
The Devil wears the Emperor's New Clothes: technology, autonomy and the privacy myth

view on our computer. That, however, mistakenly assumes that such information is 'hidden' in the first place. Just because a person shops online in the physical privacy of their own home does not mean their venture into cyberspace is a private enterprise.

In the real world, when I walk into a shop, I am carrying all sorts of personal information from credit cards to family photos. They come into the shop with me, but are kept hidden because I choose to place them in my wallet away from public view. Using the internet, there is a cyber-equivalent to my wallet: namely, the use of software to guard against cookies, spyware and the like.

The reason I carry a wallet in the real world is that I know that if I didn't, people would be able to see my personal effects. The same is true of the internet: the proliferation of modes of spying on cyber-activities over the internet should not come as a surprise

to anyone. In the same way I know the real world is full of people who can see me, I know that the internet is full of cookies and spyware. Just because there is no 'physical information' does not alleviate a person of the responsibility to guard their privacy through the appropriate medium.

Of course, where a person does go to reasonable lengths to protect their own privacy, only to have those efforts thwarted by some deviant or malicious application of technology, the situation is completely different. In those situations the expectation of privacy is a reasonable one and the law ought to intervene.

Conclusion: technology and the new public domain

It has been said time and time again in U.S. Courts that it is unreasonable to expect privacy from onlookers in a busy public place.⁵ The same is true for a mass digital or online setting where physical onlookers are replaced

with their well known technological equivalents. In the information age the application of new technologies has created a new public domain within which concerns for privacy need to be balanced. The law should not have to worry about protecting the privacy interests of people who voluntarily expose themselves to this new domain without regard for their own safety.

¹ See, eg, *Fletcher v. Price Chopper Foods of Trumann, Inc.*, 220 F.3d 871, 877 (8th Cir. 2000).

² 533 U.S. 27 (2001).

³ *Ibid.*, 35.

⁴ *Ibid.*

⁵ See, eg, *People for the Ethical Treatment of Animals ('PETA') v Bobby Beronson Ltd* 895 P.2d 1269, 1279 (Nev. 1995).

A critical analysis of NSW procurement of ICT goods and services

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The NSW Government is a major purchaser of information and communications technology (ICT). It has an estimated annual ICT spend of \$1 billion.¹ As such a big spender on ICT, it is a key customer to many suppliers.

The NSW Government market is also significant from a national perspective. Government is the single largest ICT customer in Australia. According to a recent study, within the government market, the NSW Government is the second largest customer behind the Federal Government.²

This puts the NSW Government in a unique position. Because of its spending power, it is able to shape and influence the development of the ICT industry in Australia. Depending on

the areas in which it invests and the suppliers it awards contracts to, the decisions of the NSW Government have significant ramifications for the local industry.

It is an interesting time to be a supplier of ICT to the NSW Government. Last year saw the release of the NSW Government's new ICT Strategic Plan which sets the framework for ICT planning, expenditure and allocation of resources over the next 4 years.³ The NSW Government has also begun using its new Procure IT terms and conditions for the procurement of ICT goods and services. Procure IT replaces the Government Information Technology Conditions version 2 which has been used by the NSW public sector since the 1990s.

ICT procurement policy is also evolving. In the last few years, the NSW Government has applied reforms to "provide a simplified, more predictable and accountable [procurement] process".⁴ The Independent Pricing and Regulatory Tribunal has also recommended further reforms.⁵

Given the recent changes at the NSW Government level, it is a good time to take a closer look at the legislation, policies and contractual framework affecting the NSW Government market. The issues that will be touched on in this paper are the following.

1. The NSW ICT Strategic Plan
2. The legislative framework
3. The policy framework

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4. Codes and guidelines
5. Procure IT
6. Intellectual property
7. Risk in NSW Government contracts
8. Liability
9. Indemnities

Suppliers should have at least a basic understanding of the legislation, policies and contractual framework affecting the procurement of ICT goods and services by the NSW Government. The aim of this paper is to provide an overview of the key issues.

The NSW ICT Strategic Plan

On 27 July 2006, the NSW Government released its new ICT Strategic Plan, "People First - A new direction for ICT in NSW" (**Strategic Plan**).⁶

The Strategic Plan was developed by the NSW Government Chief Information Office and NSW Government CIO Executive Council. It sets the priorities for the NSW Government's annual \$1 billion spend on ICT goods and services.

It has been almost 10 years since the NSW Government unveiled an information technology blueprint. Given the evolution and growth of ICT in recent years, this is a long time to wait for such an influential document.

The Strategic Plan seeks to bring consistency and structure to the acquisition of ICT goods and services by the NSW Government. It replaces a variety of ad hoc (and potentially inconsistent) strategies within various NSW Government departments and agencies.

The aim of the Strategic Plan is to create a co-ordinated government-wide approach to ICT planning, expenditure and allocation of resources. It seeks to redirect spending away from back office applications and infrastructure like email, content management, finance and payroll systems to front-line and line of business delivery (or core agency) technologies like e-learning, patient care, police operations,

emergency services management and community services.⁷

The Strategic Plan will be implemented over 4 years and reviewed annually. It is available at www.gcio.nsw.gov.au.

The legislative framework

The procurement of goods and services by the NSW public service is governed by the *Public Sector Management (Goods and Services) Regulation 2000*.

The NSW public service consists of NSW Government departments, statutory authorities and other Government entities.⁸ It does not include State Owned Corporations under the *State Owned Corporations Act 1989*.⁹

The NSW public service must obtain goods and services, including ICT, through the State Contracts Control Board (SCCB). The SCCB is responsible for determining the conditions under which tenders or quotations are invited or accepted and for entering into contracts on behalf of the NSW public service.¹⁰

The SCCB is established under the *Public Sector Employment and Management Act 2002*. Its role is set out in the *Public Sector Management (Goods and Services) Regulation 2000*. It is required to maximise competition in the supply of goods and services, maintain probity and select tenders that provide best value for money.

Where the SCCB has arranged a period contract (also known as a "Standing Offer Agreement"), that contract must be used by the NSW public service.¹¹ This has recently been extended by Premier's Memorandum 2006-11 which requires that all NSW Government agencies, other than State Owned Corporations, must use period contracts where they are available.¹² The benefit of using period contracts is that a full tendering process is not required, which reduces the cost to both customers and suppliers.

Where there is no period contract, the NSW public service can undertake its own purchasing within the "General Purchasing Delegation" established by

the SCCB. For purchases in excess of \$150,000, the NSW public service must hand over the purchasing function to the SCCB for the invitation of tenders.¹³

The policy framework

NSW Government procurement policy is administered by the NSW Treasury. It is implemented as a Treasurer's Direction under section 9(1) of the *Public Finance and Audit Act 1983* and consists of:

- an overarching policy statement on NSW Government procurement;
- a single Code of Practice for Procurement covering all types of NSW Government procurement;¹⁴ and
- a 10 stage procurement process map, which differs depending on whether the procurement is for construction, ICT or general goods and services.¹⁵

The overarching policy framework for NSW Government procurement is available on the NSW Treasury website

www.treasury.nsw.gov.au/procurement/procure-intro.htm. It provides that:

The fundamental objective of the NSW Government Procurement Policy is to ensure that government procurement activities achieve best value for money in supporting the delivery of government services. The Policy emphasises agency accountability for outcomes, and greater upfront planning and stronger linkage with the State Budget process prior to allocation of capital funding.

Value for money is the fundamental objective of NSW Government procurement policy. This is determined by the relevant agency undertaking a cost/benefit analysis in respect of any procurement activity.

In addition to value for money, other key principles underpinning NSW Government procurement are:

- efficiency and effectiveness;
- probity and equity; and
- effective competition.¹⁶

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Value for money does not automatically mean the lowest price.¹⁷ Both price and non-price considerations are relevant. Examples of non-price factors that may be relevant include the experience of a supplier, quality, reliability, timeliness, delivery, innovation, product servicing, fitness for purpose and ability to meet the NSW Government's economic, social and environmental objectives.¹⁸

Codes and guidelines

The NSW Government Code of Practice for Procurement¹⁹ (**Code of Practice**) is the core document on NSW procurement policy. It outlines the philosophy, obligations and standards of behaviour applicable to suppliers and agency customers during the procurement process.

The Code of Practice covers all types of NSW Government procurement. This includes the procurement of goods, service contracts, consultancies and professional services. It emphasises that Government procurement activities should achieve best value for money while being fair, ethical and transparent.²⁰

In addition to the Code of Practice, there are a number of other policy publications that a supplier might like to consider. These include:

- NSW Government Tendering Guidelines²¹ (**Tendering Guidelines**);
- Implementation Guidelines for NSW Government Procurement²² (**Implementation Guidelines**);
- a Policy and Guidelines Paper;²³ and
- a variety of other online and paper-based resources.

The Tendering Guidelines focus on the mechanics that must be followed during the tendering process. They recognise that the "principal objective of all tender evaluations is to identify the tender(s) offering the best value for money whilst achieving process probity and fairness".²⁴ Both the Code of Practice and Tendering Guidelines are mandatory for organisations tendering to the NSW Government.²⁵

The Implementation Guidelines expand upon key aspects of the Code of Practice.²⁶ They provide guidance on such matters as the roles of the parties, ethical principles, the need for continuous improvement and best practice, workplace practices and compliance.

Other relevant policy resources include a 10 step procurement process map available at www.treasury.nsw.gov.au/procurement/ict-map.htm. The process map describes the matters that must be considered by a government customer during all stages of ICT procurement, from scoping through to service provider selection, implementation, operation and evaluation.

Finally, the Acquisition of ICT Guideline is also relevant. It provides an overview of key issues in the procurement of ICT by the NSW public sector and guidance on best practice.²⁷

While the procurement policy documents described above are drafted for NSW Government customers, a supplier that would like to maximise its chances of success should have a basic appreciation of the "big picture" issues. This will enable the supplier to formulate a tender response that is conforming and addresses the key considerations.

Procure IT

Procure IT is the NSW Government's standard terms and conditions for the procurement of ICT goods and services. It was developed in 2003 and has been amended since then. Version 2.1 of Procure IT is the current version.

Procure IT replaces the Government Information Technology Conditions version 2 (**GITC 2**). It has been developed to simplify and shorten GITC 2. A Procure IT User Guide has also been drafted to clarify the matters that the NSW Government will take into account when entering into a Procure IT agreement or order form with a supplier (**User Guide**).²⁸

The Procure IT framework applies to a broad range of ICT goods and services including hardware acquisition and maintenance, software licensing, development and support, professional

services, data management, telecommunications, managed services and systems integration services.

As each NSW Government panel arrangement comes up for renewal or a new contract needs to be put in place, a tender will be released attaching the Procure IT terms and conditions. The NSW Government estimates that the process of moving all agreements to the Procure IT framework will take about 4 years.²⁹

Procure IT is usually entered into as a standing offer panel arrangement between a supplier (known as the "Contractor" in Procure IT) and the SCCB (the "Contract Authority"). The agreement between the Contractor and Contract Authority (the "Agreement") sets up the standard terms and conditions between the parties. It is essentially a head agreement under which separate contracts may be entered into between the Contractor and customers³⁰ from time to time.

Where a customer (known as the "Customer" in Procure IT) would like to be provided with goods or services, it places an order with the Contractor (the "Order"). A contract is then formed between the Contractor and the Customer (the "Contract").

The Contract will contain:

- the terms of the Agreement between the Contract Authority and Contractor;
- the Order details completed by the Customer and Contractor;
- the "Service Level Agreement" in Part 6 of Procure IT, where agreed to by the parties; and
- any additional terms agreed by the parties (known as "Additional Conditions" in Procure IT).

Additional Conditions in a Contract that are contrary to the terms of the Agreement must have the Contract Authority's prior written consent.

Depending on the nature of the supply by the Contractor to a Customer, the modules in Part 4 of Procure IT will also be relevant (the "Modules"). The Modules contain transaction-specific

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terms and conditions. Modules such as the following may be included:

- hardware acquisition and installation;
- hardware maintenance services;
- licensed software;
- software development services;
- software support services;
- IT personnel;
- professional services;
- data management;
- telecommunications;
- broadband local access;
- web services;
- managed services;
- core network services; or
- system integration services.

The development and introduction of Procure IT is a step in the right direction. It contains a number of improvements on the previous GITC 2 framework. However, in some respects it also represents a lost opportunity for suppliers and customers.

According to the Australian Information Industry Association (AIIA), ICT procurement in NSW has for many years been a one-sided affair. There has been an excessive focus on risk management, onerous contractual conditions, high bid costs, delays in processing tenders, duplication of agency conditions and policies, excessive barriers on SMEs tendering for government business and a reluctance by the NSW Government to license intellectual property.³¹

The introduction of Procure IT does nothing to address many of these issues. It brings some relief from a contractual perspective, but problems with the contractual framework remain. Ideally, ICT procurement should follow these key principles:

- the process should be workable, balancing mutually acceptable terms and conditions with flexibility to meet the individual requirements of specific projects;

- the terms and conditions should be commercially realistic; and
- the agreement should be consistent with key procurement policy initiatives, including best value for money and meaningful participation by SMEs.³²

The first two of these issues are the key points of difference between suppliers and NSW Government customers.

In the remainder of this paper, the focus will be on 4 of the more significant contractual issues that a supplier will need to consider when negotiating with a NSW Government customer: intellectual property, risk, liability and indemnities.

Intellectual property

Intellectual property is a key issue for suppliers of ICT to State or Federal Government. The problem for suppliers is that State and Federal Government customers are often reluctant to allow suppliers to retain IP rights in ICT developed for the customer.

The management of intellectual property by the NSW public sector has been the subject of a number of reviews. In 2001 the NSW Audit Office undertook a detailed review of public sector IP management and published its study, Performance Audit Report - Management of Intellectual Property (**IP Performance Audit Report**).³³ In conjunction with the IP Performance Audit Report, a Better Practice Guide was released.³⁴

A key finding of the IP Performance Audit Report was that the framework for IP management by the NSW public service was inadequate and should be better documented and co-ordinated. It was also noted that there was a lack of IP management expertise in the public service. This is a problem for suppliers because a lack of expertise tends to translate into an overly cautious approach by government to IP issues.³⁵

Thankfully, things have moved on a little. In 2005, the NSW Government developed an Intellectual Property Management Framework (**Framework**) to assist agencies to manage their IP effectively.³⁶ The

Framework includes both "IP Principles" and a "Better Practice Guide" (not to be confused with the Better Practice Guide released in 2001).

The IP Principles describe the key requirements for IP management by the NSW public sector and are mandatory. The Better Practice Guide is not mandatory and provides guidance to support the IP Principles.

The IP Principles that suppliers will be most interested in are Principles 5, 6 and 9:

5. In all circumstances in which IP might be created or acquired (including employment, outsourcing, grants, procurement, consulting and contracting agreements) ownership of IP should be specifically addressed.
6. Agencies should take reasonable steps to ensure that the people of NSW have the best opportunity to benefit from the IP, whether the ownership of, or rights to, the IP are vested in the agency, a contracted developer, a collaborative developer, a grant recipient or other party.
9. In making decisions about commercialising government IP, the agency must be satisfied that the people of NSW will obtain the maximum benefit. Note that in some cases it may be in the best interests of NSW for the agency to transfer the IP to another government agency, or private industry, either for a fee, a non-commercial fee, or free of charge.³⁷

The Better Practice Guide provides that an agency should take a considered approach towards managing risk and opportunity in determining what IP rights to acquire during procurement, contracting and engaging consultants.³⁸ Ultimately, the issue becomes one of whether to license IP from a supplier or require a transfer of ownership to the NSW Government.

The Better Practice Guide provides that an agency might decide to acquire a licence to use IP for one-off, isolated or non-critical issues or where

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alternative solutions are available or where there are low exit costs. However, an agency might decide to acquire ownership of IP where there are on-going or critical uses or the IP is likely to be further developed and the agency will need the developed IP or there are high exit costs.³⁹

The IP Performance Audit Report also deals with the issue of ownership versus licensing. It recognises that an overemphasis on acquiring ownership instead of a licence has its risks. For example, if an agency owns the IP but lacks the will or means to actively manage it, the value of the IP is likely to erode over time. Any erosion of value represents an opportunity cost to the agency and a lost opportunity for private sector development in NSW. Similarly, agency insistence on acquiring IP ownership may result in a premium being charged on the acquisition price.⁴⁰

It is encouraging that the Framework and IP Performance Audit Report recommend a flexible approach to the issue of IP ownership by the NSW public service. This is information which a supplier can use to its advantage in negotiations with NSW Government customers.

If a supplier would like to retain IP in its deliverables, it has the greatest chance of success during negotiations if it seeks to argue one or more of the following:

- it is in the best interests of the people of NSW that the supplier retains IP ownership;
- the IP is being provided for a one-off, isolated or non-critical transaction from the perspective of the NSW Government;
- it is not a core function of the NSW Government customer to retain and develop the particular piece of IP provided by the supplier; or
- there are greater levels of innovation and service improvements to be gained, to the benefit of the NSW Government customer and the people of NSW, if IP is retained by the supplier.

Clause 9.2 of Procure IT is the NSW Government's standard provision on IP ownership. It provides that all intellectual property rights in goods or services provided to a NSW Government customer automatically vest in the customer.

However, there is room to manoeuvre in subclause 9.2.3. This provision states that the supplier and the NSW Government customer may agree in the Order that the default position does not apply in relation to particular deliverables.

The User Guide provides some guidance on the circumstances in which a NSW Government customer may agree to a supplier retaining IP in deliverables:

While in most instances [Government] ownership would be the appropriate outcome, Customers should consider their reasons for acquiring ownership of IP rights in a developed product in preference to licensing rights to use it. It may be quite workable to allow ownership to remain with the developer so long as the Customer is licensed to do all the things that it wants to do. If for instance the developed software only represents a portion of a pre-existing product which is already owned by the Contractor there is not much purpose in the Customer acquiring the relevant IP ownership.⁴¹

While this is encouraging, it does not go far enough. From a supplier's perspective, the intellectual property provisions of Procure IT are inadequate. According to the AIIA, the number of situations in which government ownership of IP should be necessary, as a proportion of total procurement, is likely to be small. The default position should provide for supplier ownership with a licence to the NSW Government.⁴²

Risk in NSW Government contracts

It is useful for a supplier to have a basic understanding of the policies and procedures of the NSW public sector in the management of risk and liability in ICT procurement. It enables the supplier to understand what are the

"hot button issues" for the NSW Government and how far it can push on a particular issue.

There are a number of policy documents that are relevant to the issues of risk and liability. NSW Treasury has released a 10 stage ICT procurement map which requires a risk assessment to be completed before an agency decides to proceed with a project. Matters that should be considered include the consequences of a project failing on service delivery, stakeholder considerations, financial implications and the wider business and government risk.⁴³

Although the NSW Government is risk-averse, it may be willing to take on some risks. Ultimately, it is a balancing process. The issue becomes whether or not a particular risk is acceptable or if there are treatments that could make it acceptable.

There are a number of ways to minimise risk, many of which are not contractual. The NSW Government's Project Risk Management Guideline provides that the major approaches for treating risks are:

- reducing the likelihood of a risk occurring - this might include changing the risky aspects of a project or including relevant warranties in a contract;
- reducing the consequences, by taking action to minimise the impact of a risk if it occurs - this might include contingency planning that addresses significant risk areas where preventive action is unavailable or the cost of prevention is prohibitive;
- avoiding the risk, by not proceeding with a potentially risky event; or
- transferring the risk to another party such as a supplier or via insurance.⁴⁴

Suppliers should be aware of the alternatives. It is common for NSW Government customers to seek to negotiate a transfer of risk to a supplier. A supplier's response should be to emphasise the other options available to the NSW Government customer.

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For example, a supplier might choose to emphasise to the customer that it can adequately treat a particular risk through the use of contract management systems and procedures. This could include regular contract review meetings, the inclusion of detailed specifications in an ICT contract, a structured acceptance testing procedure where software is being provided and continual monitoring of the supplier's performance.⁴⁵

Alternatively, where a supplier is performing an outsourced ICT function for a NSW Government customer, the Contracting Out Guideline will be relevant. This document provides that "as a general rule, risk responsibility should be allocated to the party best able to manage it".⁴⁶

This is encouraging for suppliers. There are other encouraging statements as well. In relation to contract negotiations, the Contracting Out Guideline provides that:

The outcome of Contract/SLA negotiation needs to be a win-win situation, with both parties benefiting from the arrangement. The arrangement with the service provider should be approached as a partnership.⁴⁷

Many suppliers find that this attitude is not always reflected in terms negotiated with NSW Government customers. It is this difference between policy and practice that is often the problem.

Having considered the policy, this article will now explain what actually occurs in practice. The remaining sections will provide an overview of the liability and indemnity provisions in Procure IT and some guidance on how to negotiate them.

Liability

Generally speaking, the issue of risk in ICT procurement by the NSW Government is managed through contractual provisions such as liability and indemnity clauses.

Suppliers often complain that the NSW Government is unwilling to negotiate liability and indemnity clauses and that they are biased in

favour of the customer. This approach to risk management is unfortunate and does not benefit either party.

When it comes to negotiations regarding liability, two of the more significant issues are whether the government customer will agree to a liability cap and whether indirect or consequential loss is excluded. Both of these issues are dealt with in Procure IT.

Clause 8.5 of Procure IT deals with capping of supplier liability. The default position under Procure IT is that liability of the supplier is uncapped. The User Guide confirms that uncapped common law liability is the preferred position for NSW Government contracts.⁴⁸

If a supplier (as "Contractor") would like to cap its liability to the NSW Government it must either:

- (i) agree the cap upfront with the Contract Authority and specify the amount of the cap in the Schedule 1 "Agreement Details" - this will then serve as the liability cap for all future Contracts entered into with a Customer;⁴⁹ or
- (ii) at the time of placing an Order, agree the cap with the Contract Authority and Customer and include the cap in the Order form - this will then serve as the liability cap for that Contract only.⁵⁰

In relation to the second option, a risk management plan must be completed demonstrating that the cap is justified. It is then up to the Contract Authority to decide whether to approve the risk management plan and proposed cap.⁵¹

Capped liability under Procure IT is subject to a number of exclusions under subclause 8.5.5. The exclusions are for personal injury (including sickness and death), loss of or damage to tangible property and breach of legislation.

Encouragingly, subclause 8.5.7 of Procure IT provides that the supplier's liability does not include "Consequential Loss". This is defined as any loss recoverable at law (other than a loss arising in the usual course of things) which is:

- (a) consequential upon other loss;
- (b) a loss of opportunity or goodwill;
- (c) a loss of profits;
- (d) a loss of anticipated savings or business; or
- (e) loss of value of any equipment, and any costs or expenses incurred in connection with the above.

While the exclusion of consequential loss is a positive step, clause 8.5 is still unsatisfactory from a supplier's perspective. Ideally, liability should be expressed as being capped as a default. The liability cap should also be expressed to be in the aggregate, rather than per event.

Suppliers are often reluctant to negotiate with government on issues such as liability for fear of losing a potential contract. This is unfortunate. A supplier should not simply "cave in" when looking to negotiate the liability provisions of Procure IT. A supplier that presents a considered position is unlikely to damage its prospects.

A supplier has a number of arguments that it could make during negotiations. For example, the supplier could emphasise that:

- an unreasonable risk allocation limits the number of tenderers for a particular procurement and the resulting lack of competition increases the contract price;⁵²
- if the NSW Government requires unlimited supplier liability this will also result in an increase in the contract price as the supplier seeks to include the cost of excessive insurance and risk in the price; and
- there are a number of other (non-contractual) options available to the NSW Government to mitigate its risk under Procure IT, including regular contract review meetings, the inclusion of detailed specifications, a structured acceptance testing procedure where software is being provided and continual monitoring of the supplier's performance.⁵³

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Another provision which raises similar issues is the indemnity clause in Procure IT. This is discussed in the following section.

Indemnities

Procure IT includes extensive indemnities from suppliers to the NSW Government.

Clause 11.1 provides that the supplier (as "Contractor") indemnifies the Contract Authority and its personnel against any claim, loss or expense arising as a result of:

- (a) any wrongful act or omission of the supplier or its personnel in the performance of the Agreement; or
- (b) any breach of the Agreement or a deed of confidentiality under the Agreement.

Further, clause 11.2 provides that the supplier (as "Contractor") indemnifies the Contract Authority and the Customer against a loss or liability arising as a result of a claim made by a third party:

- (a) where the loss or liability was caused or contributed to by a wrongful (including negligent) act or omission of the supplier or its personnel;
- (b) where the loss or liability arises out of a breach of the Agreement or a Contract by the supplier or its personnel; or
- (c) where the loss or liability arises from a claim against the Customer that the supplier's deliverables infringe the intellectual property rights or moral rights of a third party.

Clause 11.1 is onerous. It provides for unlimited liability and an indemnity that is additional to the limitation of liability in clause 8.5. The indemnity should be expressed to be subject to any liability cap agreed between the parties. Without this amendment, the liability cap in clause 8.5 will not provide much comfort to a supplier.⁵⁴

Equally, the drafting in clause 11.2 should be significantly narrowed. It exposes the supplier to all manner of potential third party claims without appropriate (and reasonable) parameters being put in place. For

example, as drafted, a supplier will be liable even where the customer has caused the infringement due to customer modification or misuse of the IP.

A supplier should seek to negotiate clause 11.2 to make it subject to the types of exclusions that are "industry standard" in the IT sector. Clause 11.2 should be amended so that the supplier is only liable for third party IP claims where:

- there is an infringement of IP rights that exist as at the date of the contract;
- the infringement relates to IP in Australia;
- the infringement is not the result of a customer supplied item; and
- there has been no misuse, modification etc by the customer.⁵⁵

Suppliers should not be reluctant to negotiate sensible amendments to the indemnity provisions of Procure IT. The same arguments described above in the context of negotiating liability apply to the indemnity clauses. A realistic apportionment of risk has the potential to benefit the customer in terms of a lower contract price.

Conclusions

The NSW Government market for ICT goods and services is a significant one. To many ICT suppliers, the NSW Government is a key customer. In this context, it is important that suppliers take a reasoned approach to ICT procurement and seek to understand, at least at a high level, what they are dealing with.

NSW Government procurement of goods and services is governed by a complex web of legislation, policies and standard contractual provisions. It is highly regulated and differs significantly from the procurement of goods and services by the private sector.

In the context of ICT procurement, there have been a number of encouraging changes in the last 2 years. This includes the evolution from GITC 2 to the Procure IT standard terms and conditions, the simplification of NSW procurement

policies and procedures, and the development of the Intellectual Property Management Framework.

However, it is important to take a long term view of procurement reform in NSW. It is an evolutionary (not revolutionary) process. While the changes of the last 2 years are positive, there is still a long way to go. There is much more that could be done from both a policy and contractual perspective.

Procure IT contains a number of concessions to suppliers but the intellectual property, liability and indemnity provisions remain problematic. While there is room for suppliers to negotiate amendments, the outcome is largely in the hands of the NSW Government customer. It is important to remember that negotiation should be a win-win situation with both parties benefiting from the arrangement.⁵⁶

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¹ See NSW Government CIO Executive Council and Government Chief Information Office, *People First - A new direction for ICT in NSW - NSW Government ICT Strategic Plan* (2006) at p2

² Australian Information Industry Association, *Better Practice, Better Outcomes - Reforming Liability Regimes under Government ICT Contracts* (2004) at p7

³ NSW Government CIO Executive Council and Government Chief Information Office, *People First - A new direction for ICT in NSW - NSW Government ICT Strategic Plan* (2006)

⁴ See, for example, the reforms at www.dpws.nsw.gov.au/Government+Procurement/Procurement+Policy+Framework/NSW+Procurement+Reforms.htm

⁵ See Independent Pricing and Regulatory Tribunal, *Investigation into the burden of regulation in NSW*

and improving regulatory efficiency - Other Industries - Final Report (2006) at section 6.6

⁶ NSW Government CIO Executive Council and Government Chief Information Office, *People First - A new direction for ICT in NSW - NSW Government ICT Strategic Plan* (2006)

⁷ See "About the ICT Plan" at www.gcio.nsw.gov.au/docs.asp?CAT=2066

⁸ See section 6 and Schedule 1 of the *Public Sector Employment and Management Act 2002*

⁹ Examples of State Owned Corporations include Energy Australia, Rail Infrastructure Corporation and Sydney Water

¹⁰ See NSW Department of Commerce, *Contracting Out Guideline* (2002) at p37

¹¹ *Public Sector Management (Goods and Services) Regulation 2000*; see also NSW Government, *Your Guide to NSW Government Period Contracts* (2005) at pp18-25 for a listing of ICT period contracts

¹² Premier's Memorandum 2006-11, *NSW Procurement Reforms* (2006)

¹³ See www.treasury.nsw.gov.au/procurement/information.htm

¹⁴ See NSW Government, *Code of Practice for Procurement* (2005)

¹⁵ See NSW Treasury Circular TC 04/07, *Procurement Policy Reform* (2004). See also www.dpws.nsw.gov.au/Government+Procurement/Procurement+Policy+Framework/Procurement+Policy+Framework.htm

¹⁶ NSW Treasury, *NSW Government Procurement Policy - Office of Financial Management Policy & Guidelines Paper* (2004) at p4; NSW Department of Public Works and Services, *NSW Government Procurement Guidelines - Simple Procurement* (2001) at p6

¹⁷ NSW Government, *Implementation Guidelines - NSW Government Procurement* (1999) at p7

¹⁸ NSW Government, *NSW Government Tendering Guidelines* (2005) at p39; NSW Government, *Guidelines for the Engagement and Use of Consultants* (2004) at pp4-5 and 20; NSW Department of Public Works and Services, *NSW Government Procurement Guidelines - Simple Procurement* (2001) at p14

¹⁹ NSW Government, *Code of Practice for Procurement* (2005)

²⁰ NSW Government, *Code of Practice for Procurement* (2005) at p2; NSW Government, *Implementation Guidelines - NSW Government Procurement* (1999) at p8

²¹ See NSW Government, *NSW Government Tendering Guidelines* (2005)

²² See NSW Government, *Implementation Guidelines - NSW Government Procurement* (1999)

²³ See NSW Treasury, *NSW Government Procurement Policy - Office of Financial Management Policy & Guidelines Paper* (2004)

²⁴ NSW Government, *NSW Government Tendering Guidelines* (2005) at p26

²⁵ NSW Government, *Implementation Guidelines - NSW Government Procurement* (1999) at p9

²⁶ NSW Government, *Code of Practice for Procurement* (2005) at p1

²⁷ NSW Department of Commerce, *Acquisition of ICT Guideline* (2004)

²⁸ Available at www.contractservices.nswp.commerce.nsw.gov.au/Procure+IT/FAQ+and+User+Guide.htm

²⁹ NSW Department of Commerce, *Procure IT User Guide* (2006) at p4

³⁰ Customers may be Federal or State Government departments or agencies or, where approved beforehand by the NSW Government, certain non-government bodies

³¹ Australian Information Industry Association, *An AIIA Policy Statement for New South Wales - Best Practice ICT Procurement* (2005)

³² Australian Information Industry Association, *Key Principles for the NSW Procure IT Agreement* (2006)

³³ NSW Audit Office, *Performance Audit Report - Management of Intellectual Property* (2001)

³⁴ NSW Audit Office, *Better Practice Guide: Management of Intellectual Property* (2001)

³⁵ NSW Audit Office, *Performance Audit Report - Management of Intellectual Property* (2001) at pp2-3

³⁶ NSW Government, *Intellectual Property Management Framework for the NSW Public Sector* (2005)

³⁷ NSW Government, *Intellectual Property Management Framework for the NSW Public Sector* (2005) at p12

³⁸ NSW Government, *Intellectual Property Management Framework for the NSW Public Sector* (2005) at p15

³⁹ NSW Government, *Intellectual Property Management Framework for the NSW Public Sector* (2005) at p15

⁴⁰ NSW Audit Office, *Performance Audit Report - Management of Intellectual Property* (2001) at p44

⁴¹ NSW Department of Commerce, *Procure IT User Guide* (2006) at p18

⁴² Australian Information Industry Association, *Procure IT - Key issues - An Australian Information Industry Association Briefing Paper* (2005) at p7

⁴³ See www.treasury.nsw.gov.au/procurement/ict-map.htm at para 4.5

⁴⁴ NSW Department of Commerce, *Project Risk Management Guideline* (2004) at p19; see also NSW Audit Office, *Performance Audit Report - Managing Risk in the NSW Public Sector* (2002) at p37

⁴⁵ See www.treasury.nsw.gov.au/procurement/ict-map.htm at para 8; also NSW Department of Commerce, *Acquisition of ICT Guideline* (2004) at pp19-20

⁴⁶ NSW Department of Commerce, *Contracting Out Guideline* (2002) at p20

⁴⁷ NSW Department of Commerce, *Contracting Out Guideline* (2002) at p31

⁴⁸ NSW Department of Commerce, *Procure IT User Guide* (2006) at p17

⁴⁹ See subclause 8.5.1 of Procure IT. Note also that subclause 8.5.2 provides further room to reduce the cap for Contracts with SMEs and Contracts for certain telecommunication supplies.

⁵⁰ See subclause 8.5.3 of Procure IT

⁵¹ Subclause 8.5.3 of Procure IT; NSW Department of Commerce, *Procure IT User Guide* (2006) at p17; also Procure IT "Frequently Asked Questions" at "How will the process of risk assessment work and will it

delay my contract?" available from www.contractservices.nsw.commerce.nsw.gov.au/Procure+IT/FAQ+and+User+Guide.htm

⁵² See, for example, World Information Technology & Services Alliance, *Best Practices in Government IT Procurement* (2004) at p17

⁵³ See the discussion of "Risk in NSW Government contracts" above

⁵⁴ Australian Information Industry Association, *Procure IT - Key issues - An Australian Information Industry Association Briefing Paper* (2005) at p11

⁵⁵ Australian Information Industry Association, *Procure IT - Key issues - An Australian Information Industry Association Briefing Paper* (2005) at pp11-12

⁵⁶ See NSW Department of Commerce, *Contracting Out Guideline* (2002) at p31

Protecting Customer Data in Global Organisations- Regulations and Security Controls

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Organisations operating globally, in particular Financial Services Institutions, face the challenge of complying with multiple regulatory jurisdictions when it comes to the security and privacy of customer data. Managing this regulatory risk is a key driver for such organisations to implement various data protection initiatives to mitigate the threat of exposure. Customer data that is stored and processed by internal systems and/or systems of a third-party business supplier needs to be protected. Balancing regulatory requirements with appropriate technology controls is certainly a difficult and resource-intensive task. The spate of reported cases of customer data issues at various organisations, weighs on their reputation and investor confidence in general. By using the regulatory environment for building a typical security framework and applying suitable technology controls, organisations are increasing their effectiveness in data protection and reducing the risk of being tomorrow's head-lines.

Between June and December 2005,

InformationWeek cited at least 49 million cases of customer data-loss incidents in corporate America.¹ A number of companies have already settled with the Federal Trade Commission in the United States (US), for failing to provide reasonable security measures to protect customer data.² In many of the incidents, the lack of simple information security practices led to the data exposures. It seems a just cause then, that policy makers in the US are proposing a raft of new legislation to deal with data security issues.^{3,4}

Notwithstanding any pending legislation, the existing regulatory regimes are no doubt a key driver for data security initiatives; this is a conclusion reflected in responses to global information security surveys by consultants' Deloitte and Ernst & Young^{5,6} and other industry news portals.^{7, 8} A multi-national organisation would need to comply with numerous laws that encompass the need for consideration of data-security requirements. The complexity (and cost) of complying across a number of geographies then increases. Table 1 provides a *sample* set of rules

and regulations (legislation, directive or policy) that drive security initiatives and apply in the US, Europe or the Asia Pacific (APAC) region. For the sample listed, the fundamental objective of each is the protection against: (i) unauthorised access to data (encompassing both internal and external threats) and (ii) unauthorised or accidental modification of data; the former protects confidentiality and the later integrity in information systems. The considerations for security encompass a range of operational, technical and physical controls. For example:

- The Gramm-Leach-Bliley Act (G-L-B Act) *Safeguards Rule* requires financial institutions to document, implement and maintain an information security program;
- The EU Data Protection Directive and Australian Privacy Act include data security considerations;
- The Japan Personal Information Protection Act (PIPA) calls for protection against information leakage and loss; and
- The California SB 1386 entails the