as soon as practicable after 24 May 2006, and present a report to the Legislative Assembly by 24 November 2006.

## **Part 6 Transitional provisions**

**Section 54 – Government Contractual Debts (Interest) Act.** This Section applies to a contract made by the Territory before the commencement of this Section and provides for references to that Act to be taken as references to Part 4 of the *Public Access to Government Contracts Act 2000* (the repealed Act).

**Section 55– Public Access to Government Contracts Act – general.** This Section refers to a contract made by the Territory before the commencement of this section and provides for references to that Act to be taken as references to Part 3 of the *Public Access to Government Contracts Act 2000* (the repealed Act).

**Section 56 - Public Access to Government Contracts Act – reportable contracts.** This Section applies to a contract to which the Territory was a party immediately before the commencement of this Section and requires agencies to continue to comply with Section 8 (2) of the *Public Access to Government Contracts Act 2000* (the repealed Act).

**Section 57 – First report by Auditor-General under this Act.** Provides for the timing of the first report period under the new provisions covered by this Act.

**Section 58 – Transitional regulations.** Provides that the regulations may modify the operation of this part to make provision in relation to any matter that, in the Executive’s opinion, is not, or is not adequately, dealt with in this part.

**Section 59 – Expiry of pt 6.** Provides that this part expires 1 year after the day it commences.

**Clause 8 - New schedule 1** inserts a new schedule related to the model confidentiality clause into the Act.

**Schedule 1 - Model confidentiality clause** incorporates the model confidentiality clause that was Attachment A of the *Public Access to Government Contracts Act 2000*.

**Clause 9–Dictionary.** Provides the dictionary of terms for this Act.



**Clause 10 – Acts Repealed** the *Government Contractual Debts (Interest) Act 1994* and the *Public Access to Government Contracts Act 2000*.

**Clause 11 – Cooperatives Act 2002, schedule 6, item 6.7** is omitted.

**Clause 12 – Other amendments – sch 1.** The Act is also amended as set out in schedule 1.

**Schedule 1 - Other amendments.**

**[1.1] Title.** Substitutes the long title of the Act with a description which reflects the broadened scope of the Act following the amendments in the Bill.

**[1.2] New section 4A.** Inserts a new section on offences against the Act that advises of the application of the Criminal Code and other legislation.

**[1.3] Section 6 - Functions of the Board.** Expands the Board's responsibilities to reflect the enhanced role of the Board as detailed elsewhere in the Bill. The changes include the ability to issue guidelines on the disposal of goods and works by Territory entities.

**[1.4] Section 7 (2).** Expands the ability for procurement guidelines which make provision about the procurement of goods, works and services to include the disposal of goods and works by Territory entities.

**[1.5] New section 7 (5).** Inserts the ability to make regulations that prescribe activities that are, or are not, to be regarded by the Act as procurement or disposals.

**[1.6] Section 12 (1), note.** Substitutes notes on the requirements for making appointments.

**[1.7] Section 15 - Abuse of Position.** Makes details of offences and penalties more specific than previously provided for in the Act.

**[1.8] New division 2.5 - Other matters**

**Section 22 - Power to obtain information and documents.** Prescribes the ability of the Board to obtain information from a Territory entity.