

## Chapter 9

### DISCLOSURE OF CONTRACT AWARD INFORMATION

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### **Objective**

This Chapter deals with the information to be disclosed by the NSW Department of Commerce regarding contracts awarded arising from a tendering process or procurement negotiation managed by Commerce, whether as an agent for a client, under delegated authority for the State Contracts Control Board (SCCB), or from procurement for Commerce's own Offices and business units.

The objective is to ensure Commerce meets its disclosure obligations within NSW Government for transparency in tendering and contracting, while meeting procurement deliverables with best value for government, and maintaining probity, fairness, and ethical practice.

## Principles

The disclosure of information about tendering processes and contracts managed must be carried out in accordance with the Freedom of Information Amendment (Open Government-Disclosure of Contracts) Act 2006, and Premier's Memorandum 2000-11 which outline the information relating to the Government's contracts with the private sector that should, and should not, be made public after contract award.

These specify that certain information for larger contracts (of \$150,000 or more) must be automatically disclosed. The NSW Department of Commerce displays this information on the Commerce Tendering website.

The Memorandum also specifies that enquirers are entitled to obtain information for contracts (below \$150,000) on request. In addition to responding fully to such requests, the Department routinely discloses on the Commerce tendering web site information that is generally of interest regarding these smaller contracts.

## Freedom of Information Amendment (Open Government-Disclosure of Contracts) Act 2006 – No. 115

On 1 January 2007 the Freedom of Information Amendment ([Open Government-Disclosure of Contracts](#)) Act 2006 came into effect. The provisions of this Act amended the Freedom of Information Act 1989 and cover the disclosure of certain information on a contract at award. It also covers material changes that may occur to the disclosed information during the life of the contract.

Business units are to disclose the tendering and contract information required by the Act for all RFT and contracts managed by them, over \$150,000.

Where the requirements of the earlier Premier's Memorandum 2000-11 are in apparent conflict with, or do not cover items in, the Act - the specific Act requirements shall apply.

The information required to be disclosed within 60 days of the contract becoming effective is set out in *Schedule 1 Amendments Section 15A*:

- **subsection 2 - Class 1 contracts:** Items to be disclosed for all contracts;
- **subsection 3 - Class 2 contracts:** Additional items to be disclosed for contracts over \$150,000 involving direct negotiation or alliance contracts or operation or maintenance for 10 years or more or private sector financing, land swaps, asset and other property transfers and similar arrangements; and
- **subsection 4 - Class 3 contracts:** Additional items to be disclosed for contracts over \$5,000,000 and publication of the contract (excluding the items included in **subsection 9**).
- **subsection 9 - Commercial-in-confidence information:** Lists the items not to be disclosed for any contract.

Forms and guidance notes for disclosure are part of this Manual and can be accessed electronically through hyperlinks in this Manual.

## Premier's Memorandum 2000-11

### Scope of Application

The requirements of [Premier's Memorandum 2000-11](#):

- apply to all contracts entered into by the NSW Government, including construction, infrastructure, property, goods and services, information and communications technology, and other contracts;
- require disclosure of information about contracts awarded; and
- require information provided by an unsuccessful tenderer to only be disclosed with the agreement or consent of tenderers.

The Premier's Memorandum explicitly outlines the information to be disclosed, and the information not to be disclosed. It includes provisions for agencies to negotiate with tenderers about the information to be kept in confidence.

### Disclosure for all Contracts

The following information must be disclosed for contracts:

- details of contract (description of work to be completed or goods/services to be provided or property to be transferred; commencement date of the contract; the period of the contract);
- the full identity of the successful tenderer, including details of cross ownership of relevant organisations;
- the price payable by the agency and the basis for future changes in this price;
- the significant evaluation criteria and the weightings used in tender evaluation; and
- provisions for re-negotiation (where applicable).

### Additional Disclosure for Large Complex Contracts

In addition to the information required for all contracts, the following items must be disclosed for contracts valued at over \$5 million involving private sector financing, land swaps, asset transfers and similar arrangements:

- details of future transfers of assets of significant value to the Government at no or nominal cost and details of the right to receive the asset and the date of the future transfer;
- the identification and timing of any assets transferred to the contractor by the agency;
- all operation and/or maintenance provisions in the contract;
- the basis for changes (price variation clauses) in the price payable by the agency;
- the results of any cost-benefit analyses of the successful tender;
- the risk sharing in the construction and operational phases of the contract, quantified in net present value terms (where possible) and specifying the major assumptions involved;
- significant guarantees or undertakings between the parties, including loans entered into or agreed to be entered into; and
- to the extent not covered above, the remaining key non-commercial-in-confidence elements of the contractual arrangements.

Disclosure about privately funded public infrastructure contracts must also comply with the disclosure guidelines set out in the Guidelines for Privately Financed Projects – Treasury Paper - Working with Government December 2006

## **Contract Information not to be Disclosed**

The Premier's Memorandum limits the extent of material that the Government will not disclose to very specific areas, which are exhaustively identified. The following information must not be disclosed unless the contractor agrees, or disclosure is determined under the Freedom of Information Act 1989 (as amended) or is otherwise legally required:

- the contractor's financing arrangements;
- the contractor's cost structure or profit margins;
- items having an intellectual property content (such as non-tangible property that is the result of creativity, such as patentable ideas or inventions, trademarks, copyrights, and the like); and
- any other matters where disclosure would place the contractor at a substantial commercial disadvantage with its competitors both at the time of entering into the contract and at any later date when there would be an effect on future competitive arrangements.

## **Additional Agreed Information not to be Disclosed**

Tenderers may request agencies not to disclose particular information included in their tender but must give the reasons for this request. An agency must advise a tenderer in contention for a contract what information it agrees not to disclose. Agreement must be given in accordance with the requirements of the Premier's Memorandum, and the extent of material agreed not to be disclosed must be very limited and specific. If agreement with a tenderer cannot be reached, the business unit must obtain the advice of the General Manager, Accreditation, Policy Support Services, before finalising the award of the contract.

## **Other Requests for Disclosure**

### *Non-Routine Disclosure, FOI or Voluntary Release*

All requests for information about tenders or contracts, even where they are not covered by these guidelines must be dealt with promptly and efficiently. The public has rights to access to information held by the Government, which is not 'exempt matter' under the Freedom of Information (FOI) Act 1989. Contract information is not automatically exempt matter. Officers and agencies should not refuse to disclose information unless refusal of access is justified under the FOI Act. Where it is convenient and appropriate agencies may voluntarily disclose information to enquirers without the formality of FOI procedures. While maintaining appropriate confidentiality, agencies must not be seen to be unduly obstructive or secretive.

### *Tender Information before Award of Contract*

The Memorandum applies only to information about contracts that have been awarded. Maintenance of confidentiality of most information provided by tenderers up to award of contract is essential to the probity and fairness of the tendering process.

This Manual also addresses the release of tenderers' details. See Chapter 5, *Making Prospective Tenderers' Identity Public* and Chapter 6 *Announcement of Tenders Received*.

Information other than that provided by tenderers, which is contained in RFT documents and information that has been publicly advertised is already in the public domain. Information in RFT documents may generally be released, either by provision of the documents, free, or for

payment of the required cost of RFT documents, or by providing the information directly to enquirers where appropriate. No charge should be made for disclosure of RFT information that would be required to be disclosed once a contract was awarded, or is in the public domain, where no agency cost is involved.

### *Expressions of Interest*

The selection of organisations to be invited to tender following an Expression of Interest process does not form a contract, and the Memorandum does not cover disclosure in that regard.

Information other than that publicly advertised for the Expressions of Interest process and the identities of the organisations preregistered to tender would be made public, along with other information in accordance with this Tendering Manual and the Tendering Guidelines.

Other information about the subsequent tender process would not normally be disclosed before the proposed contract has been awarded.

The following details should be disclosed, after a contract is awarded from the multi-stage EOI/tender process, or Request for Proposals process:

- details of contract (description of work to be completed or goods/services to be provided or property to be transferred; commencement date of the contract; the period of the contract);
- the identities of those tendering and the successful tenderer; and
- the significant evaluation criteria and the weightings used in evaluating tenders.

The standard form at Appendix 9B is to be used when making this disclosure.

### *Contracts Without Disclosure Provision*

Information about contracts which do not contain disclosure of contract information clauses in the condition of tendering, and to which no other specific agreement or undertaking about disclosure or non-disclosure of information applies, should normally be disclosed in accordance with this Manual. The information to be disclosed for all contracts is to be disclosed. Cross ownership details and a breakdown of each of the non-price criterion weightings (the percentage weighting for the price component and non price component is normally provided in the RFT documents) may need attention. Ownership and control details are already a matter of public record through the Australian Security and Investment Commission.

There may be reason to believe that a contractor may object to disclosure of contract information, for example, where the subject of the contract is publicly unpopular and disclosure of contract information could have an unreasonable adverse effect on the business affairs of the Contractor. If this is the case, the consent of the contractor should be obtained before disclosing information where this is not addressed in the RFT documents.

The information to be released under the Memorandum for contracts over \$5 million involving such matters as private sector financing, land swaps, asset transfers and similar arrangements, may be more commercially sensitive than the information required for all contracts. Particular care should be taken in considering this information for disclosure, and the contractor's consent obtained where appropriate, where this is not addressed in the RFT documents.

### *Contracts with Confidentiality Agreements*

The information identified in the Memorandum as not to be disclosed, and information about contracts to which any specific agreement or undertaking about disclosure or non-disclosure

applies should not be disclosed unless the contractor agrees, or disclosure is determined under the Freedom of Information Act 1989 or is otherwise legally required. Contract information that would normally be disclosed and that is not specifically subject to a confidentiality agreement, should be disclosed, and not withheld just because there is a confidentiality agreement.

## **Analysing Requests and Consultation with Contractor**

Requests for disclosure may also be received involving other information that is not identified in the Memorandum as required to be either disclosed, or required not to be disclosed.

When requests are received for contract information that the Memorandum does not require to be disclosed the following matters should be considered:

- does the information concern the business, professional, commercial, or financial affairs of any entity or person?
- is there any specific agreement or undertaking about disclosure or non-disclosure of the information?
- will the assembly and analysis of requested information be likely to be so time consuming as to justify forcing the enquirer to submit a formal FOI request?

If the information requested concerns the business, professional, commercial, or financial affairs of any entity or person, it must not be disclosed without the agreement of the entity or person concerned, or unless in accordance with the FOI Act s32, the disclosure could not reasonably be expected to have an unreasonable adverse effect upon those affairs.

Where there is no apparent reason for the contractor to object, a brief telephone enquiry, facsimile or e-mail, requesting the contractor's agreement to the disclosure may be used, and if agreement is forthcoming, the information may be disclosed, with the necessary file records being made.

If the Contractor appears likely to object, but there are public interest grounds for disclosure, a more detailed e-mail, facsimile or letter should be sent to the contractor explaining the public interest grounds and seeking agreement. If there is no confidentiality agreement and the agency is considering overriding the contractor's objection, if any, the formal notice provisions of the FOI Act s32 may be commenced at this stage.

It may be that disclosure of the requested information could reasonably be expected to have an unreasonable adverse effect upon the business, professional, commercial, or financial affairs, or it is contrary to a specific confidentiality agreement, or there appear to be other grounds for the agency to refuse to disclose it as exempt matter under the FOI Act. In this case the enquirer should be advised that the agency does not believe that disclosure is appropriate, and the reasons for this. It may also save the enquirer from submitting a formal FOI request if advice is also given, where appropriate, that the matter was considered under the appropriate criteria of the FOI Act, and appears to be exempt matter that would not be disclosed.

If the assembly and analysis of requested information, and consultation with parties is likely to consume significant amounts of agency time and resources, enquirers should be advised and assisted to submit formal FOI requests.

## **Informing Tenderers and Contractors through Conditions of Tendering**

The tenderers must be clearly and explicitly advised of what contract information will and will not be disclosed, how disclosures will be made, and how tenderers can pursue an agreement with the Principal about additional items they consider should not be disclosed.

Conditions of tendering clauses have been included in all the standard form procurement contract templates.

Any option provided in the conditions of tendering for non-disclosure of a tenderer's identities is only to be used in exceptional circumstances, where the identity of tenderers must be kept confidential, for example, where personal safety or security is involved, the subject of the contract is publicly unpopular and disclosure of tenderers' identities is likely to have unreasonable adverse effects, or other serious consideration.

The prior approval of the Group General Manager of the responsible business unit, to use the option, is required.

## **Interpretations**

### **Contract Value to Determine Disclosure Requirements**

The contract value thresholds of \$150,000 for published disclosure, and \$5m for additional details disclosure, apply to the total GST inclusive contract price, or the total value of any asset transferred or work to be performed under the contract (not net value), or of income under the contract.

For contracts that do not have a clear value at the time of award, such as State Contracts Control Board period contracts involving a price per item but no ordered quantity, the estimated turnover for the life of the contract is to be used. That is the estimated total per annum turnover value of all supplies under the contract (as sales to eligible Government customers) multiplied by the life of the contract in years, or part thereof.

### **Relevant Cross Ownership**

The Memorandum requires the disclosure, for all contracts, of details of cross ownership of relevant companies. Relevant cross ownership means ownership or control relationships involving the contractor and other entities and which are known to the agency.

Agencies not required to undertake any ownership and control investigations additional to those normally required, but any ownership and control information that is common knowledge or has received wide publicity, or was discovered in the tender process, should be disclosed if it was relevant to the award of the contract.

There may be ownership and control information that could have affected the award of the contract that was not taken into account. If this happens, a brief explanation, for example, that the information was not revealed or available at the time of awarding the contract should be included in the disclosure.

### **Significant Evaluation Criteria**

The Memorandum requires the disclosure, for all contracts, of the significant evaluation criteria and any weighting/s used in tender evaluation.

In evaluating tenders value for money as a criterion may apply and some criteria which are pass/fail requirements, and some criteria that may be scored and weighted. Scoring and weighting is not necessarily applied to all tenders or selection criteria.

Price would always be listed as a significant criteria, where applicable, and its weighting disclosed when used.

If other criteria are rated and weighted this is considered significant and would be listed, with their weighting in the disclosure.

Where criteria are not rated and weighted, only criteria that have affected the award of the contract need be considered significant. For example, if two tenders were passed over, one because the tenderer had a record of unsatisfactory performance and another because the tenderer demonstrated insufficient financial capacity, then the significant criteria might be listed as:

- price;
- previous performance; and
- financial capacity.

This Manual also provides guidance for the development and use of Tender Evaluation Plans from which the criteria and weightings should be taken. See Chapter 7, *Evaluation of Tenders: Part A - Preparing Tender Evaluation Plans*

## **Basis of Future Changes in Price**

The Memorandum requires the disclosure, for all contracts, of the basis of future changes in price. In addition to provisions that may be specified in particular contracts, a number of standard price change mechanisms, should be included in contract disclosures, as is shown in the following examples:

- Construction Contracts with Cost Adjustment:  
Variations as instructed and valued by agreement or independently, and cost adjustment based on ABS indexes.
- Construction Contracts with no Cost Adjustment:  
Variations as instructed and valued by agreement or independently.
- Consultant Engagements:  
Variations as instructed and valued by agreement or independently.
- Goods and Services Contracts with Adjustments for Labour and Materials:  
Periodically adjusted for changes in Labour and Material factors.
- Goods and Services Contracts with no cost adjustments (firm price):  
Firm price quoted and accepted for the duration of the contract.
- Goods and Services Contracts with Adjustments for CPI:  
Periodically adjusted for CPI.

## **Procedure Requirements for all Business Units that Award or Enter Into Contracts**

### **Business Unit Authorities and Instructions**

Disclosure of contract information is an Office and business unit responsibility.

Support for this function is provided through the Contractor and Consultant Management System (CCMS), the electronic tendering system and [Commerce tendering web site](#)

Project managers, contract managers, or contract officers, compile and release contract information for publication on the Commerce tendering web site of contracts of \$150,000 or more (and contract information for contracts below \$150,000 that are routinely published) and respond to requests for disclosure of contract information for smaller contracts.

Officers who award contracts who do not have access to CCMS should contact the CCMS Systems Administrator in Policy Support Services, NSW Procurement on 02 9372 8925.

For issues regarding publication or the requirements for disclosure contact the Manager, Tendering on 02 9372 8900 for initial guidance.

It is important for the effective implementation of requirements, that all requests for information about contracts are efficiently met, with the enquirer being promptly provided with access to the information which is to be disclosed. Officers must not be seen as obstructive, delaying, or reluctant to disclose information, which is to be disclosed.

Business unit managers must ensure that tendering process managers and / or contract managers are given appropriate instructions and authorities to enable them to compile and release the information to be disclosed. All officers who may receive requests for contract information must be appropriately instructed in the requirements for prompt, accurate and helpful responses.

Clients for whom Commerce is acting as a procurement or project management agent must be informed, when applicable, of the obligations.

## Compulsory Disclosure

The required information about contracts must be disclosed as follows:

- for small contracts (below \$150,000) the required information must be released on request ; and
- for all contracts valued at \$150,000 or more, or where Government transfers ownership of property to the value of \$150,000 or more and the other conditions apply, the required information must be routinely published through CCMS to the *eTendering* System and then to the Commerce tendering web site within 60 days of award of the contract or of the contract becoming effective (as applicable)

### *Disclosure on Request - Small Contracts below \$150,000*

The Memorandum requires that certain contract information must be disclosed on request for small contracts below \$150,000. The identity of the enquirer or the reason for the enquiry is not relevant to the requirement for disclosure.

Business unit managers may authorise project managers, contract managers, contract officers and other business unit staff to agree with enquirers on the form of disclosure of requested information, which may be:

- oral, by telephone or in person;
- by e-mail; or
- by letter or facsimile.

Where oral disclosure is agreed, care should be taken that the relevant contract is accurately identified. The enquirer may agree that they do not want all the information which the agency may be required to disclose and less information may be provided, and the enquiry may be satisfied by the disclosing of only the information wanted. A note of the identity of the enquirer and the information disclosed should be made on the appropriate contract file. An enquirer who is dissatisfied with an oral disclosure may always request further information, either orally or in writing.

Where disclosure is in writing, it will usually be most convenient and reliable for all the information disclosed to be included in the response. Information provided should be in a succinct summary form. Standard contract clauses should not be quoted in full.

Disclosure responses must be prompt, and in accordance with normal business unit standards for timely response to correspondence.

The forms or CCMS contract disclosure input screens may be used to prepare contract disclosure details which may then be printed out, cut and pasted to e-mail, or saved to file.

### *Automatic Publication of Contracts*

#### *General Requirements*

Contract information required for all contracts valued \$150,000 or more (and additional contract information for contracts over \$5 million involving private sector financing, land swaps, asset transfers and similar arrangements) awarded must be made available for automatic publishing.

The Department routinely discloses on the Commerce tendering website part of the contract information that can be requested for small contracts below \$150,000.

The Department meets its disclosure requirements by publishing contract information for all contracts (arising from a tendering process or by negotiation) on the Internet, through data entry to CCMS and information then being published on the Commerce tendering website.

Those involved with contracts and consultants, and others planning to use the tender processes in all business units, must ensure that they or their staff have necessary access to CCMS to input contract information for disclosure. Alternatively, they must ensure they have access to a CCMS Administrator who will input the contract information into CCMS on their behalf. To arrange access to CCMS (or to a local CCMS Administrator) contact the CCMS Systems Administrator on 02 9372 8925.

A list of CCMS administrators can be accessed at:

[http://www.managingprocurement.commerce.nsw.gov.au/system/index\\_ccms.doc](http://www.managingprocurement.commerce.nsw.gov.au/system/index_ccms.doc)

*Government Contract Disclosure Forms* (PWF-0625) for one-off tendering processes in a business unit that does not normally issue requests for tenders may be sent to McKell Tenders Office for data entry: Email [tenders@commerce.nsw.gov.au](mailto:tenders@commerce.nsw.gov.au) or Fax 02 9372 8922.

#### *Method of Assembling Information*

Information for disclosure for all contracts is assembled using CCMS. Those staff with CCMS access and responsible for awarding a contract must complete the appropriate CCMS contract disclosure screens.

Those responsible staff who do not have direct access to CCMS must complete a *Government Contract Disclosure Forms* (PWF-0625) and lodge the completed form with a CCMS Administrator. This Manual provides links to the forms and guidance documents.

Occasionally, when a client has run the tendering process but the Department has responsibility for awarding the contract, contracts may enter the system at the contract award stage without an RFT Number. In these circumstances, it is necessary to first obtain an RFT Number by contacting PSS on 02 9372 8925. Then, following award of the contract, the *Government Contract Disclosure Form* must be completed and lodged with PSS, Email [CCMSDATA@commerce.nsw.gov.au](mailto:CCMSDATA@commerce.nsw.gov.au)

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*Time Frame and Time Limits for Lodgement in CCMS and Publication to the Tendering Website.*

The Act and Tendering Guidelines require that contract information must be published within 60 days of contract award or the contract becoming effective. Earlier publishing should be arranged where possible. As the information required to be disclosed initially would be known at the time of award of the contract, lack of information will not normally be a source of delay.

Those able to record the information required by the [Government Contract Disclosure Form](#) (PWF-0625) directly into CCMS must do so within 10 working days of awarding a contract.

Those without direct access to CCMS should complete the [Government Contract Disclosure Form](#) and send it to their local CCMS Administrator within 10 working days of awarding a contract.

CCMS Administrators must enter the information into CCMS within 3 working days of receiving a fully completed form.

*Receiving Confirmation of Lodgement*

When the [Government Contract Disclosure Form](#) is lodged and the information is recorded in CCMS, an e-mail detailing all the information recorded in CCMS is automatically generated confirming that:

- the contract award information is recorded in CCMS;
- the information will remain in CCMS for 7 days to allow for correction after which time it will be published on the Commerce tendering website; and
- the 7 digit RFT Number has become the unique identifier for the contract and the bond documents and is now referred to as the "Contract Number".

The Contract Number must be quoted when making any reference to the contract, for example, on letters of award, deeds of agreement, when dealing with enquiries, when referring to the contract in correspondence, and the like.

Standing Offer and Period Contracts for the SCCB are often identified by a "SCCB Contract Number", which in turn may be used to identify the contract in smartbuy®. When the SCCB Contract Number is quoted on any documents, correspondence, letters of award, deeds of agreement, and the like, it must be quoted together with the RFT/Contract Number obtained from CCMS.

*Awarding a Contract to Multiple Contractors or Suppliers*

When contracts are awarded to multiple contractors/suppliers from a single RFT, the person responsible for awarding the contracts must allocate a suffix to the 7 digit RFT Number and use the 7 digit RFT Number plus the suffix to identify each separate contract.

For construction tenders, when awarding more than one contract from a single RFT, assign the suffix "A" to the 7 digit RFT Number for the first contract and continue with B, C, D etc. for each contract awarded thereafter. For example, if the RFT number is 0011222, the first contract awarded will be 0011222A, the second 0011222B, and so on.

For standing offer tenders where several suppliers agree to provide goods and services over a period as embodied in separate deeds of agreement under the contract, assign the four digit suffix 0001 to the 7 digit RFT number for the first deed of agreement, and continue with 0002, 0003, 0004 etc. for each deed of agreement thereafter. For example, if the RFT Number is 0011333, the first deed of agreement under the RFT will be called 0011333/0001, the second 0011333/0002, and so on.

The person awarding the multiple contracts must then complete and lodge the *Government Contract Disclosure Form* providing details of the suffixes they have allocated on Section 2A of the form, which deals with multiple contracts.

When the [Government Contract Disclosure Form](#) is lodged and the information is recorded in CCMS, an e-mail detailing all the information recorded in CCMS is automatically generated confirming that:

- the contract award information is recorded in CCMS;
- the information will remain in CCMS for 7 days to allow for correction after which time it will be published on the Commerce tendering website; and
- the 7 digit RFT Number together with the related suffix has become the unique identifier for each contract or deed of agreement.

#### *How the Disclosure Information is Published on the Commerce Tendering Web Site*

Once the 7 day correction period has elapsed, the disclosure information appears under the 'awarded' status on the Commerce tendering web site against the relevant RFT Number. If there are multiple contracts, in addition to the disclosure information for the contract, the identity of the suppliers, details of any cross ownership and the commencement date for each supplier are also displayed against the RFT Number.

#### *Other Disclosures*

Other chapters of this Manual also deal with disclosure.

Chapter 7 *Request for Tenders, and the Tender Period* deals with with routine disclosures at issue of the RFT.

Chapter 6 *Handling Tenders- Receipt, Opening, Recording and Distribution* deals with with routine disclosures during the tender period and after tenders close and before award or finalisation of tendering process outcomes.

Chapter 8 *Award of Contract* deals with the formal process of advising tenderers of the success or otherwise of their tender, and tendering process outcomes.

#### *Response to Enquiries*

Where telephone, personal, or written requests for disclosure of information about contracts valued at \$150,000 or more are received, the award information should be provided promptly. The enquirer should be referred to the award section of the Tendering website if the information has been published by the date of the enquiry. If required, a print out of the award page from the website containing the award information may be forwarded to the enquirer. A note of the identity of the enquirer and the information disclosed should be made on the appropriate contract file.

Disclosure responses must be prompt, and in accordance with normal business unit standards for timely response to correspondence.

#### *Additional Information for Large and Complex Contracts over \$5m*

The additional contract information for contracts over \$5 million such as that involving private sector financing, land swaps, asset transfers and similar arrangements must also be routinely published.

CCMS provides additional contract information screens for assembling and releasing this information. The additional details required are available at Appendix 9B.

## Non-Disclosure Agreements

### Non-Disclosure Proposals

Standard conditions of tendering allow tenderers to request the Principal to not disclose particular information included in their tender and support this request with reasons. Proposals by tenderers, under this provision, may be classified as follows:

- more precise specification of information that would not normally be disclosed;
- information not covered by the Memorandum; or
- information required to be disclosed.

### Information not Normally Disclosed

It is expected that most requests for non-disclosure relate to information that would not otherwise be disclosed, and officers may agree to non-disclosure on that basis.

Where a tenderer seeks non-disclosure of information not clearly addressed by the Memorandum, officers should not decide to withhold information unless refusal of access could be justified under the FOI Act (other than FOI Act Schedule 1 s13, which itself relates to confidentiality agreements). Common reasons for withholding contract information may be that:

- disclosure would adversely affect the business affairs of some person or entity (FOI Act Schedule 1 s6), although this would usually be covered by the non-disclosure criteria; or
- disclosure would adversely affect the financial or property interests of the NSW Government or a Government agency (FOI Act Schedule 1 s15, as amended).

Business unit managers may authorise officers to agree non-disclosure with tenderers on these grounds, but particular care must be taken about the genuineness, substantialness and unreasonableness of the alleged adverse effects under consideration. Officers should refer to Office senior management for advice in any cases where there is doubt.

The advice of the Group General Manager of the responsible business unit should be sought on contract disclosure matters, and difficult cases may be referred to PSS through the Manager, Tendering, for advice.

### Non-Disclosure of Information Required to be Disclosed

Proposals from tenderers and Clients for the non-disclosure of information that would otherwise be disclosed should not normally be agreed to.

The exceptional circumstances option provided in the standard conditions of tendering for non-disclosure of tenderer's identities is not intended to cover this information about the successful tenderers. The contractors will have had the opportunity to assess the impact of any adverse effects of winning the contract, and price their tender and the contract accordingly.

If, after assessment, it is considered that there is merit in agreeing not to disclose any information required to be disclosed, approval must be obtained from the Group General Manager of the responsible business unit before any commitment or agreement is made with a tenderer, contractor or Client.

Any request for exemption from the obligations to disclose should be made as early as possible and in the first instance be provided to the Manager Tendering for further consideration by the appropriate authority.

Approval should not be presumed. Possible cogent reasons may include issues of personal safety or security, or security of material of information that is the subject of other confidentiality arrangements (eg. printing and distribution of HSC examination papers).

## Documentation of Confidentiality Agreements

Before the contract is awarded the Principal must document the information not already documented in the conditions of tendering it agrees not to disclose. This may be done by exchange of e-mail, facsimile or letters. Formal deeds will only be required in exceptional circumstances, and would then be prepared by Legal Services.

The documented agreement must be clear and specific. It must not contradict the requirements of the Memorandum without proper approval.

## Disputes and Disagreements

If the officer responsible and a tenderer cannot agree about what should be disclosed advice might be sought from PSS or Manager Tendering as appropriate. Standard conditions of tendering provide that if agreement cannot be reached on non-disclosure the Principal may make a final decision. Group General Managers, Divisional Directors, and business unit General Managers may authorise this decision in the event of a disagreement, but they must first obtain the advice of the General Manager Accreditation or the Chair of the State Contracts Control Board (as appropriate).

The Freedom of Information Amendment (Open Government-Disclosure of Contracts) Act requires publication of the reasons for non-disclosure of certain information.

## Outcome

Officers following the guidelines set out in this Chapter will understand how to appropriately disclose tendering and contract award information in accordance with the latest government policies.

## Records Risk Management

All persons involved in the procurement process should note that procurement documents that form the contract or may be required by law must be retained in an approved format on an official Departmental file. The *Records Risk Management Matrix* found in Appendix 1B of this Manual, provides guidance as to the type of records that should be retained.

## Role of NSW Procurement

### *Policy Support Services*

Policy Support Services establishes and maintains the procurement framework, systems and instruments for NSW Government. PSS also supplies the CCMS system that is the vehicle for gathering the information and exporting it to the *eTendering* System.

### *eBusiness Solutions*

eBusiness Solutions supplies (on behalf of PSS) the *eTendering* System and the tendering web site on which the disclosures are made public.

Tendering Section, (e-mail: [tenders@commerce.nsw.gov.au](mailto:tenders@commerce.nsw.gov.au) or phone 02 9372 8900) or fax 02 9372 8922), within eBusiness Solutions, specifically provides advice and assistance in the

application of these guidelines for tendering processes and provides model procedures, operational guides, and work instructions. Departmental Administrator of the Commerce tendering web site.

## Reference and Guidance Documents

*Freedom of Information (Open Government-Disclosure of Contracts) Amendment Act 2006*

[NSW Government Code of Practice for Procurement](#)

[NSW Government Tendering Guidelines](#)

Premier's Memorandum 2000-11: [Disclosure of Information in Government Contracts with the Private Sector](#).

Premiers Circular 2002-47: [Disclosure of Information in Government Contracts with the Private Sector](#).

## Forms

Appendix 9B – [Government Contract Disclosure Form](#) (PWF-0625) and Appendix 9C [Government Contract Disclosure User Guidance document](#)

Appendix 9D - [Material Variation Disclosure Form](#) – although a contract matter and not a tendering process matter this information is to be entered into CCMS to be disclosed during the life of a contract arising from the tendering process, and the link has been provided to assist officers responsible.

## Appendices

Appendix 9A – [Contract Award Disclosure Information](#) – Commerce introductory notes

Appendix 9B – [Government Contract Disclosure Form](#) (PWF-0625)

Appendix 9C – [Government Contract Disclosure User Guidance document](#)

Appendix 9D - [Material Variation Disclosure Form](#)

## Acronyms

CCMS	Contractor and Consultant Management System
FOI	Freedom of Information
NSWP	Office of NSW Procurement, Commerce
PSS	Policy Support Services, NSWP
RFT	Request for Tenders