

GITC v5.01 (Queensland): Part 2 - A Big Shift for Queensland Government, A Bigger Shift for ICT Suppliers

Michael Pym, Pym's Technology Lawyers

Michael Pym is a director at Pym's Technology Lawyers specialising in ICT Contracts, Outsourcing and Government ICT procurement.

Introduction

In Part 1 of this article, which was published in the June edition of *Computers & Law*, I explained how an ICT supplier can obtain accreditation to sell ICT products and services to the Queensland Government, what GITC v 5 is and how it works. This article is Part 2 of the series and provides a high level analysis of some of the key legal and commercial issues that are associated with the standard GITC contract together with some suggested risk mitigation strategies for suppliers.

Queensland Government spends more than \$600 million each year on Information Technology and Communications (ICT) products and services. In order to sell ICT products and services to Queensland Government and its Agencies, an ICT supplier must become an 'accredited' supplier, and sign the Government Information Technology and Services Contract version 5.01 (GITC).

Background

The Queensland Government has produced a new contract for Government Departments, Agencies and Eligible non-Government Bodies (Customers) to purchase ICT products and services. Information Standard 13, a policy document issued under the *Financial Management and Accountability Act 1997*, makes it mandatory for all Customers to use GITC as the basis for all ICT procurement in the State.

It was a major task for the Queensland Government to produce GITC which is a significant improvement on its predecessor GITC v2. Considerable industry consultation occurred in the preparation of the new drafts of GITC, in particular with AIIA (Australian Information Industry Association) and

ITCRA (Information Technology Contract and Recruitment Association).

Key Legal and Commercial Terms

Some of the legal and commercial issues worthy of note include:

Most Favoured Price

Clause 3.3 of Part 2 (Part 2 is the Customer Contract) ensures that the Customer is always offered the best pricing possible where the product or service has been offered in 'similar' circumstances. This provision is an ongoing warranty of "best price". I make the following observations:

1. The drafting captures any transaction that is similar in nature to that proposed under GITC. It is not clear from the drafting as to the actual mechanics of determining the phrase 'similar circumstances', however since the words: "includes volumes (where Price is dependent on volume), timing, terms and conditions," are included in the clause, it can be assumed that at least these factors will be taken into account in determining the 'similar circumstances'. The inclusion of the circumstance of "timing" is important given the fast moving nature of technology innovation and the rapid change in prices, especially in relation to products like PCs.
2. The drafting of the Head Agreement and Customer Contract implies that if a supplier sells goods to Customer A for \$1000 on say the 1st February 2006, then similar goods are sold to Customers B, C and D in similar circumstances for \$1,200 each on say February 28th 2006,

Customers B, C and D should be refunded \$200 each.

3. As a consequence of the requirement to provide a refund on the price received on the sales to Customers B, C and D, a potential issue arises with the recognition of revenue on those orders. Those organisations that have such revenue recognition policies should consider the impact of this clause.

In managing some of the risks associated with the most favoured price clauses, a central management function should be used to manage pricing, quotations, orders and price lists. Also, similar deals should be monitored carefully to check that the Customer really is receiving the best pricing.

Warranties

The warranties that are to be given by the Contractor under the Customer Contract are quite broad. The warranties in the Customer Contract are in addition to those required under the Modules in Part 3.

I make the following observations:

1. As the warranties in clause 9 of the Customer Contract are in Part 2, they will have a general application across all Modules. Caution should be exercised when negotiating items such as Warranty Periods and the other warranty aspects in the Modules because the warranties are structured to enable the Customer to make a subjective determination of whether the product or service has met an 'absolute' standard of compliance with the warranty. This contrasts with the industry standard position which is that an objective test should be used to

determined whether that the product or service has met the standard required in 'all material respects'.

2. To the extent that a conflict occurs between the warranties in the Customer Contract which have a general application, and the specific warranties provided for in Part 3 (the Modules) the precedence clause in the Customer Contract states that the warranties in the Customer Contract will prevail. An example of where there are differences is clause 9.4.1(c) of the Customer Contract which provides a timeframe for the warranty duration (the Contract Period) whereas in Module 1 the timeframe for the similar warranty is different (the Warranty Period).
3. Remedies that are provided for breach of warranty are similar to those provided for the introduction of viruses. There is concern that there is the same treatment for both breach of warranty (generally where there are defects in the Deliverable) and consequences of introducing viruses, because the causes could be completely different and the appropriate remedies for each event should be different. In addition, the introduction of a virus may be independent of any delivery of a Product or Service. Warranty defects most likely occur as a result of the Contractor's failure to provide the Deliverables in accordance with the Contract Specifications. On the other hand, viruses could be introduced by an email sent during the project. The Customer Contract provides that where the Contractor has introduced a virus the Customer can require the Contractor to remove the virus free of charge. The Contractor is required to warrant that the rectification work for the removal of the virus is warranted from the Actual Acceptance Date (the 'AAD') of the rectification work (although there is no AAD if the work relates only to a virus and not a Defect in a Deliverable). In my view the appropriate remedy for

a Defect existing in the Delivery during the Warranty Period is the rectification of the Defect at no cost to the Customer (although usually Defects are rectified through a support and maintenance service) and that the issues of Defects and viruses should be dealt with separately.

4. As the definition of Contract Specifications is non-exclusive, the Contractor gives a warranty that its products or services meet many potentially unintentional requirements, including sales presentations, verbal representations or documents that are not attached to the Customer Contract. This is because the "Contract Specifications" is defined as meaning 'the totality of any technical or other descriptive specifications of functional, operational, performance or other characteristics relating to a Deliverable to be provided under the Customer Contract and **may include** (emphasis added): (a) any specifications agreed to by the Customer and the Contractor in the performance of their obligations under and in accordance with the terms of the Customer Contract; (b) any specifications detailing or referred to by the Customer in the General Order and/or applicable Module Order; and/or (c) those specifications generally published or made publicly available by the Contractor which specifically relate to the Deliverable(s) under the Customer Contract as at the commencement of the Customer Contract...'. However it is clear from the User Guide that care should be taken to ensure that all changes to the Contract Specifications that have occurred during the pre-contract negotiations are captured into a clear, logical and complete document and that the Contract Specifications should be reduced to a single document which is then attached to the General Order.
5. There are only a limited number of exceptions to the warranties in

the warranty provisions. I believe that the industry standard exceptions that are specific to the type of product or service provided should be included in the relevant Module.

Liability

The liability regime contemplated under each Customer Contract is as follows:

- 1 The parties may agree to cap their liability only if specified on the General Order. Each party's liability is capped for:
 - each Occurrence/event (Occurrence is defined as 'either a single occurrence, or a series of occurrences if these are linked or occur in connection with one another from one root cause, as the case may be'); or
 - for all Occurrences/ events in the aggregate,
 for all claims except those arising from:
 - personal injury (including sickness and death);
 - loss of, or damage to, tangible property;
 - the Intellectual Property Right and Moral Right indemnity provided by the Contractor;
 - the indemnity in clause 7.2;
- 2 Under clause 7.2 of the Customer Contract, each party provides an indemnity to the other for claims arising from its wilful, unlawful or negligent act or omission. The Contractor also provides an indemnity for claims arising out of breach of the Customer Contract. **This indemnity is not restricted to third party claims;**
- 3 Liability of each party is apportioned according to the extent that each party contributes to the damage/loss;
- 4 A party is not liable for consequential and indirect losses unless otherwise specified on the General Order;

5 Loss of profit, revenue, goodwill, business opportunity or damage to reputation, *if not regarded as indirect or consequential*, are liabilities that cannot be excluded by either party; and

6 The caps apply equally to claims made by the Customer as to claims made by the Contractor.

A number of considerations will need to be taken into account when accepting the terms of this liability regime including:

1. If no caps are agreed in a General Order, then the liability of each party is unlimited;

2. The Contractor should ensure that liabilities that arise under the indemnity (clause 7.2) are considered and dealt with in conjunction with other liabilities to ensure an integrated and comprehensive approach to limiting liability. More detailed comments on clause 7.2 (Indemnities) are provided below;

3. A Contractor will also need to assess the impact of being liable for loss of data. This form of loss is not excluded from the liability regime. Clause 8.2.2 of Part 2 makes the Customer responsible for the backing up of data;

4. A proper analysis should be made for risks that are specific to the procurement as to the extent to which the liability for certain types of negligence based claims can be made against prime contractors and subcontractors under Queensland law;

5. Where a capped liability is agreed (remembering that there are some items where no cap applies), the cap will also apply to the Customer's liability to the Contractor. The cap on the Customer's liability to the Contractor will include a cap on, amongst other things, the Customer's breach of any Intellectual Property Rights or Moral Rights, and obligations associated with confidentiality or privacy;

6. The limited extent to which each party is required to mitigate its

loss, damage or expenses, notwithstanding how the loss or damage arose or the forms of coverage to such losses are provided by a party (i.e. on indemnity);

7. The General Order should clarify whether there is:

- liquidated damages;
- any right of refund (eg, clause 12.4.24(d) gives a right of refund if a Product does not pass its Acceptance Tests);
- any performance rebates (see service levels in Module Order M05(B),

and count towards the calculation of the cap on the party's liability; and

8. Each party must determine its risk profile against the business case before signing a Customer Contract. The User Guide provides useful information as to how a Customer should perform its risk assessment and negotiate a limit of liability.

In managing some of the risks associated with these provisions, it is recommended that the Contractor ensures that the cap of liability is inserted in the relevant section of the General Order.

Indemnity

The indemnity provisions in clause 7.2 of Part 2 in GITC are broad in scope. Observations made on the liability regime in clause 7.1 also apply to the drafting of the indemnity provisions in clause 7.2.

In comparison to the indemnity provisions in GITC v2, these provisions have a wider scope. I make the following observations:

1. As the indemnity under clause 7.2 gives the Customer the right to claim an indemnity for the Contractor's breach of contract (as the loss is one that 'those indemnified' that may sustain arising out of or as a consequence of any breach of the Customer Contract by the Contractor), it is important to ensure that the capping arrangements in clause 7.2.3 are

used and/or the indemnity in clause 7.2.1 is restricted only to an indemnity for third party claims. This indemnity is much broader than the third party claims indemnity in GITC v2.

2. The indemnity provided by the Customer does not cover loss or damage suffered by the Contractor arising from breach of the Customer Contract by the Customer (even though the Contractor is required to provide such an indemnity to the Customer).

3. Neither party is obliged to provide the other with reasonable assistance to defending a third party claim.

4. The settlement of an action, proceeding, claim or demand may only occur with the consent of the other party and such consent is not to be unreasonably withheld.

In managing some of the risks associated with these provisions, it is recommended that the Contractor ensures the limits of the indemnity are inserted in the relevant section of the General Order.

Performance Guarantee

GITC provides that a Contractor may have to provide a Performance Guarantee. This is a binding commitment, usually given by a director of the Contractor, or from the Contractor's parent company (the 'Guarantor'), that if the Contractor fails to perform the requirements of the Customer Contract the Guarantor will step in and perform the obligations in its place. The Contract Authority can require a Performance Guarantee under the Head Agreement as part of the accreditation process, in which case the Performance Guarantee will be available to all Customers who enter into a Customer Contract with the Contractor. Alternatively a Customer can require a Performance Guarantee for a particular project. (This requirement will usually be set out in the tender documents for that project).

The form of guarantee may be varied provided that it is substantially in the form of Schedule S5 of Part 4, or as otherwise accepted by the Customer.

The costs of establishing, maintaining and releasing the Performance Guarantee are to be borne by the Contractor.

Upon review of these provisions, I have the following observations:

1. The Customer can call on the Guarantor to perform the obligations under the Customer Contract without first giving a Contractor the opportunity to remedy the defective performance;
2. The form of Performance Guarantee as provided for in Schedule S5 of Part 4, may not suit all organisations asked to provide such guarantees; and
3. Once a Performance Guarantee is in place, the Contractor has an obligation to include such details in the financial report to the Contract Authority (Annual Report), and to Customers under other Customer Contracts.

Financial Security

A Financial Security is an unconditional security usually issued by a bank or other financial institution which allows a person the right to receive a defined amount of money simply by presenting the Financial Security to the institution and demanding payment. There is no requirement for the person making the demand to prove any breach of contract or other default or to prove any loss or damage. The Contract Authority can require a Financial Security under the Head Agreement as part of the accreditation process, in which case the Financial Security will be available to all Customers (other than Eligible non-Government Bodies) who enter into a Customer Contract with the ICT supplier. Alternatively a Customer can require a Financial Security for a particular project. (This requirement will usually be set out in the tender documents for that project).

Even if a Financial Security is required by the Contract Authority under the Head Agreement, a Customer may also request a further or larger Financial Security for its particular procurement.

The Customer Contract states that only the Contract Authority may enforce the Financial Security issued under the Customer Contract unless otherwise agreed in writing. All costs in relation to obtaining, maintaining and releasing the Financial Security will be borne by the Contractor.

I make the following observations:

1. It appears that 'any and all' loss may be drawn down from the Financial Security, subject to the limits in clause 7.1 (the clause that describes how liability is calculated and capped) even though the Customer may only be entitled to losses calculated in a more restricted way under the Customer Contract;
2. The Customer Contract states the Contractor is prevented from taking any action preventing the Customer from making a claim or receiving a payment under the Financial Security;
3. The contract framework provides for the possibility of the Contract Authority enforcing the Financial Security obtained under the Head Agreement, even though the loss occurred in a Customer Contract, to which the Contract Authority was not a party. This gives rise to privity of contract issues as the Financial Security will be in the name of the Contract Authority but the loss was sustained by the Customer;
4. If loss was calculated incorrectly and an overpayment from the Financial Security was taken, the Customer Contract does not provide for a contractual right to recover monies in situations where an overpayment was made (though there may be rights of recourse for the Contractor under the common law); and
5. Although the Customer Contract does not state how to calculate the value of a Financial Security at a project level there is useful guidance in the User Guide.

In managing some of the risks associated with these provisions, I suggest that any requirement for a

Financial Security be determined up front prior to submission of a proposal with pricing. In this way any costs associated with the Financial Security can be included in the proposal.

Recent Developments

Between Part 1 and Part 2 of this article, the Queensland Government is honouring its commitment to the industry and its Agencies to review GITC v5.01 to address issues arising from its implementation. I believe that this review will address the majority of the issues that have been raised in this series of articles. In a move welcomed by the industry, the Queensland Government has been proactive in seeking industry input and has ICT industry representatives on both the Steering Committee and in the working groups for the review. The author, Mike Pym is on both the Steering Committee and the core design team. I look forward to writing a further article on the successful outcome of that project.

In addition, GITC Services (the office responsible for GITC) has published a User Guide for GITC. This is a comprehensive guide for Departments, Agencies and ICT suppliers that provides guidance on completing orders, how to "use" the liability, indemnity, liquidated damages and intellectual property right provisions and a wealth of other practical information. It is essential reading for everyone that is involved in GITC v5 contracts, both customers and suppliers alike. It can be found at GITC Services website www.gitc.qld.gov.au.

- *This article is based on a seminar paper presented by Mike Pym at the AIIA "Briefing on GITC v5" in Brisbane on 28 February 2006.*
- *Pym's Technology Lawyers specialises in ICT contracts, outsourcing, and Government ICT procurement. Mike Pym can be contacted on 0401 693 181, or at mpym@maxwell-ip.com.*