LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

Public Access to Government Contracts Act 2000

Report on
Auditor-General's Report

STANDING COMMITTEE ON FINANCE AND PUBLIC ADMINISTRATION (INCORPORATING THE PUBLIC ACCOUNTS COMMITTEE)

Public Accounts Committee Report Number 28

August 2001

RESOLUTION OF APPOINTMENT

The Standing Committee for the Chief Minister's Portfolio was appointed by the Legislative Assembly on 28 April 1998 to examine any matter under the responsibility of the Chief Minister's portfolio. The Assembly also resolved that the committee perform the duties of a public accounts committee, specifically:

(a) to examine:

 (i) the accounts of the receipts and expenditure of the Australian Capital Territory;

 (ii) the financial affairs of authorities of the Australian Capital Territory; and

 (iii) all reports of the Auditor-General which have been laid before the Assembly;

(b) to report to the Assembly, with such comments as it thinks fit, on any items or matters in those accounts, statements and reports, or any circumstances connected with them, to which the Committee is of the opinion that the attention of the Assembly should be directed; and

(c) to inquire into any question in connection with the public accounts which is referred to it by the Assembly and to report to the Assembly on that question.

On 26 November 1999, the Assembly retitled the committee as the Standing Committee on Finance and Public Administration (Incorporating the Public Accounts Committee), omitted reference to matters under the responsibility of the Chief Minister's portfolio and included reference to women's affairs, Aboriginal and Torres Strait Islander issues, asset management, gaming and racing and any other related matter.

MEMBERSHIP OF THE COMMITTEE

Mr Ted Quinlan MLA Committee Chair

Mr Trevor Kaine MLA Deputy Committee Chair

Mr Greg Cornwell MLA

Secretary: Maureen Weeks

1. INTRODUCTION

1.1. At its meeting of 10 August 2001, the Committee received the first biannual report of the Auditor-General under the terms of the *Public Access to Government Contracts Act 2000* (the Act). The report covers the period of 21 December 2000 (when the Act commenced) to 21 June 2001. The report included a covering letter and a Register listing 22 contracts.

1.2. The Committee considered the report and the issues raised by the Auditor and agreed that the time remaining to report to this Assembly was insufficient to properly pursue the issues. However, it is of the view that this Assembly and the next need to be aware of the issues and this report was prepared address this need.

Background

1.3. On 7 December 2000, the Assembly considered the Public Access to Contracts Bill 2000. The bill had been before the Assembly since March and was passed with a number of amendments. The amendments were largely to incorporate into the bill the substance of another bill (the Government Contracts Confidentiality Bill 2000) which had also been introduced into the Assembly in March.

1.4. The purpose of the two bills (and indeed there was a third with the same intention) was to establish a more open and accountable approach to government and the Assembly's role of scrutiny in government contracting processes. The legislation sought to ensure that, without breaching any provisions of contracts entered into by government agencies with confidential information, the Assembly had some scrutiny of them. In doing so, they also sought to establish guidelines as to what information can be subject to commercial-in-confidence claims by governments in refusing the disclosure of that information.

Public Access to Government Contract Act 2000

1.5. The Act applies to Government agencies other than Territory Owned Corporations and only to contracts worth $50,000 or more and not to employment contracts or liability settlements with individuals.

1.6. Under the terms of the Act, within 21 days of making a contract a government agency must publish a "public text" of the contract which must include specified information.

1.7. In terms of the provisions relating to confidential information within a contract the Act makes certain clear provisions.

1.8. In negotiating a contract to include certain confidential material the government agency must make the other party to the negotiations aware of the provisions of the Act. The contract clause/s must also "follow the effect" of a model clause provided and must not place greater restrictions on the disclosure than those contained in the model clause. Further, the Act specifies the criteria that must be used in establishing the basis for the confidentiality clauses and such clauses have no effect if these criteria are not used.

1.9. The Act also requires the Auditor-General to maintain a register of contracts containing confidentiality clauses and that an agency must provide such a contract to the Auditor within 14 days.

1.10. The Auditor is required to give the appropriate Assembly (this committee) a list of the contracts on the register every 6 months and government agencies are required to provide the committee, on request, the information it requires relating to the decision to agree to a confidentiality clause.

2. Auditor-General's comments

Compliance by Government Agencies

2.1. The Auditor-General's first report to the Committee under the Act was provided with a substantial caveat:

> The list is provided without any assurance by my Office as to its accuracy and completeness. … Given the confusion of many agencies, I must express a concern that the list may be incomplete.[1]

2.2. The confusion is evidenced by the lack of response by agencies to the Auditor's request for the relevant information. It appears to continue despite efforts by the Audit Office, the Department of the Treasury and the Government Solicitor's Office to inform government agencies of their responsibilities.

2.3. The Auditor wrote to 34 agencies in February 2001 outlining his responsibilities under the Act and also those of the agency and requesting the agency to indicate the procedures that were in place to advise the Audit Office of the relevant information. A reminder letter was sent by the Auditor on 16 May 2001.

2.4. At the end of the first 6 month period the Auditor again wrote to agencies asking them to "check that the register was accurate and complete in regard to their contracts."[2]. Only 17 of the 28 agencies that were sent the letter responded, adding 4 contracts to the list. [3]

2.5. In addition to the correspondence sent to agencies by the Auditor alerting them to the requirements of the Act, the Department of the Treasury organised two seminars on the requirements of the Act. The Government Solicitor's Office and the Department of Treasury have distributed a legal bulletin and two circulars, respectively, on the Act. Further, material to assist agencies to develop the "public text" was posted on the basis website by ACT Procurement Solutions (Department of Urban Services).[4] The Committee also understands that the Audit Office provided extensive advice to agencies about the requirements of the Act.

The Confidentiality Clause

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[1] Auditor-General, covering letter dated 8 August 2001, p 3
[2] *IBID*, p 2
[3] *IBID*, pp 2-3
[4] *IBID*, pp 2-3

2.6. The Auditor also indicated to the Committee that "Confidentiality clauses are required where the confidentiality of information within contract arises under the Public Access to Government Contracts Act and not under other legislation or the common law."[5]. Thus, not all contracts containing confidential information are required to be listed on the register.

2.7. Further, the Auditor indicates that "Most of the contracts on the list do not contain a confidentiality clause in the form prescribed in the Act."[6]. He informs the Committee that in preparing the register he took the view that it should include all contracts provided by agencies as confidential, whether or not there is a confidentiality clause. However, he queries whether information regarded by agencies as confidential is not in fact confidential under the terms of the Act.

3. COMMITTEE COMMENT

Compliance Assurance

3.1. Compliance should not have to be policed. However, the Committee does believe that for the Act to achieve the objectives indicated during the "in principle debate" and for the Committee to exercise its responsibilities there needs to be some assurance that the Auditor's register is accurate. The responsibility for making such an assurance cannot reside with the Auditor who is reliant on information provided by agencies. It can and should reside with the Chief Executive Officers of the government agency providing the information.

Recommendation 1

3.2. Accordingly, the Committee recommends that the *Public Access to Government Contracts Act 2000* be amended to require that agency Chief Executive Officers certify, in writing, to the Auditor-General that the details of contracts and amendments provided for the register are the full and accurate details of the contracts and that the time period required by the Act is complied with.

3.3. The Committee recognises that such legislative change will not be possible to implement in the short term and therefore believes that administrative processes need to be established in the interim.

Recommendation 2

3.4. Therefore, the Committee recommends that Ministers report to the next Assembly on what administrative processes have been established in each government agency to ensure compliance with the requirements of the *Public Access to Government Contracts Act 2000.*

3.5. Under the terms of the Act (subsection 9(3)), the Committee does consider that it has a role in scrutinising confidentiality clauses within contracts and

[5] *IBID*, p 3
[6] *IBID*, p 4

commenting on the appropriateness of the use of these clauses. It is not its intention to consider the detail of the decision for every contract that appears on the Auditor-General's register. However, it believes that its scrutiny role should, at least in the early days of the Act, be an active one, providing advice to the Assembly and guidance to agencies on the use of such clauses. The Committee believes that its successor should, as a priority, define its role and inform the Assembly.

3.6. In the long term, the Committee considers that the role could be further developed to be an intermediary between the Assembly and the executive when disputes arise over confidentiality claims. Claims by government that contract information is confidential would be examined in light of the Register and the committee could seek any necessary information as to the decision to make the information confidential. It could then report to the Assembly providing a useful and more informed perspective as to whether the Assembly (or a committee) should continue to press for the information. Thus it could act to defuse a potentially difficult situation. However, this is a matter that the committee of the next Assembly would need to refine.

3.7. However, until there can be some assurance that the Register maintained by the Auditor-General is accurate the Committee cannot take on these tasks with any confidence. The Committee has therefore written to each Minister seeking assurances that the Register provided by the Auditor is accurate.

3.8. The Committee has however, considered the concerns expressed by the Auditor-General and makes the following comments.

Compliance by Government Agencies

3.9. The Committee notes the Auditor's concerns about the lack of responsiveness to correspondence seeking the information required under the Act. It is concerned that the ACT Public Service has reacted so tardily to the new statutory requirements. It hoped, given the recent Public Service Renewal program, that the Service as a whole would have been more responsive to such obligations.

3.10. Given the amount of information that was made available to agencies about their responsibilities under the Act, the Committee finds it difficult to believe that it is ignorance that has lead to this lack of response. This view is further supported by the indication in the Assembly that the Government's own handbook *Principles and Guidelines for the Treatment of Commercial Information Held by ACT Government Agencies* underpins the legislation[7].

3.11. It is disturbing that the Service may regard statutory requirements that make clear an accountability to the Assembly, through the Auditor-General, as something that can largely be ignored. The Committee considers that if this is the attitude it is not acceptable. In the absence of any statutory offences, Chief Executive Officers may need to consider what, if any, internal disciplinary action should be taken if officers are found to flout the requirements that the law places on them.

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[7] Debates of the Legislative Assembly for the Australian Capital Territory, Weekly Hansard, 29 February, 1 2 March 2000, p653

The Confidentiality Clause

3.12. The Auditor also raised some concerns that the Act does not cover all contracts that include confidential information. The Committee is of the view that this was not the Assembly's intention when passing the Act. It could reasonably be assumed that paragraph 13 (1) (b) of the Act would "capture" other legislative requirements placed on agencies in developing contracts. However, the Committee understands that the Audit Office has advice that this is not the case. The Committee believes that this aspect of the Act should be reviewed.

Recommendation 3

3.13. The Committee recommends that the operation of the *Public Access to Government Contracts Act 2000* be reviewed to assess whether all confidential information in contracts is covered by the Act and whether some contracts regularly made by government agencies fall outside the terms of the Act.

3.14. The Auditor also raised the issue of contracts not including a confidentiality clause in the form prescribed by the Act. The Committee notes the Auditor's concerns and expresses concern on two levels.

3.15. The Committee appreciates that the Auditor has tried to provide a complete picture of contracts regarded as confidential by Government agencies. However, section 14 of the Act is clear that a confidentiality clause has no effect if it is not made under the terms of sections 12 and 13 of the Act. Section 12 relates to the form of the clause. The confidentiality of contracts that do not meet this provision is possibly invalid. If this is so they should not in the Committee's view be entered on the Register.

3.16. It is of concern to the Committee that in failing to observe the terms of the Act agencies may be placing those with whom the contracts have been made in a position of disadvantage.

3.17. Further, the Committee agrees with the Auditor that it is useful to have some idea of the extent to which agencies are not complying with the provisions of the Act yet consider that the contract should be treated as confidential. It may therefore be useful if the Auditor provided the Committee with the register required under the Act and an addendum that listed those contracts registered as confidential yet which did not meet the provisions of the Act.

3.18. In view of the confusion over what constitutes confidential information, the Committee notes with concern that the Minister for Health, Housing and Community Care indicated in debate on the Bill that "the things that public servants seem to think it is so important to keep confidential, apart from privacy issues, seem to cause us so little difficulty.". [8]

3.19. The Assembly has set out the criteria that it regards as the basis for assessing whether contract information should be regarded as confidential. It is worth noting again that the Government's own handbook forms the basis of these criteria. If agencies are developing their

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[8] Debates of the Legislative Assembly for the Australian Capital Territory, Weekly Hansard, 5, 6, 7 December 2000

own criteria for making that assessment the Committee again regards it as unacceptable. There are well established means for agencies to amend legislation and these should be used rather than operating a de facto set that have not been considered by the Assembly

Conclusion

3.20. The Committee welcomes the Auditor-General's first report pursuant to the *Public Access to Government Contracts Act 2000*. However, it notes that the implementation of the legislation has not been without significant problems and has made 3 recommendations with a view to addressing some of these problems.

3.21. The Assembly was informed, on its introduction, that the proposed legislation did not reduce "the power of the Assembly to formally demand any government contract and consider its contents in full."[9] The Committee believes that if properly implemented the Act will facilitate the private sector's knowledge of the requirements that public sector accountability may place on them in providing services to the community and thus improve the working relationship between the two.

Ted Quinlan MLA
Chair

27 August 2001

[9] Op Cit, Weekly Hansard, 29 February, 1 2 March 2000, p 654