



New South Wales

# Freedom of Information Amendment (Open Government—Disclosure of Contracts) Act 2006 No 115

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New South Wales

# **Freedom of Information Amendment (Open Government—Disclosure of Contracts) Act 2006 No 115**

Act No 115, 2006

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An Act to amend the *Freedom of Information Act 1989* so as to require publication of government contracts; and for other purposes. [Assented to 4 December 2006]

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**The Legislature of New South Wales enacts:**

**1 Name of Act**

This Act is the *Freedom of Information (Open Government—Disclosure of Contracts) Act 2006*.

**2 Commencement**

This Act commences on the day occurring 28 days after the date of assent.

**3 Amendment of Freedom of Information Act 1989 No 5**

The *Freedom of Information Act 1989* is amended as set out in Schedule 1.

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## Schedule 1 Amendments

(Section 3)

### [1] Section 15A

Insert after section 15:

#### **15A Disclosure of government contracts with the private sector**

- (1) Within 60 days after a government contract becomes effective, the provisions of this section in relation to the contract must be complied with.
- (2) The following particulars of a class 1 contract must be published:
  - (a) the name and business address of the contractor,
  - (b) particulars of any related body corporate (within the meaning of the *Corporations Act 2001* of the Commonwealth) in respect of the contractor, or any other private sector entity in which the contractor has an interest, that will be involved in carrying out any of the contractor's obligations under the contract or will receive a benefit under the contract,
  - (c) the date on which the contract became effective and the duration of the contract,
  - (d) particulars of the project to be undertaken, the goods or services to be provided or the real property to be leased or transferred under the contract,
  - (e) the estimated amount payable to the contractor under the contract,
  - (f) a description of any provisions under which the amount payable to the contractor may be varied,
  - (g) a description of any provisions with respect to the renegotiation of the contract,
  - (h) in the case of a contract arising from a tendering process, the method of tendering and a summary of the criteria against which the various tenders were assessed,
  - (i) a description of any provisions under which it is agreed that the contractor is to receive payment for providing operational or maintenance services.

- (3) In addition to the particulars referred to in subsection (2), the following particulars of a class 2 contract must be published:
- (a) particulars of future transfers of significant assets to the State at zero, or nominal, cost to the State, including the date of their proposed transfer,
  - (b) particulars of future transfers of significant assets to the contractor, including the date of their proposed transfer,
  - (c) the results of any cost-benefit analysis of the contract conducted by the agency,
  - (d) the components and quantum of the public sector comparator if used,
  - (e) where relevant, a summary of information used in the contractor's full base case financial model (for example, the pricing formula for tolls or usage charges),
  - (f) where relevant, particulars of how risk, during the construction and operational phases of a contract to undertake a specific project (such as construction, infrastructure or property development), is to be apportioned between the parties, quantified (where practicable) in net present-value terms and specifying the major assumptions involved,
  - (g) particulars as to any significant guarantees or undertakings between the parties, including any guarantees or undertakings with respect to loan agreements entered into or proposed to be entered into,
  - (h) particulars of any other key elements of the contract.
- (4) In addition to the particulars referred to in subsections (2) and (3), a copy of a class 3 contract must be published. If the agency concerned does not publish the contract, or publishes only some of the provisions of the contract, because of subsection (9), the agency is to publish:
- (a) the reasons why the contract or those provisions have not been published, and
  - (b) a statement as to whether it is intended that the contract or those provisions will be published at a later date and, if so, when it is likely that they will be published, and
  - (c) where some but not all of the provisions of the contract have been published, a general description of the types of provisions that have not been published.

- (5) If a material variation is made to a contract that would affect the particulars that are required to be published under this section in relation to the contract, the published particulars are to be amended to reflect the variation within 60 days after the variation becomes effective.
- (6) If a material variation is made to a contract that is required to be published under subsection (4), a copy of the variation or the varied provisions is to be published within 60 days after the variation becomes effective.
- (7) The information required to be published under this section in relation to a contract:
- (a) is to be published on the internet website called <https://tenders.nsw.gov.au> (or such other internet website authorised by the Premier for the purposes of this section) and may be published in such other manner as the responsible Minister for the agency may approve, and
  - (b) is to remain on that internet website:
    - (i) for at least 30 days, or
    - (ii) until the project to which the contract relates is complete, the goods and services concerned have been provided under the contract, the term of the lease has expired or the real property has been transferred,whichever is the greater period.
- (8) If a person other than a member of staff of the agency (including, for example, a party to a government contract) disagrees with the way in which an agency has interpreted its obligations under this section, the agency is to obtain the opinion of the Chairperson of the State Contracts Control Board in relation to the matter.
- (9) None of the provisions of this section that require the publication of a copy of a contract or information in relation to a contract require the publication of:
- (a) the commercial-in-confidence provisions of a contract, or
  - (b) details of any unsuccessful tender, or
  - (c) any matter that could reasonably be expected to affect public safety or security, or
  - (d) a copy of a contract, a provision of a contract or any other information in relation to a contract that is of such a nature that its inclusion in a document would cause the document to be an exempt document.

- (10) This section does not apply to or in respect of any of the following:
- (a) a government contract entered into by or on behalf of an agency before the commencement of this section,
  - (b) a government contract entered into by the Department of State and Regional Development that involves the provision of industry support.
- (11) Information is required to be published under this section by an agency only to the extent that the agency has the information or it is reasonably practical for it to obtain the information.
- (12) The regulations may apply all or any of the provisions of this section to a local authority and may modify those provisions in their application to a local authority.
- (13) For the purposes of this section, a government contract becomes effective:
- (a) except as provided by paragraph (b), when it is entered into by or on behalf of the agency concerned, or
  - (b) if the contract contains a provision to the effect that one or more conditions are to be met before the obligations of the parties under the contract are enforceable—when the condition or conditions have been met.
- (14) In this section:
- agency** does not include a State owned corporation (or its subsidiaries) as defined in the *State Owned Corporations Act 1989* or a local authority.
- class 1 contract** means any government contract under which:
- (a) the total estimated value of the project, or
  - (b) the total estimated value of the goods or services over the term of the contract, or
  - (c) the value of the real property transferred, or
  - (d) the rent for the term of the lease,
- is likely to be \$150,000 or more.
- class 2 contract** means a class 1 contract in respect of which any of the following paragraphs applies:
- (a) there has not been a tender process, the proposed contract has not been made publicly available and the terms and conditions of the contract have been negotiated directly with the contractor,

- (b) the proposed contract (whether or not made publicly available) has been the subject of a tendering process and the terms and conditions of the contract have been substantially negotiated with the successful tenderer,
- (c) the obligations of one or more parties under the contract to maintain or operate infrastructure or assets could continue for 10 years or more,
- (d) the contract involves a privately financed project as defined by guidelines published by the Treasury (as in force from time to time),
- (e) the contract involves a transfer of a significant asset of the agency concerned to another party to the contract in exchange for the transfer of an asset to the agency.

**class 3 contract** means a class 2 contract under which:

- (a) the total estimated value of the project, or
- (b) the total estimated value of the goods or services over the term of the contract, or
- (c) the value of the real property transferred, or
- (d) the rent for the term of the lease,

is likely to be \$5,000,000 or more.

**commercial-in-confidence provisions**, in relation to a government contract, means any provisions of the contract that disclose:

- (a) the contractor's financing arrangements, or
- (b) the contractor's cost structure or profit margins, or
- (c) the contractor's full base case financial model, or
- (d) any intellectual property in which the contractor has an interest, or
- (e) any matter whose disclosure would place the contractor at a substantial commercial disadvantage in relation to other contractors or potential contractors, whether at present or in the future.

**contractor**, in relation to a government contract entered into by an agency, means the person with whom the agency has entered into the contract.



**government contract** means:

- (a) a contract between an agency and a private sector entity under which the agency or private sector entity agrees:
  - (i) to undertake a specific project (such as a construction, infrastructure or property development project), or
  - (ii) to provide specific goods or services (such as information technology services), or
  - (iii) to transfer real property to the other party to the contract,
- (b) a lease of real property where the parties to the lease are an agency and a private sector entity,  
but does not include a contract of employment.

**private sector entity** means any person or body (whether incorporated or unincorporated) who or which is not an agency.

**[2] Schedule 1 Exempt documents**

Insert after clause 7 (1) (a):

- (a1) if it contains matter the disclosure of which would disclose the commercial-in-confidence provisions of a government contract (within the meaning of section 15A), or

**[3] Schedule 1, clause 7 (1) (b) (i)**

Insert “or commercial-in-confidence provisions” after “trade secrets”.

**[4] Schedule 1, clause 7 (1) (c) (i)**

Insert “, commercial-in-confidence provisions” after “trade secrets”.

[Second reading speech made in—

Legislative Assembly on 1 December 2005

Legislative Council on 22 November 2006]

BY AUTHORITY