

Procurement guidelines: Contract disclosure

Office of the Chief Advisor – Procurement



Queensland
Government

Procurement guidelines: Contract disclosure
v3.0 May 2019

The State of Queensland (Department of Housing and Public Works) 2019



<http://creativecommons.org/licenses/by/4.0/deed.en>

This work is licensed under a Creative Commons Attribution 4.0 Australia Licence. You are free to copy, communicate and adapt this work, as long as you attribute by citing 'Procurement guidelines: Contract disclosure, State of Queensland (Department of Housing and Public Works) 2019.

Approval authority

In accordance with clause 3.3 of the Queensland Procurement Policy 2018 this document was approved for issuing by the Director-General, Department of Housing and Public Works, on 20 May 2019. This version of the guideline supersedes v2.2 dated April 2019.

Contact us

The Office of the Chief Advisor – Procurement is committed to continuous improvement. If you have any suggestions about how we can improve this guide, or if you have any questions, contact us at betterprocurement@hpw.qld.gov.au.

Disclaimer

This document is intended as a guide only for the internal use and benefit of government agencies. It may not be relied on by any other party. It should be read in conjunction with the Queensland Procurement Policy, your agency's procurement policies and procedures, and any other relevant documents.

The Department of Housing and Public Works disclaims all liability that may arise from the use of this document. This guide should not be used as a substitute for obtaining appropriate probity and legal advice as may be required. In preparing this document, reasonable efforts have been made to use accurate and current information. It should be noted that information may have changed since the publication of this document. Where errors or inaccuracies are brought to attention a reasonable effort will be made to correct them.

Table of Contents

| | | |
|----------|---|-----------|
| 1 | Purpose..... | 4 |
| 1.1 | Contract award information to be published | 4 |
| 1.2 | Where information is to be published | 5 |
| 1.3 | How often information is to be published | 5 |
| 1.4 | Accountability for contract disclosure | 5 |
| 1.4.1 | Agency procurement procedures | 5 |
| 2 | Identifying reportable contracts..... | 6 |
| 2.1 | Calculating whether a contract meets the value threshold for disclosure | 6 |
| 2.1.1 | How to value contracts in different situations | 6 |
| 2.2 | Legally binding contracts subject to disclosure | 7 |
| 3 | Treatment of variations and amendments..... | 9 |
| 3.1 | What is a material change? | 9 |
| 4 | The disclosure environment: Right to Information and Information Privacy implications..... | 10 |
| 4.1 | The disclosure environment | 10 |
| 4.2 | Considerations related to Information Privacy | 11 |
| 4.3 | Using the RTI Act as a guide to contract disclosure decision making | 11 |
| 4.4 | Recording reasons for non-disclosure | 14 |

1 Purpose

This guideline is provided pursuant to clause 3.3 of the Queensland Procurement Policy 2018 (QPP) which requires certain government agencies¹ to publish details of awarded contracts in accordance with this guideline.

1.1 Contract award information to be published

Agencies must publish the following minimum requirements for reportable contracts²:

- **basic details** of all awarded contracts valued at \$10,000 and over³
- the **procurement method used** for contracts valued at \$500,000 and over
- **additional contract details** for contracts valued at \$10 million and over.

Table 1 details the information that must be disclosed depending on an awarded contract's value.

Table 1: Information to be published under contract disclosure

| Contract value | Details to be published |
|------------------------|---|
| \$0 – \$9,999 | No reporting. |
| \$10,000 – \$9,999,999 | <p>Basic details:</p> <ul style="list-style-type: none"> • name and address of the agency procuring the contract • a description of the goods or services procured • the date of award or contract date • the value of the contract or standing offer arrangement (SOA) • the name and address of the successful supplier • state if the disclosure is a variation to a contract • state if a specific confidentiality provision has been used⁴. |
| \$500,000 and above | <p>Basic details and Procurement method used (i.e. whether the offer method used was open, select or limited⁵).</p> |

¹ Clause 3.3 of the QPP applies to budget sector agencies, large statutory bodies and special purpose vehicles as those terms are defined by the QPP. It does not apply to government owned corporations. For the purposes of this guideline these different agency types are collectively referred to as 'agencies'.

² Refer to section 2 for more information on what a 'reportable contract' is.

³ All dollar values referred to in this guideline are inclusive of GST.

⁴ A specific confidentiality provision relates to information that a supplier has explicitly requested to be kept confidential. Further guidance is provided in the guide [Use and disclosure of confidentiality provisions in government contracts](#).

⁵ These procurement methods are defined within the QPP.

| Contract value | Details to be published |
|---------------------|---|
| \$10 million | <p><i>Basic details, procurement method used and additional details:</i></p> <ul style="list-style-type: none"> • identifying details (reference information for the offer and contract) • number of offers sought • evaluation criteria and weightings • form of contract • deliverables • contract milestones • contract performance management (such as KPIs or other arrangements that measure supplier performance)⁶. |

Dealing with requests for further information

Should an agency receive a request for information beyond what is disclosed in accordance with these guidelines, the application should be dealt with under the usual Right to Information processes established by the agency.

1.2 Where information is to be published

The information on all awarded contracts over \$10,000 must be published on the **Queensland Government open data** website. For completeness the dataset must include reportable contracts awarded on QTenders.

1.3 How often information is to be published

Each agency must collate awarded contracts information in preparation for publication on the open data website. Agencies must publish monthly datasets of contract information, ensuring that no more than 60 days elapses between contract award and publication.

1.4 Accountability for contract disclosure

Each agency is ultimately accountable for discharging their obligations in accordance with the QPP and this guideline, along with ensuring consistency with legislative requirements, contractual terms and conditions and any other relevant instrument.

1.4.1 Agency procurement procedures

Accountability extends to establishing internal systems, processes and procedures as required to achieve compliance with the guidelines.

⁶ For further guidance on contract performance management and KPIs see section 7.2 [Queensland Government Procurement Contract Management Framework](#)

Agency procedures should cover, at a minimum:

- the internal systems and processes that will be used to enable contract disclosure within the timeframe required
- a requirement that clauses be included in tender and contract documentation to enable contract disclosure
- processes for how reportable contracts will be identified, including contract variations and amendments
- processes to validate the information to be published to ensure that it is true and correct, appropriate for publication, and that Right to Information and Information Privacy matters are managed appropriately
- processes to ensure the reason(s) for non-disclosure of any particular contract is documented and maintained in a single register maintained by the agency.

2 Identifying reportable contracts

To be considered a reportable contract, and therefore subject to disclosure requirements, a contract must meet the following:

- meet the value threshold for disclosure (refer to section 2.1)
- be considered as a legally binding contract subject to disclosure (refer to section 2.2).

2.1 Calculating whether a contract meets the value threshold for disclosure

When calculating whether a contract meets the value threshold for disclosure, government agencies should:

- ensure the total contract value is taken into account. This includes GST and any premiums, fees, commissions, interest or other revenue streams payable to a supplier
- not divide the contract into separate parts, or otherwise structure a contract, to avoid disclosing the contract (sometimes referred to as ‘splitting’).

2.1.1 How to value contracts in different situations

While determining a contract’s value is often straightforward, this is not always the case. **Table 2** provides guidance in relation to several possible situations.

Table 2: How to value contracts in different situations

| Situation | Suggested approach |
|---|---|
| Contracts with optional extensions | The value for the initial contract term should be disclosed. Where a contract extension is later exercised the disclosed value should be updated. |
| Multi-stage procurements | When a procurement is conducted in stages, how disclosure occurs depends on how many contracts are awarded: <ul style="list-style-type: none"> • if separate contracts are awarded at each stage, each stage contract should be disclosed. If any of these contracts equal or exceed \$10 million in value, reference should also be included to the other stage contracts in each disclosure • if the procurement is conducted in stages only one contract is awarded, the contract should be disclosed, and the value updated (if necessary) at the completion of each stage. |

| Situation | Suggested approach |
|---|--|
| Contracts for the use of multiple government agencies (including SOAs) | Upon establishment, the agency responsible for setting up the deed or contract discloses it (this includes SOAs). For any contracts that are subsequently entered into (including contracts established under an SOA) the contracting agency discloses the contract provided it meets the value threshold for disclosure. |
| Contracts where the value is unknown at award | In instances such as this, a best value estimate should be used. The disclosure should note that the figure is an estimate. Once the contract has ended the estimate should be updated with the actual value. |
| Trade-ins | In situations where the total amount payable is reduced due to a trade-in, the total contract value (including the trade-in value) must still be disclosed. |

Section 3 of this guideline provides guidance on how to deal with situations where contracts are varied or amended.

2.2 Legally binding contracts subject to disclosure

All legally binding contracts⁷ and common-use supply arrangements⁸, established pursuant to the QPP, are within scope of the disclosure obligations unless it is the subject of an exclusion (refer to **Table 3**).

The disclosure obligations apply regardless of the form that the reportable contract takes. For example, it does not matter whether it is made under seal (also known as a deed) or is a simple contract (which can be verbal, written, or a combination of both).

Table 3: Reportable contracts – inclusions and exclusions

| Inclusion/exclusion | Contracts in and out of scope |
|--|--|
| Inclusions – examples of reportable contracts | <ul style="list-style-type: none"> • Purchase/procurement of general goods and services. • Purchase/procurement of contractor and consultancy services. • Procurement of capital works (including buildings and infrastructure). • Establishment of SOAs and panel arrangements. • Contracts made under SOAs (e.g. by the issuing of a purchase order under an arrangement's terms and conditions). • Should a payment be made by corporate card for goods and services over \$10,000, and no corresponding reportable contract (e.g. purchase order) is raised and disclosed, then the corporate card transaction is in-scope for disclosure. |

⁷ Elements of legally binding contracts include offer and acceptance (agreement by the parties); consideration; intention to create legal relations; both parties have capacity to enter into the contract; legality (i.e. that the purpose of the contract is not illegal).

⁸ The term 'common-use supply arrangement' is defined under the QPP. For clarity this term includes SOAs, but (for the purposes of this guideline only) excludes pre-qualified supplier panels.

| Inclusion/exclusion | Contracts in and out of scope |
|---|--|
| <p>Exclusions – these are not considered as reportable contracts</p> | <ul style="list-style-type: none"> • Procurement of real property⁹ (including interests in real property such as leases/tenancies). • Grants¹⁰ (whether in the form of a contract or a conditional gift). • Intragovernmental transactions¹¹ including, for example, procurement with commercialised government business units. • Loans and investments. • Payments to employees (whether permanent or temporary) of government agencies, including contracts issued under the <i>Public Service Act 2008</i>. • Lists of suppliers established following a pre-qualification process. An example of this is the Prequalification (PQC) system administered by the Department of Housing and Public Works. • Sponsorship payments. • Milestone payments to suppliers, where the contract (total contract value) has already been disclosed. • Payments received by agencies for the disposal of assets or the sale of land. • Incidental transactions in connection with a contract for goods or services not related to the contract payment (e.g. where a refund of administrative fees is necessary to correct an overcharging error). • Payments to corporate card providers for amounts due (i.e. administrative fees). • Periodic payments (e.g. monthly invoices) under contracts already disclosed. This would include, for example, the payment of invoices for utilities such as water and electricity. • Payments established in law for which there is no discretion, for example, taxation payments and payments of local government rates. |

⁹ For clarity and the purposes of these guidelines, real property includes land or pre-existing premises built on land.

¹⁰ The [Financial Accountability Handbook](#), published by Queensland Treasury, provides more information on grants.

¹¹ For the purposes of these guidelines, 'intragovernmental' means transactions within Queensland Government and does not include other levels of government (i.e. the Australian Government, local governments and other state and territory governments). Letters of intent or memoranda of understanding do not usually form legally binding contracts, but may inadvertently take on the status of reportable contracts if all the elements of a legally binding contract exist.

3 Treatment of variations and amendments

During the life of a contract there may be variations to the value or other components of a contract. This may occur for a variety of reasons, including the exercising of extension options or a change in the contract's scope of works.

Where a contract requires disclosure under Section 2, further disclosure is required where a contract is later 'materially changed'. This can occur by either updating the original disclosure or making a new disclosure which clearly references the original disclosure.

3.1 What is a material change?

A material change is defined as either:

- a change in a contract's value equal to or exceeding \$10,000
- any other change to the information already disclosed (as per **Table 1**).

For variations or changes to contracts that do not relate to contract value, agencies should apply professional judgement to determine whether, in the circumstances, the variations or changes represent a material change to the contract and should therefore, be reflected in an update to the initial information disclosed. For example, have new suppliers been added, existing suppliers removed or extensions or significant changes in agreed deliverables under the contract been agreed. In addition to the above, **Table 4**, below, provides guidance for some unique situations and how material changes should be handled.

Table 4: Examples of situations which would be considered as a material change

| Situation | Further detail |
|---|---|
| SOAs | <p>As noted in Table 2, updates need to be later made where a contract's value is unknown at the time of award. This is particularly applicable for SOAs which, by their nature, are purchased from as required by government agencies.</p> <p>For this reason, an estimated value for SOAs should be initially disclosed, with an updated actual spend figure provided at the end of the SOA.</p> <p>Updates to disclosed information should also be made where suppliers are added or removed from a SOA. This should occur regardless of the reason for a supplier's addition or removal.</p> |
| Capital works construction contracts | <p>Variations to these contracts typically occur throughout the duration of a contract. This can include planned but not specified works, application of contingencies, or to address errors and omissions in design or documentation.</p> <p>It is acknowledged that for such contracts the number of material variations can number into the hundreds.</p> <p>Therefore, for such contracts agencies should:</p> <ul style="list-style-type: none"> • disclose the contract value at the time of contract award, noting that any variations will be disclosed upon the issuing of the final certification of completion • disclose the final value, taking into account all variations, following the final certificate of completion being issued. |

4 The disclosure environment: Right to Information and Information Privacy implications

Important note

In reading this section, agencies should:

- note that the *Right to Information Act 2009* (the RTI Act) can be used as a guide when making decisions as to whether to disclose information contained in a particular contract
- note that while this section provides examples and guidance, this is general in nature and does not consider individual circumstances. The information should not be relied upon as definitive advice
- seek advice from either their Right to Information, Information Privacy and/or legal service area in relation to undertaking disclosure if this raises Right to Information, Information Privacy or other related concerns.

4.1 The disclosure environment

The disclosure of contract details under the QPP is not the same as formal applications under the RTI Act. The RTI Act can, however, act as a guide for agencies in making decisions about whether to disclose (or not disclose) a contract's details.

This guideline therefore uses the principles of the RTI Act as a basis. Agencies should also be guided by any administrative release policies their agency may have.

The RTI Act operates under a pro-disclosure bias. This means that access must be given to a document unless it contains exempt information, or its disclosure would, on balance, be contrary to the public interest. Following this, there will be situations where the publication of a contract's details, either wholly or in part, may not be, on balance, in the public interest or may be subject to legislative requirements.

In addition to the RTI Act, the *Information Privacy Act 2009* (the IP Act) also needs to be taken into account when making disclosures to (or not) publish contract information.

What about confidentiality clauses and 'commercial-in-confidence' information?

A decision to withhold certain information or documents may be justified in certain circumstances to maintain confidentiality or privacy (including, for example, where the obligation of confidence arises as a contractual requirement, under specific legislation, or otherwise at law).

Confidentiality and commercial-in-confidence clauses should not, however, be used as a matter of course and only included where there is strong justification for confidentiality. Further guidance is provided in the guide [Use and disclosure of confidentiality provisions in government contracts](#).

Agencies should be aware that while contract details may appear to be commercially sensitive, this does not necessarily mean that they should not be published. Where an agency is uncertain about the disclosure of information in accordance with these guidelines, they should seek advice from either their Right to Information, Information Privacy and/or legal service area.

4.2 Considerations related to Information Privacy

The IP Act deals with personal information. 'Personal information' is defined as:

*"...information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion."*¹²

Personal information applies to natural living persons only. A business entity will not, in itself, have personal information but individuals within the entity will. Therefore, a contract will necessarily contain personal information, even if this is nothing more than a name and signature of the individuals who signed the contract.

Under the IP Act a number of Information Privacy Principles (IPP) are set out which deal with how personal information is to be handled. One of these, IPP 11, states that, generally, personal information of an individual should not be given out to anyone other than the individual themselves. However, the IPP also sets out exceptions to this.

In the context of contract disclosure, the most relevant of these¹³ allows for disclosure if the individual is reasonably likely to have been aware, or have been made aware, that, in accordance with IPP 2, it is the agency's usual practice to disclose that type of personal information.

Therefore, contracting agencies must make potential suppliers aware that, in the event they are awarded a contract, personal information may be disclosed.

How to handle disclosure related to individual contractors and consultants, along with legal services

Generally, agencies should disclose the name of the employing organisation, not the name of individual contractors or consultants. The only exception to this would be where the contractor/consultant's name is also the organisation name.

In relation to legal services, agencies should take care to ensure that legal professional privilege is not inadvertently waived by revealing in the description the nature of the legal advice received. To avoid this, agencies should consider using more generic terms such as 'legal services'.

4.3 Using the RTI Act as a guide to contract disclosure decision making

Table 5, below, applies the RTI Act and provides steps that you can follow to determine whether a contract's details are suitable for disclosure.

¹² Section 11 of the *Information Privacy Act 2009*.

¹³ Schedule 3 (11)(1)(a) of the *Information Privacy Act 2009*.

Table 5: Application of the RTI Act to the contract disclosure decision making process

| | |
|--|--|
| Step 1: Check the document type | <ul style="list-style-type: none"> • The RTI Act does not apply to certain documents (Section 11). • Schedule 1 of the RTI Act lists the type of documents to which this Act does not apply (e.g. particular documents under the <i>Crime and Corruption Act 2001</i> are exempt). • It is suggested that advice be sought from your agency's Right to Information, Information Privacy and/or legal service area where a contract relates to one of these document types. |
| Step 2: Check to see if the information is exempt | <ul style="list-style-type: none"> • Certain information is exempt from release under Right to Information (Section 48). These exemptions are detailed under Schedule 3 of the RTI Act. • Some exemptions which may be particularly relevant to contract disclosure include: <ul style="list-style-type: none"> - situations where the disclosure of contract details would be found to be actionable for a breach of confidence. This could occur where a contract's parties had, for example, agreed to keep confidential details about how a piece of software performed. This could then be an issue if a disclosed description referenced performance details of the software - publication of contract details which may compromise state or national security. This could include, for example, disclosure of contracts related to particular law enforcement activities which, if disclosed, could compromise the effectiveness of the operation. |
| Step 3: Consider public interest factors | <ul style="list-style-type: none"> • Deciding whether to disclose information contained in a contract involves considering factors for and against disclosure. Section 49 of the RTI Act sets out the steps to consider about whether disclosure would, on balance, be contrary to the public interest. • A number of factors are detailed under Schedule 4 of the RTI Act. Table 6, below, provides a summarised list of factors that may be particularly relevant to contract disclosure. These factors cover: <ul style="list-style-type: none"> - irrelevant matters that cannot be taken into account in determining whether it is or is not in the public interest to disclose - factors favouring disclosure in the public interest - factors favouring non-disclosure in the public interest, including because of public interest harm. |

What about exclusions for particular entity types and functions under section 17 of the RTI Act?

It is correct that section 17 of the RTI Act exempts certain entities, or particular functions of certain entities, from Right to Information requirements (e.g. Parliamentary Service, the Governor). These entities and functions are listed under Schedule 2 of the Act.

Despite this, section 5 of the Act also specifies that Right to Information does not affect the operations of another Act or administrative scheme that requires the publication of information concerning government operations. Therefore, in accordance with this provision, all agencies (and agency functions) that may otherwise be exempt must still undertake contract disclosure.

Table 6: Public interest factors that may be particularly relevant to contract disclosure

Note: Factors in the below table have been tailored to suit the contract disclosure context.

| Irrelevant matters that cannot be taken into account ¹⁴ | Factors that favour disclosure ¹⁵ | Factors that favour non-disclosure, including public harm ¹⁶ |
|--|---|---|
| <ul style="list-style-type: none"> • Disclosure could reasonably be expected to cause embarrassment to the government or a loss of confidence in the government. • Disclosure could reasonably be expected to result in misinterpreting or misunderstanding the disclosed information. • Disclosure could reasonably be expected to result in mischievous conduct by the recipient of the information (e.g. an agency could not refuse to disclose an awarded contract simply because it is concerned that an unsuccessful supplier may view the disclosure and lodge a complaint). • The person responsible for creating the contract is or was of high seniority within the government agency. | <ul style="list-style-type: none"> • Disclosure could be reasonably expected to promote open discussion of public affairs and enhance the government's accountability. • Disclosure could be reasonably expected to inform the community about government's operations. • Disclosure could reasonably be expected to ensure effective oversight of the expenditure of public funds. • Disclosure could reasonably be expected to reveal the reason for a government decision and any background or contextual information that informed the decision. | <ul style="list-style-type: none"> • Disclosure could reasonably be expected to prejudice the private, business, professional, commercial or financial affairs of an entity (e.g. the disclosure of information which reveals unit pricing in a specialised or limited market and results in a commercial disadvantage for a supplier). • Disclosure consists of information of a confidential nature that was communicated in confidence (e.g. models or prototypes). Confidentiality is also a relevant factor if disclosure of the information could reasonably be expected to prejudice an agency's ability to obtain confidential information. • Disclosure of information could reasonably be expected to prejudice the protection of an individual's right to privacy (e.g. the publication of personal information about an individual). • Disclosure could reasonably be expected to cause public interest harm as it would disclose trade secrets or destroy or diminish the commercial value of the information. |

¹⁴ Part 1, Schedule 4 of the *Right to Information Act 2009*.

¹⁵ Part 2, Schedule 4 of the *Right to Information Act 2009*.

¹⁶ Parts 3 and 4, Schedule 4 of the *Right to Information Act 2009*.

4.4 Recording reasons for non-disclosure

It is acknowledged that there may be genuine situations where disclosure cannot occur (e.g. it may not be legally possible, disclosure may be contrary to the public interest).

As mentioned under section 1.4.1, agencies should have processes in place to ensure that the reason(s) for non-disclosure of any particular contract is documented and maintained in a single register maintained by the agency.

Reminder about ensuring that disclosed information is appropriate for the public domain

When making a disclosure, it is important that agencies ensure information disclosed is appropriate for release into the public domain. This includes identifying and removing any personal information, and any information which would be, on balance, not in the public interest to disclose.

Agencies should also note that information provided as part of contract disclosure could be used as part of a false billing scam, so it is important that agencies have robust internal controls to help identify any scam invoices that may be submitted. This should include checking:

- the registered name ABN/ACN and address on the invoice to ensure they are correct
- the date and other details on the invoice (e.g. purchase order number) to see if it corresponds to the order placed
- whether the goods and/or services have been received.