Recent developments in the GITC

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Background

The supply of hardware and software to Commonwealth and State government departments, together with a number of government and semi-government agencies, is largely governed by the GITC.

"GITC" initially stood for "Government Information Technology Conditions". It now stands for "Government Information Technology and Communications Framework".

The working party responsible for creation of GITC Version 1, which was operative from 1 July 1991, comprised representatives of the Commonwealth government and each of the State and Territorial governments, together with representatives of the Brisbane City Council and the State Electricity Commission of Victoria.

The working party responsible for the creation of GITC Version 2, which superseded GITC Version 1 from 1 December 1994, was expanded to include the Queensland Electricity Commission, the College and University Directors of Information Technology and the Australian Information Industry Association.

GITC Version 1 embraced hardware acquisition, hardware maintenance, software licensing and software support. GITC Version 2 dealt with a wider range of information technology and telecommunications transactions so as to embrace IT consultancy, software development and modification, systems integration, and data conversion and migration.

The philosophy which drove versions 1 and 2 was one of maximising the Government's purchasing power in an IT context and promoting consistency in government procurement across government Australia wide.

GITC Version 3[1] was published in October 1998. It was adopted only by the Commonwealth, Victoria and Western Australia, with the other jurisdictions opting to continue with Version 2. The caution demonstrated by traditional users of GITC Version 2 was largely attributable to the radical change in nature of the document, including its underlying principles.

In addressing criticisms that GITC Version 2 was lengthy, inflexible and legalistic, the principles underlying GITC Version 3 included the following:

- terms and conditions are to be fair to all parties;
- the document should allow flexibility in customising contracts to suit their individual requirements;
- the format should be user friendly and in "plain English" style;
- the style and language should suit the end users of products and services;
- there should be consistency in terminology, definitions and style;
- in addition to describing the bargain between the parties, the document should include a dispute resolution mechanism, performance incentives and risk allocation; and
- in general, obligations and risks that are within the control of the principal should be borne by the principal and obligations and risks that are within the control of the contractor should be borne by the contractor. A party to a contract should bear a risk where:
  - (a) the risk is within the party's control;
  - (b) the party can transfer the risk through insurance and it is most economically beneficial to deal with the risk in this fashion;
  - (c) the preponderant economic benefit of controlling the risk lies with the party in question; and
  - (d) if the risk eventuates, the loss falls on that party in the first instance and there is no reason to cause expense and uncertainty by attempting to transfer the loss to another.

GITC Version 4[2] was launched in 3 August 2001 and is principally designed for use by Commonwealth departments and agencies and their suppliers. It is intentionally designed, however, with sufficient flexibility to enable its use by other Australian governments. Although not formally adopted yet by any other Australian jurisdiction, its informal use has become widespread in Victoria at least.

GITC 4 is expressed as being a "framework". The framework comprises:

- a head agreement;
- terms and conditions;
- contract details;
- appendices and attachments;
- categories of products and services; and
- a user guide.

Head Agreement

The Head Agreement records the terms of trade between the contract authority and the contractor. In the case of the Commonwealth, the contract authority is represented by the Department of Finance and Administration. A contract authority, and indeed a Head Agreement, will not be involved in every instance, however.

The principal relevance is that since 1 October 1998, the Department of Finance and Administration has used the Head Agreement in order to contract with IT suppliers under the Endorsed Supplier Arrangement ("ESA"). ESA is a pre-qualification program for IT suppliers seeking to

sell to the Commonwealth government. A condition of endorsement is to enter into the Head Agreement.

The principal function of the ESA Head Agreement is to provide a centralised facility to hold insurance policies and performance guarantees for a supplier. This is intended to avoid the need to put in place multiple guarantees and insurances for different customers.

The terms and conditions are intended to be even handed although with a default position which favours the Commonwealth. The parties are invited to negotiate a departure from the default position in all contentious issues by reference to the Contract Details. The Contract Details in essence contain the details of the specific transaction along with the variables.

Users are encouraged to seek legal advice in relation to completion of the Contract Details. Whilst the plain English terms and conditions are intended to obviate the need for thorough legal advice in relation to most issues, it is important that a party completing the Contract Details does not inadvertently negate a key provision in the terms and conditions or unwittingly settle a variable in an unfavourable manner.

The GITC web site[3] provides a mechanism to enable users to build contracts electronically. Key functionality includes:

- the ability to save contracts (as xml) for later on-line editing;
- the ability to open (upload) contracts for editing; and
- the ability to change products and service categories covered by the contract after the contract has been created.

Some of the key provisions of the GITC 4 contractual documentation are set out below.

Non mandatory

Unlike GITC Versions 1 and 2, GITC 4 is not intended to be mandatory for Commonwealth or other government departments and agencies. It is intended, instead, to be valuable as a set of terms and conditions which, following protracted negotiation between the Department of Finance and Administration and IT industry representatives, represents a reasonably acceptable, reasonably even handed pro forma. By virtue of this very nature, it will not be appropriate for use in all instances, but particularly in relatively low cost transactions which may not warrant a protracted negotiation between the parties, it is a convenient and potentially quick and easy means of accelerating the contracting process.

Flexible

Because of the relatively even handed and high level nature of the terms and conditions, it is expected that in many transactions there will be little need for the parties to alter the terms and conditions. Any special requirements can be dealt with in the Contract Details. Potentially contentious issues such as ownership of intellectual property and the capping of liability are flagged in the terms and conditions, with the parties being referred to the Contract Details where they are required to stipulate the agreed position. In this manner, the Contract Details become fundamentally important to the framework. Users – along with their legal representatives – need in particular to familiarise themselves with the nature and intent of each item contained within the Contract Details.

User Guide

The central significance of the Contract Details is reflected in the User Guide. The User Guide does not attempt to explain the terms and conditions – the theory is that these are written in sufficiently plain English to make any further explanation in a User Guide redundant.

The User Guide therefore attempts to educate users as to the considerations which must be taken into account when completing the variable and flexible information in the Contract Details.

Contentious issues

The particularly contentious issues which were addressed during the process of drafting GITC 4, and which for the most part continue to attract debate in negotiation between the parties as to the content of the Contract Details, are set out below.

Incorporation of tenders: Clause 4

There is often debate over whether the customer's request for tender, and the supplier's tender (and other material subsequently submitted during the tendering process, such as a Best and Final Offer) should form part of the contract. Suppliers generally prefer the tender not to be appended because of concern over potentially loose and high level language. Customers, on the other hand, often prefer to have the supplier's tender appended as part of the contract, to ensure that no pre-sales representations are inadvertently overlooked in the other appendices. The GITC clause 4.3 makes provision for incorporating the supplier's tender whilst the User Guide explains the pros and cons so that the parties can resolve between themselves what the position should be. This is an example of a default position favouring the government.

Standard licence terms

Clause 10 contains standard, high level licence terms and conditions. These are appropriate in the absence of the supplier's own standard terms. Often, however, the supplier will have its own terms which are unique to the product and unique to the supplier's own business operations.

To cater for these competing interests, clause 10.1, when read in conjunction with the User Guide, highlights the fact that a supplier can append its standard licence terms to the Contract Details, thereby overriding the default provisions. This is another example of a default provision favouring the Commonwealth, yet the contract ensuring that there is sufficient flexibility to cater for the supplier's interests if it can convince the customer that the default position should not prevail.

Performance guarantees and financial undertakings

Needless to say, suppliers tend to resent offering performance guarantees or financial undertakings at the best of times. Often, however, customers regard a performance guarantee or a financial undertaking as an essential form of security. Clause 14.10 seeks to address both competing interests.

In circumstances where a supplier has already provided a performance guarantee or financial undertaking under the Head Agreement, the terms and conditions provide that further security will not be required except where this is considered necessary by the customer to secure a pre-payment to the supplier. There is, however, provision for the customer to seek a further performance guarantee or financial undertaking if there are particular risks or other special circumstances associated with a transaction – whether or not the supplier acquiesces will be a matter for negotiation.

A performance guarantee or financial undertaking provided under the Head Agreement will not be of benefit to every customer in every situation. One obvious example is when the customer is a State government entity. In these circumstances, there is every prospect that the customer will more vigorously pursue a performance guarantee or financial undertaking. Pro forma documentation is contained in the appendices.

Implied terms: Clause 17.5

It is almost standard commercial practice for suppliers to exclude implied terms and, where applicable, to limit liability for statutory implied terms to the extent permitted by the Trade Practices Act Part V Division 2A.

In drafting GITC 4, the Commonwealth government took the position that it would be incongruous for a pro forma procurement contract to exclude implied terms by way of default. Accordingly the default position is that implied terms are not excluded but clause 17.5, again when read in conjunction with the User Guide, invites the parties to stipulate in the Contract Details whether, and to what extent, implied terms are in fact to be excluded. This provides the contractor with an opportunity to convince the customer, during negotiations over the Contract Details, that it would be appropriate for implied terms to be excluded.

Audits: Clause 18

Clause 18 contains a requirement for contractors to co-operate with government audits. This much is not intended to be negotiable. The provisions are modelled on guidelines issued by the Australian National Audit Office.

The User Guide alerts customers, however, to the issues surrounding the granting to auditors of access to suppliers' premises. The User Guide suggests that this be considered on a case by case basis and this is one of the few clauses in the terms and conditions which might be suitable for variation as part of the negotiations between the parties.

Confidentiality: Clause 20

There is nothing particularly unusual or contentious about the basic confidentiality obligations set out in clause 20.1. It is noteworthy, perhaps, that the clause does not include a time limit (often sought by suppliers) on the obligation of confidentiality.

Also noteworthy is the fact that the parties' confidentiality obligations are subject to prevailing government policy on disclosure. Hence at Commonwealth level, for example, a customer might as a consequence refer in the Contract Details in appropriate circumstances to the Australian National Audit Office Report on "The Use of Confidentiality Provisions in Commonwealth Contracts"[4] and/or the Attorney-General Department's "Commonwealth Protective Security Manual". State governments, such as Victoria, have quite liberal public disclosure requirements in relation to government contracts.

A familiar feature of government confidentiality requirements is a stipulation that employees and subcontractors must, if requested, sign individual confidentiality deeds. Suppliers often argue, however, that they are vicariously responsible for their employees, that they have comprehensive internal confidentiality and secrecy procedures in place and that there are limits on their ability to insist that employees execute legally enforceable agreements with third parties. For this reason, an exception is made in relation to employees – if a supplier can demonstrate that it has adequate internal procedures in place to protect confidentiality, the customer cannot seek an individual confidentiality undertaking from an employee. This exemption does not apply, however, to the supplier's agents or subcontractors.

Intellectual property ownership: Clause 21

Ownership of intellectual property is another issue which is likely to be the subject of intense negotiations in some situations. Again, it was the Commonwealth position that it would be incongruous for a default position to exist which vested ownership of newly created materials in a developer, even though this is a concession which will often be made. Accordingly the default position as set out in clause 21.1(a) is that ownership of intellectual property in developed materials will vest in the customer. The remainder of clause 21.1 identifies, however, other forms of ownership (specifically, consolidated ownership, joint ownership, severable ownership and concurrent ownership) which the parties may agree to adopt. The User Guide refers the parties to the Department of Communications, Information Technology and the Arts Guidelines, titled "The Commonwealth Government IT IP Guidelines" to assist in weighing up the arguments for and against the various options.

Indemnities: Clause 22

Suppliers are naturally reluctant to offer indemnities. Some government entities, however, regard indemnities as mandatory in certain situations.

Addressing this situation, clause 22 specifies a default position whereby suppliers must offer indemnities in relation to a variety of circumstances. Clause 22.1 makes it clear, however,

that the Contract Details can provide to the contrary if the parties so agree.

There is capacity for the contract to cater for the reciprocal situation – an indemnity by the customer. Because this is relatively unusual for government entities, however, the default position is that customer indemnities are not offered. The parties can stipulate to the contrary in the Contract Details. Commonwealth users are referred in the User Guide to the Commonwealth "Guidelines for Issuing Indemnities, Guarantees and Letters of Comfort"[5].

Capping of liability: Clause 24

Suppliers will invariably seek to cap their liability in an IT contract. Whilst the default position is that no cap applies, clause 24.2 makes it clear that a cap may be inserted in the Contract Details. It is important to note that under the default provisions, any cap inserted in the Contract Details will be reciprocal.

Termination for convenience: Clause 28.2

Government customers tend to feel comfortable with an ability to terminate for convenience. Suppliers are understandably reluctant to agree unless there is an adequate compensation mechanism in place in the event that the customer exercises this right. Clause 28.2 provides by way of default that the customer has a right of termination for convenience accompanied by an obligation to compensate the contractor for stranded costs only. Nevertheless reference is again made to the fact that, in the Contract Details, the parties can stipulate that a right of termination for convenience will not apply, or that a different compensation formula will be invoked.

Summary

The GITC 4 has been produced with the intention of best meeting the needs of government agencies, whilst having due regard to the status of the IT industry in Australia and the needs of IT contractors. The documentation and processes intended by and built into GITC4 will hopefully assist parties to meet their respective contracting needs with greater efficiency and by adding greater certainty to the relationship.

1 Editor's note: available at <http://www.gitc.finance.gov.au> under "Archive".
2 Editor's note: available at <http://www.gitc.finance.gov.au> under "About GITC/The Framework".
3 Editor's note: available at <http://www.gitc.finance.gov.au>.
4 Editor's note: Audit Report No.38, tabled 24/05/2001, available at <http://www.anao.gov.au/> under "Publications".
5 Editor's note: FC 1997/06 Guidelines, April 1997, available at: <http://www.finance.gov.au/publications/FinanceCirculars/1997/fc199706_guidelines.htm>.

Defamation on the internet (Italy)

On 6 February, the Court of First Instance of Teramo suggested a peculiar key to the assessment of damages incurred through the Internet. The case concerned the owner of a web site who was charged with libelling, through the Internet, a bank which he alleged had defrauded him. The bank, which was eventually held not liable for fraud, sued the web site owner before the Court of Teramo for defamation.

The web site owner was held liable for defamation but the bank should have adduced evidence as to the damages it had effectively suffered as a result. The decision stated that posting information on the Internet does not necessarily imply full disclosure to the public (as would be the case for press and television) since, in order to visit a web site, the user must take some specific actions such as typing the full address in the browser bar or using a search engine. By using this criterion the traditional rules on defamation through press and television cannot be automatically applied to the Internet.

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