



AUSTRALIAN CAPITAL TERRITORY

# Public Access to Government Contracts Act 2000

No 75 of 2000

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**MODEL CONFIDENTIALITY CLAUSE**



AUSTRALIAN CAPITAL TERRITORY

# Public Access to Government Contracts Act 2000

No 75 of 2000

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## **An Act to make public, as far as possible, the terms of government contracts**

*[Notified in ACT Gazette S69: 21 December 2000]*

The Legislative Assembly for the Australian Capital Territory enacts as follows:

### **PART 1—PRELIMINARY**

**1 Name of Act**

This Act is the *Public Access to Government Contracts Act 2000*.

**2 Commencement**

This Act commences on the day it is notified in the Gazette.

### 3 Definitions

In this Act, the following definitions apply:

**confidentiality clause** means a provision in a government contract that requires a government agency that is a party to the contract to keep confidential particular terms of the contract or of another contract to which a government agency is a party, and includes 2 or more provisions in a government contract that together have that effect, whether or not they appear together in the contract.

*Example*

Provisions in a government contract that are in the form of clauses M and N in the Schedule to this Act together constitute a single **confidentiality clause**. This applies whether or not the provisions appear together in the contract.

**government agency** means the Territory or a Territory instrumentality, but does not include a Territory owned corporation.

**government contract**—see section 5.

**public text**, of a government contract—see section 6.

**Territory owned corporation** means a Territory owned corporation under the *Territory Owned Corporations Act 1990*.

### 4 Notes

A note included in this Act is explanatory and is not part of this Act.

*Note* See *Interpretation Act 1967*, s 12 (1), (4)-(5) for the legal status of notes.

### 5 Government contracts that Act applies to

(1) This Act applies to a contract in writing (a **government contract**) that is—

- (a) a contract to which a government agency is a party; or
- (b) an amendment of such a contract;

made after the commencement of this section.

(2) However, this Act does not apply to—

- (a) a contract of employment; or
- (b) a contract for consideration (whether monetary or otherwise) worth \$50,000 or less; or
- (c) a contract for the settlement of liability to an individual.

## PART 2—MAKING GOVERNMENT CONTRACTS PUBLIC

### 6 Public text of a contract

(1) Within 21 days after making a government contract, the government agency must prepare a *public text* of the contract in accordance with this section.

(2) The public text must include all the text of the contract that is not confidential together with the following information, if it does not appear in that text:

- (a) details identifying each party;
- (b) details, of which the government agency is aware, of the cross-ownership of relevant companies;
- (c) the duration of the contract;
- (d) any transfer of assets under the contract;
- (e) the effect of any maintenance provisions;
- (f) the full consideration to be given by the government agency;
- (g) the effect of provisions dealing with renegotiation and renewal rights;
- (h) risk allocation among the parties at the various stages of the contract;
- (i) the effect of any penalty provisions;
- (j) the effect of guarantees, loans or undertakings;
- (k) any information required by law to be disclosed to the Australian Securities and Investments Commission;
- (l) any other information needed to understand the contract.

(3) If a term of the contract that does not appear in the public text of the contract because it is confidential—

- (a) ceases to be confidential in accordance with the contract; or
- (b) otherwise becomes public knowledge;

the government party must prepare a new public text that includes the term within 21 days.

### 7 Government contracts must be made public

The current public text of the contract must be made available to the public by—

- (a) making paper copies available for purchase; or

- (b) making electronic copies available without charge.

*Example*

Electronic copies might be made available on a website, or distributed by email.

**8 Registration of government contracts with confidentiality clauses**

- (1) The auditor-general must maintain a register of contracts containing confidentiality clauses.
- (2) A government agency that agrees to a confidentiality clause must provide the auditor-general with a copy of the contract containing it within 14 days after the contract, or an amendment inserting the clause into the contract, is made.

**9 Assembly to be informed of confidentiality clauses**

- (1) For the 6 months after the commencement of this Act, and for each 6 month period after that, the auditor-general must give the appropriate Legislative Assembly committee a list of the contracts inserted in the register mentioned in section 8 in the 6 month period.
- (2) The auditor-general must give the committee the list of contracts for each 6 month period as soon as reasonably possible after the end of the period.
- (3) A government agency must, when asked by the committee, give the committee the information the committee requires about a decision to agree to a confidentiality clause.
- (4) In this section:

*appropriate Legislative Assembly committee* means—

- (a) the public accounts committee of the Legislative Assembly;  
or
- (b) another Legislative Assembly committee nominated by the Speaker for the purpose, from time to time.

**10 No liability for complying with this Part**

- (1) This section applies to a government agency that is a party to a government contract.
- (2) The agency is not liable to another party to the contract or anyone else for anything done in good faith to comply with this Part.

### **PART 3—CONFIDENTIALITY CLAUSES IN A GOVERNMENT CONTRACT**

#### **11 Notice of Act to other parties**

If a confidentiality clause is proposed during the negotiation of a government contract, the government agency must ensure that the effect of this Act is drawn to the attention of the other party.

#### **12 Confidentiality clause in a government contract**

If a government contract is to make certain information confidential, it must do so using provisions that—

- (a) follow the effect of the model confidentiality clause in the Schedule as far as required; and
- (b) do not constrain disclosure to a greater extent than provided in the model clause.

#### **13 Grounds for confidentiality of information**

**(1)** A government agency may agree to make information confidential under a government contract only if it has satisfied itself, in accordance with this section—

- (a) that the release of the information would result in—
  - (i) the unreasonable disclosure of personal information; or
  - (ii) the disclosure of a trade secret; or
  - (iii) the unreasonable disclosure of information with commercial value; or
  - (iv) the unreasonable disclosure of information about the business affairs of a person; or
- (b) that it is required by, or gives effect to, an obligation of confidentiality that arises from another source.

**(2)** However, a government agency must not agree to make information confidential if—

- (a) it would inappropriately restrict a government agency in the management or use of Territory assets; or
- (b) it would not be in the public interest to do so; or
- (c) the information is already public knowledge; or
- (d) the information has been obtained by the government agency from another source; or

- (e) the agreement would require the confidentiality to apply for longer than is necessary to protect the interest concerned.

**14 Invalidation of non-complying confidentiality clauses**

A confidentiality clause has no effect if—

- (a) it does not comply with section 12 (Confidentiality clause in a government contract); or
- (b) the agreement by the government agency to the clause was not in accordance with section 13 (Grounds for confidentiality of information).

**PART 4—MISCELLANEOUS**

**15 Effect of disclosure of confidential information**

If information required to be kept confidential by a confidentiality clause is disclosed under this Act, that disclosure does not affect the continuing force of the confidentiality clause under the contract.

**16 Effect of other disclosure laws**

This Act does not change the effect of any other Territory law that deals with an obligation either to disclose or not to disclose information.

**17 Regulation-making power**

The Executive may make regulations for this Act.

**SCHEDULE**

(See s 12)

**MODEL CONFIDENTIALITY CLAUSE**

**M. Definition of *confidential information***

In this Agreement, *confidential information* means [list of the kinds of information to be kept confidential].

**N. Confidentiality obligations of the Territory**

N.1 In giving effect to the principles of open and accountable government, the Territory may disclose information unless it has otherwise agreed, or is otherwise bound, to treat the information as confidential.

N.2 Except as provided in this agreement, the Territory must not disclose the confidential information to any person without the prior consent of X (which consent will not be unreasonably withheld) except where the confidential information—

- (a) is required or authorised to be disclosed by law;
- (b) is disclosed to the Territory's solicitors, auditors, insurers, or advisers or to the Territory ombudsman;
- (c) is disclosed by the responsible Minister in reporting to the Legislative Assembly or its committees;
- (d) is generally available to the public;
- (e) is in the possession of the Territory without restriction in relation to disclosure before the date of receipt from X; or
- (f) is reasonably necessary for the enforcement of the criminal law or for the protection of public revenue.

N.3 The *Public Access to Government Contracts Act 2000* applies to this contract.

N.4 The following grounds mentioned in subsection 13 (1) of the *Public Access to Government Contracts Act 2000* apply to clause M and this clause: [list of relevant grounds in subsection 13 (1)].

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*[Presentation speech made in Assembly on 8 March 2000]*

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