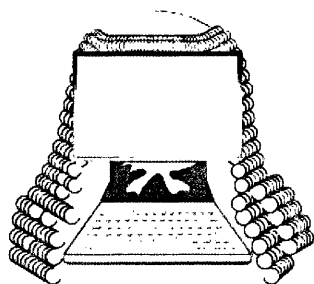


# COMPUTERS & LAW

Journal for the Australian and New Zealand Societies  
for Computers and the Law



Editor: Martin Squires

ISSN 08117225

Number: 81

August 2011

## Procure IT: Best Practice Process Generates Model Form Contract

**Government and Industry collaborate to improve NSW Government's  
standard contract for purchasing ICT products and services**

*By Mike Pym*

*Mike Pym is one of the directors of Pym's Technology Lawyers, a boutique firm specialising in technology and business law. He represented the leading ICT industry body, the Australian Information Industry Association (AIIA), in the negotiations with the NSW Government to revise Procure IT. (Pym's Technology Lawyers' web site is at [www.pyms.com.au](http://www.pyms.com.au))*

*He was ably assisted in the negotiations by Jane Fogarty, Managing Counsel - GBS, IBM Australia and New Zealand and Chair of the AIIA Legal Forum, and Amanda Mason, Legal Counsel at Accenture and member of the AIIA Legal Forum.*

*This article has been produced with the kind permission of AIIA.*

### **The new Procure IT – the new paradigm for NSW Government procurement of ICT**

NSW Government is one of the largest purchasers of ICT (Information, Communications and Technology) products and services in Australia, spending more than \$1.5 billion per year on ICT products and services<sup>1</sup>. The

majority of this spend has been exercised under a standard contract known as Procure IT. Many ICT suppliers generate more than 30% of their revenue from Government contracts. Accordingly, any change to NSW Government's standard contract for purchasing ICT products and services is of significant importance for both the ICT industry and NSW Government buyers.

#### **In this issue**

<i>Mike Pym, Procure IT: Best Practice Process Generates Model Form Contract</i>	1	<i>Fredrick Oduel Oduor, The Evolution of Internet Defamation Law: Will Dow Jones v Gutnick Survive the International Legal Schisms and Legislative Onslaught?</i>	13
<i>Phil Farrelly and Sandra Potter, Crossing Borders in the Cloud</i>	10	<i>Martin Squires, Book review: "Electronic Mobile and Commerce Law: An analysis of trade, finance, media and cybercrime in the digital age"</i>	18

**From the editors...**

In this issue, we are pleased to bring you a detailed examination of the new Procure IT contract (version 3.0) that has been developed for use by the NSW Government as its standard contract for purchasing ICT products and services. Michael Pym, who represented the Australian Information Industry Association (AIIA) in the negotiations with the NSW Government, provides an excellent overview of the major changes that have been made to the Procure IT contract.

In the second article, Sandra Potter and Phil Farrelly discuss issues associated with conducting eDiscovery involving cloud systems, and show that it will need quite a different approach to an eDiscovery exercise where the data is contained within the user's own systems. In particular, they consider jurisdictional issues that arise when cloud systems are used.

In our third article, we publish an article submitted as part of the 2010 Student Prize competition. This article considers whether the defamation principles reiterated and established by the High Court of Australia in *Dow Jones v Gutnick* will survive the increasing impact of the internet as a means of communication.

We remind students that the 2011 Student Prize competition is now open. Please see page 9 for details.

Finally, we publish a review of *Electronic and Mobile Commerce Law: An analysis of trade, finance, media and cybercrime in the digital age* by Charles Wild, Stuart Weinstein, Neil MacEwan and Neal Geach. This book covers a wide range of topics relevant to those with an interest in computers and the law.

**Martin Squires and Vinod Sharma**

*Continued from Page 1*

Further, as the ICT industry has been given an opportunity to provide substantial comment on the new Procure IT contract, NSW Government is expecting that future ICT tenders will provide suppliers with less flexibility to negotiate the new standard Procure IT contract (version 3.0) as part of any tender response. Accordingly, this new Procure IT contract is likely to apply in the new form to all NSW Government procurements of ICT products and services for many years to come.

Given the high degree of acceptance of the new Procure IT contract by its members, AIIA hopes that the new framework will become the benchmark contract for ICT procurement in the other States, Territories and the Federal Government, extending its benefits to other jurisdictions.

**Expected Benefits**

Both the ICT industry, represented by the Australian Information Industry Association (AIIA<sup>2</sup>), and NSW Government, represented by the Department of Services, Technology and Administration (DSTA<sup>3</sup>), agreed that there could be significant gains in productivity, reduced costs, increased competition and additional ICT industry development if the standard contract (*Procure IT*)<sup>4</sup> used by NSW Government to buy ICT products and services was improved.

From DSTA's perspective it is hoped that the new Procure IT contract will lead to increased industry participation in tenders, resulting in lower prices and more innovative solutions, as well as providing increased opportunities for SME's (Small and Medium Enterprises, which in the ICT industry are typically considered to be companies with fewer than 200 employees) to participate

in the government marketplace. Indeed DSTA determined that a "fundamental policy shift"<sup>5</sup> was needed and that it should adopt a more co-operative approach to contracting with the ICT industry.

On the other hand, the ICT industry sought improvements to remove a number of risks and conditions that were restricting large ICT companies, as well as local SMEs, from selling to NSW Government, or that were creating risk-based price premiums.

Both NSW Government and the ICT industry also wanted to streamline the contract process so that there were as few changes to the 'standard' contract as possible. It is expected that this will reduce the management time and legal fees involved in detailed negotiations on each tender, as well as reducing the time to execute a contract and bringing forward the cost savings and business benefits associated with procurement. It is expected that the financial benefits to be achieved just in reducing the management time and legal fees, as well as the brought forward costs savings, will exceed \$10m per year to NSW Government and the ICT industry.<sup>6</sup>

**Background and Process**

The challenge in changing Procure IT was to identify and then remove or amend obligations which imposed risks on suppliers that were disproportionate to the benefits gained by the government buyers, in the context of the broader policy goals of creating jobs, encouraging ICT industry development and lowering prices, whilst avoiding unnecessary risk for NSW Government buyers.

In February 2010 AIIA provided DSTA with a discussion paper setting out AIIA's concerns on a number of major issues with the current version of Procure IT (version 2.1.3). A joint NSW

Government/AIIA Working Group met on a near fortnightly basis to discuss these issues. In between the Working Group's meetings, lawyers representing AIIA and DSTA created draft changes to Procure IT and suggested policy changes that would be needed to implement the outcomes. Once agreed at a Working Group level, these changes, together with the policy implications, were submitted back to the joint NSW Government/AIIA Steering Committee, chaired by NSW Government's Office of the GCIO.

The work was divided into two phases; the boiler plate terms and conditions (e.g. issues such as the panel arrangements, indemnities, confidentiality, privacy, limit of liability, termination), and the Modules (which deal with issues that are specific to each of the particular products or services that may be purchased under Procure IT). As at the date of this article, the first phase has been completed, with the Modules expected to be completed within the next few months.

Drafts of the boiler plate terms and conditions were sent to each party's respective stakeholder groups (a group of Agencies for DSTA and more than 30 AIIA members for the ICT industry) and, with each group's feedback being further discussed and updated, the boiler plate terms and conditions of Procure IT contract were finally agreed in February 2011.

It is true to say that unlike many other "consultations with industry" these discussions were conducted in a truly positive and collaborative manner. The result was that the new Procure IT contract not only addressed the key issues, but was further improved to address many practical or drafting issues that had arisen since 2001 when the first version of Procure IT was introduced.

Best practice collaboration has resulted in a much better outcome for both sides, and is a model process that can be adopted for the Modules and, indeed, for other issues.

### **Structure and Format of the new Procure IT**

#### *Separating the Panel Arrangement from the Customer Contract*

The original Procure IT was drafted as a single set of clauses that operated both:

- (a) as a panel agreement, and included obligations between the Contract Authority (the State Contracts Control Board) and the Contractor (the ICT supplier) relating to the ICT supplier making certain ICT products and services available to "Eligible Customers"<sup>7</sup>, at defined prices for a defined term; and
- (b) as a Customer Contract under which any Eligible Customer could acquire the products and services on the panel arrangement from the ICT supplier.

This caused confusion, as it was not clear whether certain of the ICT suppliers' obligations were owed to the Contract Authority, the Eligible Customer or to both.

This confusion was of particular concern in areas of limitation of liability, warranties and indemnities.

In addition, DSTA had created a "Client Specific" version of Procure IT which was designed for a single transaction between a customer and an ICT supplier. This version of Procure IT had become out of step with the full Procure IT, as DSTA had updated the full version of Procure IT over time, but not always made the same changes to the Client Specific version.

Accordingly, it was decided that the Procure IT would be re-drafted so that the panel arrangements between the Contract Authority and the ICT supplier (*Head Agreement*<sup>8</sup>) would be separated from the terms and conditions for a specific transaction between an Eligible Customer and the ICT supplier (*Customer Contract*<sup>9</sup>). Apart from resolving the issues of confusing obligations, this also enabled the Customer Contract to replace the Client Specific version of Procure IT, ensuring that there will always be consistent terms and conditions under which customers contract with ICT suppliers.

#### *Implementing the National ICT Contractual Framework*

In addition to the structural change described above, it was agreed that the new version of Procure IT would implement the National ICT Contractual Framework (*NICTC Framework*<sup>10</sup>). The NICTC Framework is the Charter that sets out the principles of contracting under which government will acquire ICT products and services in Australia. The NICTC Framework is a contract structure that is to be adopted by all the participating jurisdictions when re-drafting their standard ICT contracts. It is designed to make it easier for both industry and government by making ICT contracts more similar in structure, and more consistent through the use of 'standard' defined terms. In August 2007 the NICTC Framework was endorsed by the States, Territories and Federal Government, as well as the AIIA.

Implementing the NICTC Framework in the new Procure IT contract involved re-ordering all the clauses, schedules and appendices to comply with the NICTC Framework, as well as using the definitions set out in the NICTC Framework in place of the similarly defined terms in the original Procure IT.

As a result, the structure and format of the new Procure IT contract has changed, although many of the clauses are substantially the same as in the previous version of Procure IT (but these clauses use the new definitions and are in a different order).

#### *Other changes to the contract and training*

The new Procure IT also includes new clauses that deal with the AIIA's key issues (see below); revised Schedules, especially the main Schedules that are used as the order documents (the forms that set out the specifics of each transaction); new clauses that implement new business models (especially the reseller business model, software as a service, and open source software) redefine roles and obligations for subcontractors, agents and

resellers; and a general review of all text. Details of all these other changes are beyond the scope of this article.

DSTA is producing a new User Guide to explain the new Procure IT contract to its Agencies, and AIIA held a seminar to provide training to its members and others in the ICT industry. Further seminars will be held once the Modules are completed. Please check the AIIA website ([www.aiia.com.au](http://www.aiia.com.au)) events section for details.

### **AIIA's Key Issues**

#### *Ownership/Licensing of Intellectual Property*

As a result of the discussions on Procure IT, the NSW Government has adopted a new policy on the ownership and licensing of intellectual property that is newly created for the NSW Government. The intention of this policy is to promote ICT industry development, particularly in SMEs. It also removes one of the constant sources of protracted negotiations in many procurements of ICT contracts, and reflects the reality that NSW Government does not generally exploit any newly created intellectual property, whereas ICT suppliers may well create new products or enhance existing products if they retain the intellectual property in newly created intellectual property. This policy decision is broadly consistent with similar recent policy decisions in Victoria and the Commonwealth, and was warmly welcomed by AIIA.

This policy is reflected in the new Procure IT and provides for:

- (a) All existing intellectual property, and any adaptations, translations or derivatives of that existing Intellectual Property created under a Procure IT contract to remain the property of the original owner.
- (b) Any other intellectual property that is newly created by the ICT supplier under the Procure IT contract will, by default, be retained by the ICT supplier, and be licensed to the Eligible Customer for its own use in conjunction with any underlying deliverables. This royalty free licence includes:
  - (i) any internal use, including copying, modification, support and further development;
  - (ii) use by outsourcers or contractors acting for the Eligible Customer, subject to certain confidentiality and security restrictions;
  - (iii) if the Eligible Customer is a Division of NSW Government, a NSW Public Sector Service, an Agency or a Public Health Organisation<sup>11</sup>, this licence is extended free of charge to others of those entities.

However, the Eligible Customer does not have the right to commercially exploit the newly created intellectual property.

- (c) If the Customer does retain intellectual property in the newly created intellectual property, then ICT supplier is granted a free-of-charge licence to use, develop and exploit that intellectual property.

The list of circumstances when the Customer will not be required to follow the default policy position of allowing the ICT supplier to retain IP in newly created intellectual property will be documented by DSTA in the near future.

#### *Limitation of Liability*

The new Procure IT adopts a completely different approach to limitation of liability than the previous version of Procure IT. In the previous version, subject to minor exceptions, the ICT supplier's liability was unlimited unless a comprehensive risk assessment was conducted by the buyer and approved by the Contract Authority. In practice, it was found that these risk assessments were not being conducted, and limits of liability were being negotiated between the buying customer (and not the Contract Authority) on a case by case basis. This led to a significant variation in outcomes, with large well-resourced suppliers securing more favourable limits of liability than suppliers without the resources to negotiate.

The new Procure IT provides for a limitation of the ICT supplier's liability in both the Head Agreement (with the Contract Authority) and the Customer Contract (with the buying customer).

The intention is to remove the continual negotiation of the limit of liability clause by adopting a pro-forma clause that adequately covers the buying customer (in fact, a review of all recent published cases over the past seven years shows that there has never been an award of damages for breach of a performance obligation - i.e. late delivery, failure to perform, deliverable not meeting the specification - which has exceeded 125% of the contract price)<sup>12</sup>, whilst providing ICT suppliers with a degree of certainty that liability is limited in a manner that is consistent with good corporate governance (and in practice is consistent with multi-national ICT suppliers' contracting policies, as these ICT suppliers are often subject to Sarbanes-Oxley governance obligations).

#### **Liability under the Customer Contract**

The new Customer Contract adopts a standard limitation of liability clause that will apply in all but the most extreme of circumstances (certain defined very high risk projects and transactions where the contract price exceeds \$20,000,000). There is no need for any risk assessment to be conducted prior to determining the limitation of liability, nor for the Contract Authority's approval to be obtained.

Broadly the liability of the ICT supplier under the Customer Contract, in aggregate, is limited to:

- (a) twice the contract price for products and technology solutions (such as systems integration or fixed consulting deliverables); or

- (b) the prior 12 months' fees for re-occurring services (such as managed services, support and maintenance); or
- (c) the expected fees for short term services (less than 12 months), such as short term T&M consulting services,

provided that in all cases there is a minimum liability of \$100,000.

Neither party is liable for consequential loss, including under an indemnity.

Each party must mitigate its loss, and any losses will be reduced proportionately to the extent of the party's own malicious or negligent act, or failure to perform under the contract.

The ICT supplier's financial cap of liability does not apply to certain types of loss, including death or bodily injury, loss or damage to tangible property, breach of confidentiality, breach of the privacy indemnity or the ICT supplier's intellectual property right indemnity.

Further, where the *Competition and Consumer Act 2010* (Cth) applies to the Customer Contract (primarily where the Customer Contract is for products or services under \$40,000) the ICT supplier's liability is limited, at the ICT supplier's option, to one of the remedies that are provided for under section 64A of the *Competition and Consumer Act 2010* (Cth).

#### **Liability under the Head Agreement**

Again there is a standard limitation of liability that applies to the ICT supplier's obligations under the Head Agreement. Under the Head Agreement the ICT supplier's liability in aggregate is limited to the greater of \$250,000 or 1.5 times the Management Fees payable under the Head Agreement, subject to a number of exceptions (i.e. where the ICT supplier has no financial cap on liability), including death or bodily injury, loss or damage to tangible property, infringement of a third party's intellectual property rights and breach of confidentiality.

Neither party is liable for consequential loss. Each party must mitigate its loss, and any losses will be reduced proportionately to the extent of the party's own malicious or negligent act, or failure to perform under the contract.

#### *Indemnity*

The indemnity provisions have now been brought more into line with industry standards in terms of the scope of the indemnity, as well as the process for enforcing and defending the indemnity.

#### *Head Agreement Indemnity*

Under the Head Agreement the ICT supplier provides an indemnity to the Contract Authority for any loss it suffers as a result of any malicious or negligent act of the ICT supplier in the performance of its obligations under

the Head Agreement. This indemnity is subject to the limitation of liability clause, including the heads of claim for which the ICT supplier has no financial limit of liability, the exclusion of consequential loss, proportionate liability and the obligation to mitigate losses.

The ICT supplier has the right to defend any third party claim (subject to government policy to the contrary) or reasonably agree to the final settlement of the third party claim.

#### *Customer Contract Indemnities*

Under the Customer Contract the ICT supplier provides an indemnity to the customer for any loss it suffers to the extent that it arises from:

- (a) breach of the privacy obligations in Procure IT. The ICT supplier has no financial limit on its liability under this indemnity but the indemnity is subject to the exclusion of consequential loss, proportionate liability and the obligation to mitigate losses;
- (b) third party claims arising from any malicious or negligent act of the ICT supplier in the performance of its obligations under the Customer Contract. This indemnity is subject to the limitation of liability clause, including the heads of claim for which the ICT supplier has no financial limit of liability, the exclusion of consequential loss, proportionate liability and an obligation to mitigate losses; and
- (c) claims against the customer arising from infringement of Intellectual Property Rights during the use of the deliverables in accordance with the contract. The ICT supplier has no financial limit on its liability under this indemnity but the indemnity is subject to the exclusion of consequential loss, proportionate liability and the obligation to mitigate losses.

Importantly, the IP indemnity now has a number of the more usual exceptions, including infringements caused by combination or use with other products, modifications made by persons other than the ICT supplier and continued use after the ICT supplier has provided an updated version.

The ICT supplier is provided with the right to defend any third party claim (subject to government policy to the contrary) or reasonably agree to the final settlement of the third party claim.

#### *Insurance*

The insurance requirements have been improved so as to reflect the reality of the Australian insurance market and to allow increased participation in the government marketplace by SMEs. Previously the amounts of insurance and the terms imposed on the types of insurance that were required, could not be obtained

readily, or in some cases, could not be obtained at all, in the Australian insurance market place.

The new Procure IT contract requires that an ICT supplier has minimum insurance of:

- (a) workers' compensation as required by law;
- (b) public liability with cover of \$10m per event; and
- (c) products liability with cover of \$10m in aggregate; and
- (d) if services are being provided, professional indemnity or errors and omissions insurance with cover of \$1m per event and in aggregate.

There are also provisions that allow for multi-national companies to use their global insurance arrangements, and for an ICT supplier to self-insure (subject to agreement, not to be unreasonably withheld). There are no longer any requirements to provide copies of policies or to provide a Statutory Declaration of cover from the ICT supplier's insurance broker.

It is possible to agree to have additional levels of insurance, or additional types of insurance, as part of a panel arrangement, or as part of a Customer Contract. It is expected that these additional requirements will be included in any tender documentation.

At a policy level it is agreed that the amount of professional indemnity/errors and omissions insurance that is required will not exceed the amount of the cap of liability (i.e. 2 times contract price or the amount that is applicable for the type of service).

#### *Financial Security*

Whilst the clauses relating to the requirements for a Financial Security (unconditional bank guarantee) were not changed substantially, there were a number of key changes as to when a Financial Security would be required.

The changes that are included in the new Procure IT contract are:

- (a) a customer can require a Financial Security under a Customer Contract, but the Contract Authority cannot ask for a Financial Security as part of a panel arrangement. (This is to prevent ICT suppliers incurring the cost and imposition of obtaining a Financial Security before winning any work.)
- (b) there are defined default end dates on Financial Securities; and
- (c) the Customer must pay the ICT supplier's costs of providing the Financial Security.

#### *Performance Guarantee*

Again, the clauses relating to the supply of a Performance Guarantee (usually a parent company guarantee providing for the guarantor to re-perform the services in place of the ICT supplier) were not

significantly changed, rather the obligations as to when a Performance Guarantee are required were updated. The changes include:

- (a) any Performance Guarantee that is agreed with the Contract Authority under the Head Agreement will automatically apply (or can be required to apply) to all Customer Contracts made under the Head Agreement. This eliminates the need to have multiple Performance Guarantees for every transaction made under a panel agreement; and
- (b) the Customer will identify its requirements for the financial standing of any ICT supplier in the tender (e.g. must be profitable over the past 2 years and have revenues in excess of X).

#### *Time is of the essence*

The previous version of Procure IT provided that all of the ICT supplier's obligations for which there was a due date for performance were obligations to which the "time is of the essence" clause applied. This clause has been replaced with a more comprehensive set of clauses that provide more appropriate remedies for the customer, including liquidated damages and notice and cure provisions that may lead to termination of the Customer Contract in the case of substantial breaches that remain unremedied.

This change addresses the ICT supplier's risk that any failure to perform strictly in accordance with the ICT supplier's obligations could lead to immediate termination of its contract. In practice the NSW Government did not exercise this right, preferring instead to use "notice and cure provisions" and "show cause" notices instead. If ICT suppliers increased their prices to account for the risk of the "time is of the essence" clause, yet the clause (and its remedy of immediate termination) was not used by NSW Government buyers, then removing the clause reduces the risk to ICT suppliers who may provide a corresponding reduction in costs to NSW Government buyers.

#### *Warranties*

There is a new suite of warranties for both the buyer and the ICT supplier, which better reflects the nature of each party's responsibilities and is more consistent with industry practice. All of the "product or service" specific warranties .e.g. "The Licensed Software will perform in accordance with the Contract Specifications in all material respects for the Warranty Period, subject to the Exclusions", have been removed from the "boiler plate" clauses in the body of the Customer Contract and placed in the specific Module<sup>13</sup> that includes the terms and conditions for that specific product or service. This enables the ICT supplier to provide warranties that are specific to the type of product or service being bought, as well as enabling specific defined product/service exceptions to apply.

#### *Acceptance Testing*

A new acceptance testing clause has been included which improves on the previous clause in that it provides:

- (a) clarity as to how the acceptance tests are to be conducted, what the acceptance test criteria are, who is responsible for creating test scripts and how the acceptance test criteria and data represent the requirements of the contract;
- (b) that, where there are only minor defects that do not materially affect performance/use of the deliverable, the deliverables will be Conditionally Accepted;
- (c) an acceptance test process for deliverables that are documents;
- (d) for the customer to provide a detailed 'defects list' if defects are found; and
- (e) if and when 'deemed acceptance' occurs.

*Best Price/Most Favoured Customer clause*

In common with many government contracts, and consistent with a similar clause that has been a standard in many Australian government contracts over the past 2 decades or more<sup>14</sup>, the previous version of Procure IT included a "best price" clause, often known as the "Most Favoured Customer clause". This clause provided that the products and services under the panel agreement must be offered to any Eligible Customer at prices that are "no less favourable" than the prices the ICT supplier offers those products and services to any other customer in Australia in "similar circumstances".

The ICT industry has many issues with this clause, primarily because it is argued that it is very difficult, if not impossible, to define what constitutes "similar circumstances". Indeed over the history of Procure IT the wording of this clause has changed in repeated attempts to redefine what it actually meant.

If the clause was to be removed, DTSA sought alternative provisions that provided them with comfort that government buyers would receive value for money under long term supply arrangements. Accordingly, the "best price" clause has been replaced with a clause that provides obligations on the ICT supplier under a panel agreement for products to:

- (a) use reasonable efforts to provide prices that represent good value for money during the term of a panel agreement;
- (b) seek ways to identify new or improved changes to business processes to enable products to be provided at lower costs and/or with greater benefits; and
- (c) submit to a review of these obligations on an annual basis.

In addition, more specific price review mechanisms (such as benchmarking) apply where specific products are provided, e.g. telecommunication services.

*Management Fee*

The AIIA has long maintained its opposition to the management fee as an unnecessary cost imposition on the industry, but was unable to persuade DSTA to remove this impost, as the management fee is a fee that applies similarly under other contracts for other goods and services, not just ICT products and services. This fee is currently 2.5% plus GST and is payable by the ICT supplier on the value of all invoices in respect of products or services that are the subject to, or are deemed to be subject to, a Procure IT arrangement. Strangely, the ICT supplier is not permitted to separately identify this management fee on its invoices to the Agencies or other Procure IT users, even though the management fee is public knowledge and part of NSW procurement policy.

Notwithstanding the continued use of the management fee, there have been a number of key changes to the clauses that clarify the situations when a management fee is payable.

These changes include:

- (a) a revised deeming provision that adds clarity to the identity of government customer transactions that are subject to the management fee;
- (b) revised clauses concerning the timing of payments, clarifying that payments are due based on paid invoices (with credits for refunds/rebates etc) rather than on issued invoices;
- (c) no requirement for an ICT supplier to provide a Statutory Declaration where its monthly sales report shows a 'nil return'; and
- (d) the ability to agree that the liability to pay the management fee rests with a reseller of products/services, where the reseller acts as the legal agent of the ICT supplier and supplies the products and services directly to the customer.

In addition, NSW Procurement will maintain a website of all the entities (other than the primary government Departments and Agencies) that are eligible to use each of the panel arrangements that are issued under Procure IT contracts (and so give rise to the ICT supplier's liability to pay the management fee). The current list of Departments and Agencies is extensive (it runs into 1,000s of entities) and includes many organisations that many would not expect to be included, such as other State Governments, local councils, schools, charities and not-for-profit organisations. However, this list will now need to be divided up so as to reflect which of these entities are eligible to purchase under each separate panel arrangement. It should be noted that the State Contracts Control Board has authority to arrange for the supply of ICT products and services to a broad range of entities, as

defined by the *Public Sector Employment and Management (Goods and Services) Regulation 2010*.

These changes will enable much better understanding of the obligations, more streamlined implementation of the clause and easier compliance and collection processes, benefitting both industry and NSW Government.

### Next Steps

The new Procure IT contract cannot be used without the Modules, and so DSTA is in the process of reviewing and discussing the changes to the Modules as this Article goes to print. It is expected that the revised Modules will be agreed within the next couple of months. The Modules will also reflect the NICTC Framework, both in terms of the sequencing of the clauses and the use of defined terms, and so will be a re-write of the existing Modules. They are expected to address the reseller's business model in the supply of hardware, software and service, as well as other business models such as subscription licensing, software as a service and open source licensing.

### Summary

The new Procure IT should be a breath of fresh air to both industry and government buyers alike, substantially reducing the time and cost involved in NSW government procurement of ICT products and services. The adoption of a new IP policy, the implementation of a standard default position on the supplier's liability, more realistic insurance requirements, together with a clearer set of more commercially acceptable obligations, provide ICT suppliers with significantly increased incentive to do business in NSW. NSW Government's fundamental policy shift towards co-operative contracting with the ICT industry is now enshrined in Procure IT v3.0. Both the AIIA and NSW Government intend to monitor the use and benefits that come from the new Procure IT contract to ensure that the expected benefits are realised. I look forward to reporting the outcomes of those reviews as they become available.

---

<sup>1</sup> NSW Government, Department of Services, Technology and Administration website, "People First: The NSW Government ICT Strategy". [www.gcio.nsw.gov.au/people-first-the-nsw-government-ict-strategy](http://www.gcio.nsw.gov.au/people-first-the-nsw-government-ict-strategy)

<sup>2</sup> AIIA is the Australian Information Industry Association, the leading ICT industry association in Australia, representing more than 400 companies from major international ICT suppliers to local SMEs. [www.aiaa.com.au](http://www.aiaa.com.au)

<sup>3</sup> NSW Department of Services, Technology and Administration.

<sup>4</sup> Procure IT version 2.1.3. This is the current NSW Government standard contract for the purchase of ICT products and services, such as hardware, software, maintenance and support, professional services, project management services, change management services, recruitment services, data management services, managed services, systems integration, web services and telecommunications services. The recently negotiated version is version 3.0.

<sup>5</sup> DSTA presentation at the launch of Procure IT on 21 February 2011.

<sup>6</sup> AIIA estimates provided to DSTA in February 2011.

<sup>7</sup> Eligible Customers was defined in Procure IT v 2.1.3 to include a wide range of Agencies, Departments, Statutory Corporations, and other entities that exercised government functions (in NSW and in other States, Territories and Federal Government), as well as other bodies who are not-for-profit entities.

<sup>8</sup> The panel agreement terms and conditions are now known as the Head Agreement, which is Part 1 of the Procure IT Framework.

<sup>9</sup> The transaction specific terms and conditions are now known as the Customer Contract, which is Part 2 of the Procure IT Framework.

<sup>10</sup> This NICTC Framework was agreed between representatives of NSW, Victoria, South Australia, Western Australia, Queensland and the Federal Government and the AIIA in August 2007 working through the Australasian Construction and Procurement Council (representing the Ministers for Procurement for each the States, Territories and the Australian Government). Details of the Charter can be obtained from Jane Montgomery-Hribar, Executive Director, Australasian Procurement and Construction Council, PO Box 106, Deakin West ACT 2600.

<sup>11</sup> A Division of the Government Service is defined under the *Public Sector Employment and Management Act 2002* (NSW), a NSW Public Sector Service is defined under the *Public Sector Employment and Management Act 2002* (NSW), a NSW Government Agency is defined in the *Interpretation Act 1987* (NSW), and a Public Health Organisation is defined under the *Health Services Act 1997* (NSW).

<sup>12</sup> Based on a 2010 review of all published ICT cases in Australia over the past 7 years, conducted by Holding Redlich Lawyers. AIIA presented this review to DSTA during the negotiations on Procure IT.

<sup>13</sup> The Modules are in Part 4 of the Procure IT Framework. Each Module provides the terms and conditions that are specific to the particular product or service. For example Module 1 Hardware Acquisition and Installation provides for the terms and conditions relating to the supply of the Hardware, passing of title and risk, hardware warranty, installation etc.

<sup>14</sup> See for example GITC v 2, Part 2, clause 6, which was the standard government contract in NSW and other States for many years. A variation of this clause still exists in Queensland's standard ICT contract, GITC v 5.

**Disclaimer:** This article includes generalised information as to the content and meaning of certain clauses in Procure IT. In many cases specific exceptions, qualifications or alternate positions have been excluded from this article in order to keep it to a reasonable length. It should not be relied on, nor interpreted as definitive or complete. It is not legal advice. Specific professional legal advice should always be sought to reflect the specific circumstances that apply to specific situations. Pym's Technology Lawyers would be pleased to provide such advice.