Queensland Government

Queensland Information Technology Contracting (QITC) Framework

User Guide

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Part A: Queensland Information Technology Contracting (QITC) framework

Overview

The Queensland Information Technology Contracting (QITC) framework has been developed following extensive government and industry consultation.

It replaces the Government Information Technology Contracting (GITC) framework as the basis for all procurement of information and communications technology (ICT) Products and Services for Queensland Government[1]. It also replaces the Department of Housing and Public Works' *General Contract Conditions for General Goods and Services*, previously used as an alternative to GITC for the procurement of low risk ICT services with a total contract value of under $1 million.

QITC is available to Queensland Government entities which are required to comply with *Information Standard 13 – Procurement and Disposal of ICT Products and Services* as well as entities that choose to follow that standard as best practice[2].

The purpose of this User Guide is to:

- provide an overview of QITC (Part A)
- highlight key legal issues (Part B) and
- identify risk management policies and processes relevant to selecting, developing and managing a contract (Part C).

The User Guide provides general information and guidance only and should not be relied upon in place of detailed legal advice. If you have any questions regarding the User Guide or preparing a particular contract, contact your procurement or legal team for advice. The User Guide is not a legally binding document and does not form part of, or affect the interpretation of, any contract established under the QITC framework.

Interpretation

For the purposes of the User Guide:

- a 'General Contract' refers to a Contract created using the *General Contract Conditions – ICT Products and Services* and the *General Contract Details – ICT Products and Services*
- a 'Comprehensive Contract' refers to a Contract created using the *Comprehensive Contract Conditions – ICT Products and Services*, the *Comprehensive Contract Details – ICT Products and Services* and relevant Modules and Schedules
- 'Customer' means a Queensland Government entity which uses QITC to purchase from a Supplier
- 'Supplier T&C', 'Bespoke Contract' and 'Standing Offer Arrangement' are defined as set out in this document other capitalised terms are defined in the *General Contract Conditions – ICT Products*

[1] The Queensland Government Chief Information Office (QGCIO) defines ICT products and/or services as generally covering all types of technology (data, voice, video, etc.) and associated resources, which relate to the capture, storage, retrieval, transfer, communication or dissemination of information through the use of electronic media. All resources required for the implementation of ICT are encompassed, namely equipment, software, facilities and services, including telecommunications products and services that carry voice and/or data.

[2] Information Standard 13 is a policy of the Queensland Government Enterprise Architecture (QGEA). QGEA policies apply at a minimum to Queensland Government departments, but may apply to other Queensland Government entities at the discretion of the entity's Minister. For all cases where a QGEA policy does not apply to a Queensland Government entity, the QGEA provides best practice guidance.

and Services and/or the *Comprehensive Contract Conditions – ICT Products and Services* or Modules.

QITC framework

The QITC framework allows for individual contracts to be directly formed between a Supplier and a Customer for ICT procurements under a common contractual framework.

It includes standardised terms and conditions for the purchase of ICT Products and Services and was co-designed by government and industry.

The QITC framework provides a choice of contract types to reflect the risk and value of ICT procurement activities.

It is supported by a *Contract Type Decision Tool* to help Customers select the right contract type for their particular procurement.

The QITC framework provides for four different contract types:

- General Contract
- Comprehensive Contract
- Supplier's Terms and Conditions (Supplier T&C)
- Bespoke Contract.

Contract Pathways

The QITC framework provides the following general recommendations:

- **General *Contract***

  A General Contract is recommended for procurements of up to $1 million **and** assessed as low risk.

- **Comprehensive *Contract***

  A Comprehensive Contract is recommended for:

  - procurements over $1 million which are assessed as low risk and
  - procurements assessed as either moderate or high risk regardless of value.

- **Supplier's Terms and Conditions (Supplier T&C)**

  A Customer may choose to use Supplier T&C if the cost of the ICT Products and Services will be up to $100,000 **and** the procurement is assessed as low risk.

- **Bespoke Contract**

  A Bespoke Contract is recommended if the procurement is assessed as very high or extreme risk. The Comprehensive Contract Conditions or the Modules should be used as the basis for creating a Bespoke Contract.

Assessing risk and value

In order to determine which contract type to use, it is necessary for Customers to:

- identify and evaluate the risks of a particular procurement (see Part C of this User Guide *Risk management in ICT contracting* for tools on assessing risk) and

- identify the cost of the procurement. Depending on the Customer's policies, this may include:
    - the cost of the initial Term, including warranty periods, service, maintenance and support and subscription periods;
    - any extensions; and/or
    - GST.

The *Contract Type Decision Tool* is designed to help Customers select the right contract type for their particular procurement.

In selecting a contract type under QITC and in developing the contract, a Customer must also consider the requirements of:

- all applicable Queensland Government policies/procedures, including the *Queensland Procurement Policy*, and its own internal policies, procedures and requirements, including those relating to procurement, risk assessment, contract formation, financial authorisations and delegations and
- applicable legislation and regulations, including the *Financial Accountability Act 2009 (Qld), Financial and Performance Management Standard 2009 (Qld), Statutory Bodies Financial Arrangements Act 1982 (Qld)* (if applicable to the Customer) and any applicable legislation which establishes the Customer.

Standing Offer Arrangements

A Standing Offer Arrangement (SOA) is an agreement between a Principal and a Supplier where the Supplier agrees to provide a standing offer to supply Products and/or Services to multiple customers on a set of pre-determined contractual terms (such as pricing and Service or Product specifications). If a customer wishes to accept the Supplier's standing offer during the SOA term, a contract will be established between the Supplier and the customer in the contract form set out in the SOA.

A Customer may wish to procure ICT Products and/or Services under an existing ICT SOA where it is suitable for the particular procurement.

An ICT SOA that was established before the introduction of QITC will continue for its duration unless terminated in accordance with its provisions. A Customer purchasing under an existing ICT SOA will need to use the contract terms prescribed by the ICT SOA. This may be a GITC contract in some cases.

Please refer to https://www.forgov.qld.gov.au/create-ict-contract for information about how to establish an ICT SOA aligned with the QITC.

Framework Process

Diagram 1 shows where the QITC framework sits within the procurement process.

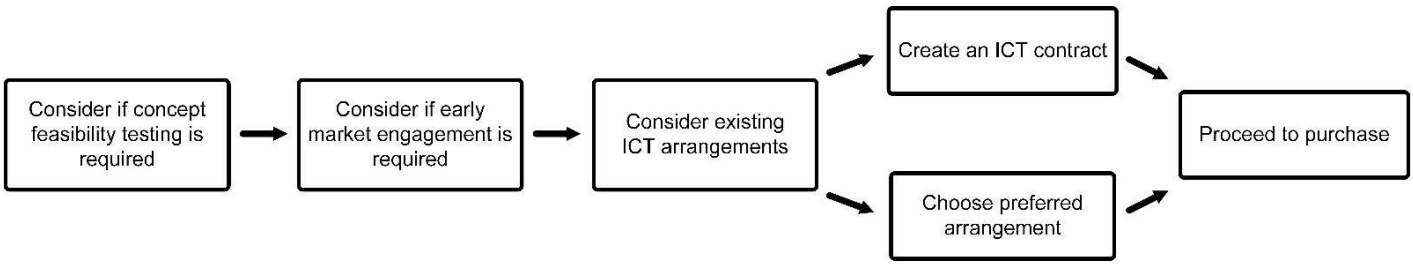
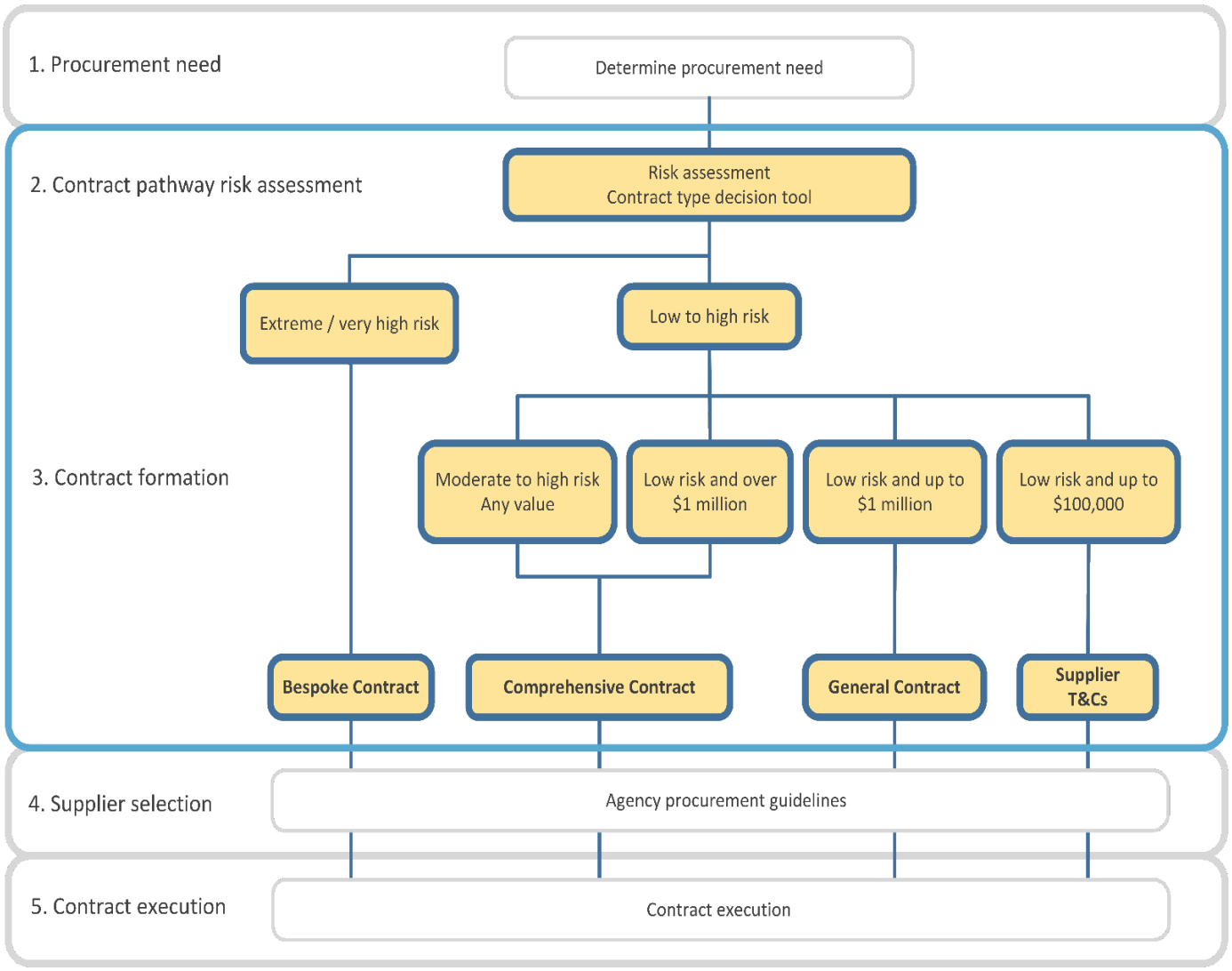


Diagram 2 shows the QITC framework



Documents supporting QITC

The following templates and guidelines have been developed to support QITC:

General Contract

The General Contract Conditions – ICT Products and Services and the *General Contract Details – ICT Products and Services* are required to create a General Contract. A *Schedule 1 – Price and Payment Terms*, which is attached to the *General Contract Details – ICT Products and Services*, has been designed for use with a General Contract.

Other documents and schedules may also be incorporated for a particular procurement.

A number of Schedules have been developed for use with the *Comprehensive Contract Conditions – ICT Products and Services*. Some of these can be used and tailored for a particular General Contract, where required.

No modules are required for the General Contract. Instead, the *General Contract Conditions – ICT Products and Services* contain provisions for specific transaction types which are considered suitable for a General Contract. These are Hardware, Hardware Maintenance Services, Licensed Software, Software Support Services, Developed Software, As a Service and ICT Professional Services[3].

Guidance Notes for the General Contract Details – ICT Products and Services may assist in the preparation of the documents necessary for creating a General Contract.

The *General Contract Conditions – ICT Products and Services* are accepted by government and industry as balanced, standardised terms to be used, without any amendment, for ICT procurements which are assessed as low risk up to $1 million.

Comprehensive Contract

The following templates are required for the establishment of a Comprehensive Contract:

- *Comprehensive Contract Conditions – ICT Products and Services*
- *Comprehensive Contract Details – ICT Products and Services*
- Modules and Module Order Forms 1 – 7 and
- Schedules 1 – 11.

Modules and Module Order Forms are available to address particular transaction types. The Modules are:

- Module 1 – Hardware
- Module 2 – Software
- Module 3 – As a Service
- Module 4 – Systems Integration
- Module 5 – Telecommunications Services
- Module 6 – Managed Services
- Module 7 – ICT Professional Services.

[3] The General Contract Conditions do not provide for Telecommunications, Managed Services or Systems Integration services as these procurements are generally considered more suited to a Comprehensive Contract or a Bespoke Contract.

A number of Schedules have been developed for use with the *Comprehensive Contract Conditions – ICT Products and Services.* The Schedules are a collection of optional documents and templates that may be required for a particular procurement. These are:

- Schedule 1 – Price and payment terms
- Schedule 2 – Project implementation and payment plan
- Schedule 3 – Statutory declaration by subcontractor
- Schedule 4 – Confidentiality, privacy and conflict of interest deed
- Schedule 5 – Escrow agreement
- Schedule 6 – Financial security
- Schedule 7 – Performance guarantee
- Schedule 8 – Service levels
- Schedule 9 – Acceptance testing
- Schedule 10 – Statement of work template
- Schedule 11 – Change request template

Schedules 1, 2, 8, 9, 10 and *11* can be used as a starting point for a Customer to develop documents which are tailored to suit an individual procurement.

Schedules 3 – 7 are purpose-specific legal agreements, deeds or declarations. These documents provide a base level of coverage on the subject matters dealt with in the schedules. Legal advice is recommended where amendments are proposed to be made to these documents.

Guidance Notes for the Comprehensive Contract Details and Modules may assist in the preparation of the documents necessary for creating a Comprehensive Contract.

The *Comprehensive Contract Conditions – ICT Products and Services* and the Modules are accepted by government and industry as balanced, standardised terms to be used, without any amendment, for ICT procurements over $1 million which are assessed as low risk, as well as moderate or high risk procurements of any value.

Supplier's Terms and Conditions (Supplier T&C)

Guidelines for using Supplier Terms and Conditions will assist a Customer to assess whether the Supplier T&C are acceptable for a low risk procurement up to $100,000.

Bespoke Contract

For very high or extreme risk procurements, a Bespoke Contract should be considered.

The terms and conditions in the *Comprehensive Contract Conditions – ICT Products and Services* and the Modules should be used as the basis for developing a Bespoke Contract.

Bespoke Contract development will require additional contractual negotiation considerations, increasing the cost and time for the Customer and Supplier, along with a risk of the negotiated position being less favourable to the Customer than those accepted through the standardised Comprehensive Contract Conditions and Modules.

Part B: Key legal issues

Part B examines some key legal issues which are dealt with in the *General Contract Conditions – ICT Products and Services*, the *Comprehensive Contract Conditions – ICT Products and Services* and Modules. Some of these issues require a Customer to make decisions on the legal position to adopt to suit the needs of a particular procurement and to manage risks. The positions adopted by a Customer on these issues can often significantly impact on price.

Guidance on the clauses to be incorporated into a Bespoke Contract is outside the scope of this User Guide. However, many of the issues in Part B may need to be considered in developing a Bespoke Contract. The *Comprehensive Contract Conditions – ICT Products and Services* and the Modules should be used as the basis for developing a Bespoke Contract. Customers should follow their procurement guidelines, including approvals, for the development of a Bespoke Contract and it is recommended that legal assistance be obtained.

Guidance for the use of Supplier T&C is provided in *Guidelines for using Supplier Terms and Conditions.* A Customer's internal policies may provide further guidance.

It is recommended that the Customer determines its position on key legal issues (such as intellectual property, liability caps, insurances, security and escrow) as early as possible, ideally before an invitation to offer is released, as these issues can impact on price and the evaluation of potential suppliers. However, if key legal issues are unable to be determined at an early stage, it is recommended that the Customer clearly communicate to potential suppliers that some of the terms are subject to negotiation or consideration, following receipt of the offers and the outcome of the evaluation process.

Interpretation:

For the purposes of Part B:

- 'General Contract Conditions' refers to the *General Contract Conditions – ICT Products and Services*
- 'Comprehensive Contract Conditions' refers to the *Comprehensive Contract Conditions – ICT Products and Services*
- 'Details' refers to either the *General Contract Details – ICT Products and Services* and/or the *Comprehensive Contract Details – ICT Products and Services*, as appropriate in the context
- 'Products and/or Services' means ICT Products and/or Services and
- 'Contract' means a General or Comprehensive Contract.

1. Documents making up the Contract

The General and Comprehensive Contract Conditions set out the documents which make up the respective Contracts:

General Contract (Clause 1.3)	**Comprehensive Contract** (Clause 1.3)
A General Contract consists of the following: (a) the General Contract Conditions (b) the Details (excluding Additional Provisions and any document which the Details state will form part of the Contract or is otherwise expressly incorporated by reference in the Contract) (c) any Additional Provisions (d) any statement of work (e) any schedules (excluding documents which the Details state will form part of the Contract or are otherwise expressly incorporated by reference in the Contract) and (f) any documents which the Details state will form part of the Contract or are otherwise expressly incorporated by reference in the Contract.	A Comprehensive Contract consists of the following: (a) the Modules which are stated as forming part of the Contract in the Details (b) the Comprehensive Contract Conditions (c) the Module Order Forms which correspond to the Modules which are stated as forming part of the Contract in the Details (excluding any Additional Provisions and any document which the Details or Module Order Form states will form part of the Contract or is otherwise expressly incorporated by reference in the Contract (d) the Details (except the Additional Provisions and any document which the Details or a Module Order Form states will form part of the Contract or is otherwise expressly incorporated by reference in the Contract) (e) any Additional Provisions (f) any Statement of Work (g) any schedules (excluding documents which the Details or a Module Order Form states will form part of the Contract or is otherwise expressly incorporated by reference in the Contract) and (h) any document which the Details or a Module Order Form states will form part of the Contract or is otherwise expressly incorporated by reference in the Contract.

In case of conflict between the documents, the order of priority of the documents is as set out above from highest to lowest.

Three of the documents referred to in the above table are explained further below:

Additional Provisions - (clause 1.3(c) General Contract Conditions, clause 1.3(e) Comprehensive Contract Conditions)

The General and Comprehensive Contract Conditions and the Modules are accepted by government and industry as balanced, standardised terms to be used, without any amendment, for ICT procurements which are low to high risk. However, the General and Comprehensive Contract Conditions permit the parties to include Additional Provisions for a particular Contract with specific limitations.

It is expected that there will be minimal circumstances in which the parties will need to include Additional Provisions.

Under clause 1.4 of the General and Comprehensive Contract Conditions, any Additional Provisions take effect only to the extent that they are additional to, and do not detract from, the parties' rights and

obligations under the terms and conditions of the General or Comprehensive Contract Conditions and the Modules. If they do, they will not form part of the Contract.

However, under clause 1.4, any Additional Provisions included to enable the Customer to comply with applicable legislative and policy requirements are deemed not to detract from the parties' rights and obligations. This would mean that, for example, if a Customer needs to comply with a policy developed for the benefit of small to medium enterprises (SME), which, in turn, required it to introduce SME reporting and associated obligations on the Supplier in the Contract, those additional obligations would not be regarded as detracting from the Supplier's rights or obligations.

Statement of Work - (clause 1.3(d) General Contract Conditions, Clause 1.3(f) Comprehensive Contract Conditions)

If, during the Contract, a Customer wants to buy further Products and/or Services, the parties can execute a statement of work which incorporates additional Products and/or Services into the existing Contract.

The additional Products and/or Services to be purchased under a statement of work do not necessarily need to be from the same category of the original Products and/or Services procured under the Contract. For example, if the Contract was originally for the procurement of Licensed Software, a Customer can purchase Hardware and Hardware Maintenance Services under a statement of work.

Where a Customer wishes to purchase a new category of Products and/or Services under a statement of work, then it should review the Contract as a whole. This is because the risk profile of the Contract may change, potentially substantially, depending upon the additional Products and/or Services being procured.

A Customer will also need to ensure that it complies with its procurement policies, delegations and approvals in adding Products and/or Services to an existing Contract.

Schedule 10 – Statement of Work template is designed for use with the Comprehensive Contract Conditions where a Customer wants to purchase further:

- Hardware
- Hardware Maintenance Services
- Licensed Software
- Software Support Services
- Developed Software and
- ICT Professional Services.

The Schedule can be adapted, as required, if further terms are required from the relevant Module Order Form, or if the Customer wishes to purchase other types of services which are not specified in the Schedule (such as As a Service, Managed Services, Integration Services or Telecommunications Services). In completing the template statement of work, the Customer should refer to the corresponding Modules and Module Order Forms to ensure that the statement of work appropriately captures all details necessary to appropriately describe the additional Products and/or Services and the Customer's requirements.

Once the statement of work is signed by both parties, it forms part of the Contract, and includes the terms of the applicable Modules which correspond to the additional Products and/or Services being procured.

Schedule 10 can also be used, with modifications, for a statement of work issued under a General Contract, where required.

As this document is lower in the contract hierarchy than the General or Comprehensive Contract Conditions, Modules and Additional Provisions, any term in the statement of work which conflicts with the terms in those documents, will not apply.

Incorporated Documents - (clause 1.3(f) General Contract Conditions, clause 1.3(h) Comprehensive Contract Conditions)

Contracts are often made up of multiple documents, many of which are incorporated by reference. Clause 1.3(f) of the General Contract Conditions and clause 1.3(h) of the Comprehensive Contract Conditions cater for these documents.

They provide that the Contract includes:

- documents which are stipulated in the Details (or, in the case of the Comprehensive Contract, a Module Order Form) as forming part of the Contract and
- other documents which are expressly incorporated by reference in any documents which form part of the Contract.

These documents are lowest in the contractual heirarchy set out in clause 1.3(f) of the General Contract Conditions and clause 1.3(h) of the Comprehensive Contract Conditions.

For a document to be incorporated by reference in the Contract, it needs to be expressly referred to in one of the documents which make up the Contract (for example, referred to in a Schedule). If the parties merely attach a document to a Contract without expressly referring to it in one of the Contract documents, it will not be incorporated by reference and will not form part of the Contract.

To the extent possible, it is recommended that all documents which fall under clause 1.3(f) of the General Contract Conditions or clause 1.3(h) of the Comprehensive Contract Conditions are stipulated in one consolidated location, even if they are also referred to in another document which forms part of the Contract. This will increase certainty as to the documents which make up the Contract, rather than requiring a review of all documents to check for references to other documents. The Details contains an item which allows the parties to list all documents.

It is strongly recommended that a document hierarchy be specified to identify which of the documents which fall under clause 1.3(f) of the General Contract Conditions or clause 1.3(h) of the Comprehensive Contract Conditions should govern in the event there is inconsistency between the terms of those documents.

For certainty, it is also strongly recommended that all documents which are expressly incorporated by reference are attached to the Contract as annexures. Although this may have the effect of creating a sizeable physical document, particularly for signing by the parties, it will provide greater certainty as to the actual terms of the Contract.

2. Requirements and Specifications

It is very important to have a sufficiently detailed description of the Products and/or Services the Supplier is required to supply under the Contract to ensure there is certainty as to what the Supplier is required to deliver. If this does not occur and the Supplier or the Deliverables fail to perform as expected, it may be difficult for the Customer to assess whether the Supplier has complied with its obligations.

Requirements

The General and Comprehensive Contract Conditions allow for the inclusion of Requirements for the provision of the Deliverables and the Supplier's performance obligations.

Under the General and Comprehensive Contract Conditions, 'Requirements' is defined as '*the standards, Specifications and other requirements for the Deliverables and the performance of the Supplier's obligations under the Contract, which are set out in the Contract*'.

Specifications

Specifications are a subset of the Requirements with which the Deliverables and the Supplier must comply.

Under the General and Comprehensive Contract Conditions, 'Specifications' is defined as:

(a) for Products, Services and Deliverables, the requirements set out or referred to in the Details (for a General Contract) or Order Documents (for a Comprehensive Contract); and
(b) for Licensed Software, Hardware and As a Service, includes any published specifications of the Supplier or a third party manufacturer or supplier relating to the Licensed Software, Hardware and As a Service (as applicable).

'Specifications' in (a) need to be set out or referred to in the Details (for a General Contract) or Order Documents (for a Comprehensive Contract). Order Documents is defined as the Details, any schedule, Module Order Forms and any document which the Details or a Module Order Form state will form part of the Contract or is otherwise expressly incorporated by reference in the Contract.

'Specifications' in (b) include published specifications of the Supplier or third parties (such as a manufacturer) for Licensed Software, Hardware or As a Service.

There is considerable risk in referring in the Contract to published specifications (which, for example, feature on a Supplier's website) as they often change over time. It is recommended that the published specifications are attached to the Contract and the date of the published specifications is specified in the Contract documents.

In addition, a Customer may want to consider where the published specifications will fall within the order of precedence of the various documents which together form the Specifications. For example, a Customer may want to ensure that the Supplier's standard specifications are low in the Specifications hierarchy because the Customer's requirements often extend beyond the Supplier's standard offering.

General guidance for Requirements and Specifications

In effect, there is little practical difference between the Requirements and the Specifications, especially as the term Requirements is defined to include the Specifications. A Customer should not be concerned about separately specifying the Requirements and the Specifications. Instead, the Customer should simply ensure that all of its requirements are accurately and comprehensively detailed in the Contract, irrespective of whether they technically fall within the meaning of Requirements or Specifications.

There are specific prompts in the Details (for a General Contract) and the Module Order Forms (for a Comprehensive Contract) for Requirements and Specifications to be incorporated or referred to for each category of Products and/or Services being procured by the Customer.

However, Requirements and Specifications can be incorporated or referred to in any of the documents which make up the Contract (other than the Conditions or the Modules). Any terms which, by their nature, fall within the meaning of Requirements or Specifications will form part of the Requirements or Specifications, regardless of where they are located in the Contract.

How the Requirements or Specifications are incorporated will affect the priority which they are given under the contractual hierarchy if their terms are inconsistent with the terms in another Contract document.

- In the case of a Comprehensive Contract, if the Requirements or Specifications are incorporated in a Module Order Form, they will be given the third highest priority in the hierarchy (being the highest possible priority for documents of that nature) pursuant to clause 1.3(c). If, however, the Module Order Form merely refers to an annexed Requirements or Specification document, they will be lower in the hierarchy if there is an inconsistency with terms in a document which is higher in the contract hierarchy.
- In the case of a General Contract, if the Requirements or Specifications are incorporated into the Details, they will be given the second highest priority in the hierarchy (being the highest possible priority for documents of that nature) pursuant to clause 1.3(b). If, however, the Details merely refer to an annexed Requirements or Specifications document, they will be lower in the hierarchy if there is an inconsistency with terms in a document higher in the hierarchy.

Single source Requirements/Specifications

It is open to the parties to develop one comprehensive, self-contained Requirements or Specifications document. This could be based on the Customer's original stated technical, functional, operational and performance requirements as amended, whether increased or decreased, in accordance with the Supplier's offer, subsequent negotiations and mutual agreement between the parties. The creation of a stand-alone and consolidated Requirements or Specifications document will provide greater certainty for a Customer than defining them by reference to multiple documents.

However, even where a self-contained Requirements or Specifications document is developed, if there are other terms in the Contract which, by their nature, fall within the meaning of Requirements or Specifications, they will form part of the Requirements or Specifications.

Multiple source Requirements/Specifications

It is also open for a Customer to define the Requirements or Specifications by reference to multiple documents. For example, the Requirements or Specifications may be made up of:

- the Customer's Invitation to Offer (ITO)
- the Supplier's response to the ITO
- any mutually agreed requirements or specifications prepared during the offer evaluation and contract negotiation process
- the Supplier's standard, published specifications for the ICT Products and/or Services and
- other documents which are intended to be prepared and agreed following the commencement of the Term of the Contract (e.g. Bespoke Documentation such as various designs and plans).

In those circumstances, it is recommended that the Customer specify the order of precedence of those documents which set out the Requirements or Specifications. This can be stipulated in the Details.

It is recommended that the Customer carefully reviews all documents which are to form part of the Specifications or Requirements to make sure that they do not include any terms which affect the parties' rights and obligations. It is recommended that, where possible, the Requirements or Specifications are restricted to description of the functional, operational, technical and performance requirements of the Products and/or Services and the Supplier's obligations.

3. Intellectual Property Rights (IPR)

Intellectual property covers the wide range of intangible property that is the result of investment in the creative and intellectual efforts of individuals and organisations. Intellectual Property Rights (IPR) include all copyright, trademark, design, patents, semi-conductor and circuit layout rights and other proprietary rights, and any rights to register those rights in the world.

The owner of IPR in Material has the ability to exercise a number of rights in relation to that Material, including the right to:

- use the Material
- modify or develop the Material
- assign IPR in Material
- supply goods or services using the Material
- license others to use, or to exercise any of the owner's other rights in, the Material (directly or through distribution or other intermediaries) and
- mortgage or grant other security interests in it.

IPR may be valuable assets and their treatment in a Contract can have a significant bearing on the costs payable by a Customer.

Guidance on the management of IPR in material is contained in the *Queensland Public Sector Intellectual Property Principles*.

Under the *Financial and Performance Management Standard 2009*, Customers are required to manage their assets (including their IPR) appropriately. As such, each government agency is responsible for the day to day management of the IP it develops, owns or uses, in accordance with applicable legislation, the IP principles and other relevant policies.

In ICT contracts, material in which IPR vest tends to be software programs that are developed and/or modified to suit a particular client application or in written documents created for or on behalf of a Customer (such as reports, plans, designs and drawings developed by a Supplier and Supplier documented service processes). Any IPR in Customer Data is, at all times, owned by the Customer under the General or Comprehensive Contract Conditions.

The General and Comprehensive Contract Conditions distinguish between the three components of Material in which IPR subsist:

- **Pre-Existing Material**

  This is defined as all Material which existed at the Contract start date or which is developed independently of the Contract and includes adaptations, translations or derivatives of that Pre-Existing Material. It does not include Third Party Material, Licensed Software or As a Service.

  The parties can specify in the Details the Material which is to be included as Pre-Existing Material.
- **New Material**

  This is defined as all Material that is created, written, developed or otherwise brought into existence by or on behalf of the Supplier for the Customer in the course of the Supplier performing its obligations under the Contract. It includes the Material specified in the Details. It does not include any Pre-Existing Material, Third Party Material, Licensed Software and As a Service.
- **Third Party Material**

  This is defined as all Material in which the IPR is owned by a third party. It includes Material which

the parties specify in the Details as Third Party Material. For the Comprehensive Contract, it does not include Third Party Software. Module 2 deals with the Customer's licence rights in relation to Third Party Software.

Pre-Existing Material

In the General and Comprehensive Contract Conditions, all IPR in Pre-Existing Material remain vested in the party that owns the IPR and any adaptation, translation or derivative of that Pre-Existing Material vests in, or is transferred/assigned to the owner immediately on creation.

The Supplier grants a licence to the Customer to exercise all IPR in any of its Pre-Existing Material which is incorporated into a Deliverable for:

- the purposes of using, supporting and/or modifying that Deliverable in the course of the Customer's functions or activities and
- such other purposes specified in the Details.

The licence granted to the Customer in relation to the Supplier's Pre-Existing Material which is incorporated into a Deliverable is:

- ***irrevocable***
  the Supplier cannot terminate the licence rights granted
- ***unconditional*** *(subject to that licence)*
  the Supplier imposes no conditions on the licence except for the conditions in that clause
- ***perpetual***
  the licence is granted for an indefinite period (i.e. in perpetuity, not a set term or for the contract period)
- ***royalty free***
  the Supplier requires no payment for the licence
- ***non-exclusive***
  the Supplier can grant others a similar licence
- ***worldwide***
  the Customer can exercise the rights anywhere in the world
- ***transferable***
  the Customer can transfer its licence rights to another party (such as another government department) or agency
- ***sub-licensable*** *to specific persons*

  the Customer can sub-licence its rights to various entities, being any Department, Public Service Office, Hospital and Health Service, a contractor that is providing services to the Customer that includes the use of the Pre-Existing Material (but, in relation to a contractor, only for the duration of that service arrangement) or another entity specified in the Details. There may be a cost associated with this, if specified in the Details.

However, a Customer is not able to manufacture, sell or otherwise commercially exploit the Supplier's Pre-Existing Material, unless otherwise specified in the Details.

It is possible that a Deliverable (e.g. a procedures document, transition in or out plans or any Bespoke Documentation under clause 5.3 of the Comprehensive Contract Conditions) may incorporate Pre-Existing Material as well as New Material. If the Customer wishes to own all IPR in the Deliverable and have full rights

to exercise all IPR in that Deliverable, the Customer may wish to require the Deliverable to be developed without reference to any Pre-Existing Material.

New Material

IPR ownership in New Material that is incorporated into a Deliverable is negotiable and can be set out in the Details. It is possible to specify in the Details that a Customer owns IPR in some New Material and the Supplier owns the IPR in other New Material. For example, a Customer may own IPR in a particular Bespoke Documentation, but the Supplier may own IPR in a Developed Software that constitutes New Material.

Regardless of which party owns the IPR in the New Material, that party grants the other party a licence to that New Material.

Customers should think about which party will own IPR in New Material in the early stages of the procurement process. Customers may want to highlight in their invitation to offer documents which party will own the IPR. Alternatively, Customers may decide to invite potential Suppliers to tender prices against the two options – the final decision to be determined based on the costs and options tendered. By identifying the issue early on, Customers can streamline the evaluation and negotiation of tenders.

The following are examples of Deliverables which may constitute New Material under a Contract:

- Bespoke Documentation
- Developed Software
- Transition-In Plan
- Transition-Out Plan
- Procedures Manual
- Design Specification
- Detailed Specification
- Data Migration Plan and
- other Documentation Deliverables, including reports.

The Customer should carefully consider each Deliverable to be provided and decide whether or not the Customer needs to own the IPR in the material incorporated into that Deliverable to the extent that it constitutes New Material.

It is possible that a Deliverable (e.g. a procedures document, transition in or out plans or any Bespoke Documentation under clause 5.3 of the Comprehensive Contract Conditions) may incorporate Pre-Existing Material or Third Party Material as well as New Material. If the Customer wishes to own all IPR in the Deliverable and have full rights to exercise all IPR in that Deliverable, the Customer may wish to require the Deliverable to be developed without reference to any Pre-Existing Material or Third Party Material.

(a) Supplier owned New Material

The Queensland Public Sector Intellectual Property Principles provide that agencies may give consideration to adopting a position in favour of ICT suppliers owning IPR in new material which is developed under the Contract.

Allowing the Supplier to own the IPR in New Material may provide better overall value for money to the Customer, and help the Supplier to grow its business and the local economy. This, in turn, increases the customer base providing greater product stability. The potential flow on effect is that

Customers may be able to take advantage of better pricing and further development of the New Material by the Supplier.

Under the General and Comprehensive Contract Conditions, where the Supplier owns the New Material, the Customer is granted a licence in relation to New Material, which is identical to that provided in relation to the Supplier's Pre-Existing Material which is incorporated into a Deliverable (see above).

This position may not be appropriate if:

- the Customer needs an exclusive licence to the New Material (this is because the Supplier is free to grant licences to third parties). In that case, a Bespoke Contract would need to be developed
- the Customer intends to grant a sublicence to the New Material to a third party on commercial terms where the sublicensee may require the Customer to warrant that the Customer owns the New Material. In that case, the Customer would need to own the IPR in the New Material
- the Customer intends to exclusively commercialise the New Material
- the Customer wishes to be able to licence the New Material to the public or world at large on Creative Common terms. In that case, the Customer would need to own the IPR in the New Material to ensure that it can grant such a broad licence to third parties.

(b) Customer Owned New Material

If the Customer owns the IPR in the New Material, the Customer grants the Supplier a sublicensable, non-transferrable licence to exercise IPR in the New Material for '*any purpose of the Supplier'*. This will mean the Supplier has the right to use any New Material for any purpose, including commercial purposes, but it cannot transfer those rights to a third party.

The licence granted to the Supplier is subject to the Supplier removing any of the Customer's Confidential Information and Personal Information incorporated or contained in the New Material before exercising its licence rights.

(c) Other licensing options - Bespoke Contract

There may be rare occasions where the parties wish to specify a different model for IPR in New Material than is catered for in the General or Comprehensive Contract Conditions. If, for example, a Customer wished to exclusively exploit or commercialise the New Material, it may wish to have exclusive rights to the New Material or wish to consider joint IPR ownership. It is recommended that legal advice is obtained in these circumstances.

It should be noted that by owning all IPR in New Material without a licence to the Supplier, a Customer may pay high relative development costs and would prevent the future development of the New Material by the Supplier.

Third Party Material

If a Deliverable incorporates any Third Party Material (other than any Licensed Software or As a Service), the Supplier grants, or must procure the grant by the applicable third party, to the Customer a non-exclusive licence to exercise all IPR in that material:

- for the purposes of using, supporting and/or modifying the Deliverable incorporating the Third Party Material in the course of the Customer's functions or activities and

- for such other purposes specified in the Details,

subject to any terms and conditions (including licence terms and conditions) specified in the Details.

The Supplier may impose terms and conditions in relation to that licence, which may include third party licence terms and include costs. These will need to be specified in the Details. The Customer should carefully review these terms to ensure that it will get full use of the Deliverable which incorporates the Third Party Material as required.

4. Liability

The General and Comprehensive Contract Conditions:

- exclude the parties' liabilities for specific losses and
- permit the parties to limit their liabilities for some, but not all, losses.

Liability Exclusions

The General and Comprehensive Contract Conditions exclude each party's liability for:

- Consequential Loss in most circumstances and
- loss or damage to the extent the other party contributed to the loss or damage or failed to take reasonable steps to mitigate its loss.

Consequential Loss is defined as:

(a) indirect or consequential loss not arising as a natural consequence of a breach or other event giving rise to a party's liability

(b) any loss of profits, revenue, contract value, anticipated profit or damages for lost opportunity or

(c) loss of data but not where the data loss arises out of the Supplier's contractual obligation with respect to:

i. hosting, storing, migrating, converting, cleansing or backing up data in providing the Products or Services or

ii. Harmful Code[4].

Liability Caps

Limitation of liability clauses are used as a risk allocation tool to reduce or limit the financial obligations of the parties under the Contract. Limiting or capping liability is achieved by placing an upper limit on the liability a party would otherwise have under the Contract. The innocent party will be responsible for some of the losses in the event that the limit of liability is exceeded.

A common issue for Customers is misunderstanding the difference between liability caps, an indemnity and insurances. A liability cap simply represents an agreement where one party (e.g. the Customer) agrees to a limit on the liability of the other party (e.g. the Supplier) to the first party. An indemnity is an agreement where one party (e.g. the Supplier) agrees to accept the risk of loss or damage that the other party (e.g. the Customer) may suffer, whether or not the first party would otherwise be liable at law for that loss or damage. An indemnity may be capped (i.e. the liability under the indemnity is not unlimited).

[4] For example, clause 6.3 of the Comprehensive Contract Conditions requires the Supplier not to maliciously or negligently introduce any Harmful Code to the Customer's IT System. A number of Modules refer to Harmful Code in relation to the Supplier's warranties and defect rectification obligations. There are other obligations imposed on the Supplier in relation to Harmful Code in the General and Comprehensive Contract Conditions and Modules.

The fact that one party (e.g. the Supplier) is required to hold insurance for a particular type of liability does not, in and of itself, make that party liable to the other party (e.g. the Customer) for that type of liability. An agreement for one party (e.g. the Supplier) to maintain a certain level of insurance does not necessarily equate to an agreement to cap the liability of that party to the other party (e.g. the Customer) to an amount equal to that level of insurance. The requirement for a party (e.g. the Supplier) to hold insurance simply aims to reduce the risk that that party will not have sufficient financial resources to meet its liability under the Contract.

General Liability Cap

The General and Comprehensive Contract Conditions permit separate liability caps to be set for the Supplier and the Customer.

There is no default position in relation to the liability capping of the parties. The liability cap for each party is to be determined on a contract-by-contract basis and specified in the Details.

Specifying a liability cap does not necessarily mean that a party will be liable up to the maximum amount of that cap. A court will determine the extent of the damages that may be awarded in a particular case. However, a liability cap ensures that a party's liability in relation to losses which are covered by the cap will be no greater than the capped amount.

Liabilities that cannot be capped under the General Liability Cap and where Consequential Losses can be recovered

Under the General and Comprehensive Contract Conditions, there are some liabilities:

- which cannot be capped under the general liability cap and
- for which Consequential Losses may be recovered.

These are liabilities in relation to:

- personal injury, including sickness and death
- loss of, or damage to, tangible property
- an infringement of Intellectual Property Rights or Moral Rights
- any fraudulent act or omission of the Supplier or its Personnel
- any breach by the Supplier or its Personnel of a Confidentiality or Privacy obligation under the Contract.

These do not include the Supplier's liability for loss of, or damage to Customer Data in providing As a Service.

Supplier's Liability Cap for Customer Data loss or damage in the provision of As a Service

The Supplier's liability in connection with loss of or damage to Customer Data in providing an As a Service is dealt with separately from the general liability cap mentioned above.

If a cap is specified for the As a Service:

- it does not apply to the extent the Customer Data loss or damage was caused or contributed to by a fraudulent act or omission of the Supplier or its Personnel. Here, the Supplier's liability will be unlimited and
- Consequential Losses within the meaning of (a) and (b) of the definition of Consequential Loss (see above) are excluded in relation to a Supplier's liability for Customer Data loss or damage with one

exception. The Supplier remains liable for Customer Data loss or damage arising out of the Supplier's obligation with respect to:

- hosting, storing, migrating, converting, cleansing or backing-up data for the Customer in providing Products or Services or
- Harmful Code.

Where the Supplier is liable for those Consequential Losses (within the meaning of (a) and (b) of the definition of Consequential Loss) for Customer Data loss or damage, its liability will be subject to the As a Service liability cap.

Determining Supplier's liability cap

Determining the appropriate Supplier's general liability cap under the General and Comprehensive Contract Conditions, and the cap for Customer Data loss or damage in the provision of As a Service, requires a Customer to conduct a risk assessment, taking into account:

- the nature and circumstances of the particular transaction
- the Customer's assessment of the risks involved in the Products and/or Services and
- the potential losses the Customer may incur as a result of a Supplier's failure to perform, including any failure of the Products and/or Services.

It requires careful consideration and assessment of the likely events and consequences that may lead to damages where the Supplier may be held liable.

It is important not to confuse risk with contract value. Just because the price payable for the Products and Services is low does not mean that the risk of loss or damage the Customer may potentially suffer is also low. Conversely, not every high value contract requires a high value cap. For example, where the Customer is purchasing a large number of commodity PCs, the risk profile may be relatively low.

The Customer will need to consider any losses or costs it may incur if the Supplier fails to supply the Products and/or Services in accordance with the Contract. The circumstances in which it may be appropriate for the Supplier's liability to be capped at an amount equal to the price payable under the Contract will be rare. This is not an appropriate 'default' cap where the Customer is uncertain about how to determine the cap.

It is also important to note that, except to the extent that such liabilities are otherwise uncapped, any liability cap will apply to the Supplier's indemnities.

A Customer may want to obtain specialist assistance from its procurement or financial advisors in determining the Supplier's liability caps for its procurement, particularly if it is considered of higher risk.

Suppliers will generally try to keep liability caps low so it is important that the Customer carefully considers what is an appropriate liability cap for the ICT Products and/or Services being purchased. It is important to weigh up the risks of a loss (for example, due to the Deliverables not meeting the Requirements, data misuse, infringing third party Intellectual Property Rights or some other Supplier act/omission) against the possibility that the Supplier may increase its Prices to reflect increased risk if the liability cap is inappropriately high.

If the Supplier's liability is not capped, it will be unlimited. This does not necessarily mean that the Supplier will be liable for an extravagant amount. A court will ultimately determine the Customer's damages based on the individual circumstances. However, an uncapped liability may increase the costs of the procurement as the Supplier may build the increased risk of liability into the Price payable by the Customer. If the liability cap is unlimited or too high, it may also cause the Supplier difficulty in gaining approval to enter into the Contract.

If a Supplier's liability is capped at a low level, a Customer will need to ensure that it covers any exposure above that liability cap either with appropriate insurances held by the Customer (or though self-insurance) or by managing the risk in some other way. Otherwise, such risks, if realised, will be a liability that the Customer must bear.

The following are some issues for consideration when determining the cap for a Supplier's liability:

(a) Vary the liability cap over the Term to reflect changing risk profile

It may be appropriate and cost effective to vary the amount of the Supplier's liability cap for different stages of the procurement. For example, a Customer may want to consider stipulating different liability caps for:

- the implementation/design phase of a project
- the initial operation phase of a project and
- the remaining duration of the project once the services have been in successful operation for a significant period,

to reflect the changing risk profile of the parties at each stage of the project. There may be different liability caps for non-recurrent services (set piece of work which needs to be delivered) than those for annuity services (where fees are paid annually).

(b) Liability Cap Models

In capping liability, various liability cap models can be used, being:

- a specific dollar amount (excluding GST)
- a multiple of the "Price payable" (however, this is not generally recommended – see below)
- the greater of a specific dollar amount and the multiple of the Price payable or
- another liability cap model.

It is generally recommended that capping liability to a multiple of the Price payable under the Contract should not be used unless the Customer is able to determine the total Price payable under the Contract. This is unlikely to be the case where the Price for the Service depends on user consumption.

Often there is no relationship between Price and the potential liability that a party will be exposed to. A low Price payable under the proposed Contract does not necessarily mean that the risk of loss or damage the Customer may potentially suffer is also low. Therefore, where the level of risk has no relation to the Price, it would be inappropriate to tie the cap to the Price or a multiple of the Price.

If the multiple of a 'Price payable is used, it will be necessary to determine the period of the Contract in which the payments of the 'Price payable' will be included. For example, should the liability be capped up to the Price payable to the Supplier:

(i) at the time of the event giving rise to the liability?
(ii) up to the end of the Contract year in which the liability arose?
(iii) in the 12 months before the time of the event giving rise to liability?
(iv) for the full duration of the Term?
(v) for the full duration of the Term plus any extension periods?

If liability is capped as per (i), (ii) or (iii) above and an event giving rise to liability arose early in the Term, very little money will be payable by a Customer to the Supplier. This will mean that the Supplier's liability cap for any event which occurs early in the Term will be low, unless the Customer was required to make significant up-front payments. Conversely, if the event giving rise to liability arises near the end

of a lengthy Term, the Supplier's liability cap will be much higher. For these reasons, it is considered that the multiple of a 'Price payable' does not give certainty to either party.

It is generally recommended that a dollar value be specified or a combination of the higher of the multiple of the Price payable and a specified dollar value.

(c) Aggregate or Per Event

Customers will also need to consider the type of cap that will apply. This could be:

- a 'per event' cap (or 'per occurrence')
- an 'aggregate' cap
- an 'annual aggregate' cap
- a combined 'per event' and 'aggregate' cap.

A 'per event' cap provides scope for a refresh of the value of the cap if more than one breach occurs during the Term.

> *E.g. The liability of the Supplier under the Contract is limited to $xxxx on a per-event basis.*

An 'aggregate' cap limits the total Supplier's liability under the Contract regardless of the number of breaches.

In this model, the Customer should consider the events that could lead to liability by taking into account the duration of the Contract, the number of Deliverables due under the Contract and the measures or check points in place to ensure Deliverables will meet the Requirements. Contracts of a relatively low risk, short duration and which will involve close scrutiny by a Customer may be suitable for an 'aggregate' cap.

> *E.g. The liability of the Supplier under the Contract is limited to $xxx in the aggregate.*

An 'annual aggregate' cap limits the Supplier's liability under the Contract for the year, regardless of the number of events which give rise to liability which occur during that year. The benefit of this cap is that whilst it provides a Supplier with certainty in terms of its maximum liability exposure during a 12 month period, it allows for the liability cap to be refreshed each year. Care should be taken to ensure that the refresh date for each year is clearly specified (e.g. on each anniversary of the commencement date of the Term or upon the commencement of each new financial year (1 July to 30 June).

> *E.g. The liability of the Supplier under the Contract is limited to $xxx in the annual aggregate, which is refreshed on each anniversary of the commencement date of the Term [or 'on xxx each year of the Contract]*

A combination of 'per event' and 'aggregate' cap is possible, with an aggregate amount higher than the per event cap (e.g. the Supplier's liability under the Contract is limited to $5 million per event, but $20 million in the aggregate).

> *E.g. The liability of the Supplier under the Contract is limited to $xxx per event and $yyy in the aggregate.*

(d) Review Liability Caps over the life of the Contract

The Customer may also wish to review the adequacy of the liability caps set in the Contract:

- each time the Contract is varied

- if there is a Change to the scope of the Deliverables or PIPP which requires a Change Request to be issued by one of the parties
- if a statement of work is issued for the purchase of additional Products or Services, and
- when the Customer is considering exercising an option to extend the Term.

This is because the Contract's risk profile may change over the life of a Contract. Some new risks may have emerged and existing risks may disappear or vary in severity.

If the change in risk profile warrants revising the liability cap in the Contract, the Customer will need to negotiate with the Supplier to vary the Contract to amend the liability cap. A Customer may consider that the proposed revised liability cap is a pre-condition to its agreement to the variation, statement of work or for exercising an option to extend. If the parties are unable to agree to vary the Contract to incorporate the revised liability cap, the Customer may wish to consider its options in relation to the procurement, including whether to proceed with the variation, statement of work or extension of the Term.

Customer's liability cap

If the Customer's liability is not capped, the Customer's liability to the Supplier will be unlimited. The Customer should consider the likelihood and extent to which it could cause the Supplier loss under the Contract and seek to limit that with a liability cap.

If the Customer's liability is unlimited, or subject to a large liability cap, the Customer will need to check that it does not impact on the Customer's insurance (e.g. by voiding cover). Please contact your procurement or legal team for advice.

A Customer will need to consider the same issues as set out above in relation to determining a Supplier's liability cap.

5. Indemnity

An indemnity is an agreement where one party (e.g. the Supplier) agrees to accept the risk of loss or damage that the other party (e.g. the Customer) may suffer, whether or not the first party would otherwise be liable at law for that loss or damage. An indemnity may be capped (i.e. the liability under the indemnity is not limited).

The party which receives the benefit of the indemnity (e.g. the Customer) is still contractually obligated to take reasonable steps to mitigate its loss and the Supplier will not be liable to the extent that the Customer contributed to its own loss.

Supplier Indemnity

Under the General and Comprehensive Contract Conditions, the Supplier releases and indemnifies the Customer and its Personnel from and against losses suffered in connection with:

(a) a failure by the Supplier or its Personnel to comply with applicable Laws
(b) a fraudulent or willfully wrong act or omission of the Supplier or its Personnel
(c) a third party Claim that a Deliverable or its use in accordance with the Contract, infringes that party's Intellectual Property Rights or Moral Rights (IP Claim) (although there are some exceptions to this indemnity)
(d) a breach by the Supplier or its Personnel of a Confidentiality or Privacy obligation under the Contract or

(e) a third party Claim arising out of negligence of the Supplier or its Personnel in performing the Supplier's contractual obligations.

The General and Comprehensive Contract Conditions contain provisions that set out which party is to handle settlement negotiations or litigate a third party Claim.

If the Supplier's liability is capped in the Details, its obligation to indemnify will also be subject to that cap. Note that, in relation to Customer Data loss or damage for As a Service, the Supplier's obligations to indemnify for (a) and (d) above, where the loss or damage was caused by a privacy or confidentiality breach, is subject to that separate liability cap (if any) as specified in Module 3 (for a Comprehensive Contract) or in item 20 of the General Contract Details (for a General Contract).

Customer Indemnity

The Customer is not required to provide an indemnity under the General or Comprehensive Contract Conditions.

6. Insurances

Insurance protects the Supplier if there is an occurrence which gives rise to a claim. It can improve a Customer's chances of being able to enforce an award of damages against the Supplier, if the award of damages might not otherwise be capable of being paid by the Supplier (i.e. if payment would send the Supplier into insolvency). For this reason, insurance is particularly important if a Customer considers that the Supplier may not have sufficient assets to meet an award of damages.

The fact that the Supplier is required to hold insurance for particular types of losses does not of itself make the Supplier liable for those types of losses. It will still be necessary to establish the Supplier's liability under the Contract or at law (e.g. for breach of the Contract). The level of insurance required to be held by the Supplier does not necessarily equate to the cap on the Supplier's liability under the Contract. The maintenance of insurance by the Supplier simply provides a Customer with a degree of comfort that the Supplier may have the financial ability to meet its potential liability under the Contract.

A Customer has no direct right to access an insurance payment made under an insurance policy. The Contract merely requires the Supplier to hold certain insurances. If the Customer brings an action or claim under the Contract against the Supplier, the Supplier may claim on its insurance. The Customer cannot compel the Supplier to make a claim on its insurance.

A Customer needs to take reasonable steps to ascertain whether the Supplier's contract of insurance with its insurer covers the Supplier for all Customer claims which may arise out of, or result from, the Supplier's supply of Products and/or Services under the Contract (whether these services are performed by the Supplier, or its Personnel for whose acts it may be liable).

Whether an insurer will accept a Supplier's claim will depend on what is covered by the policy and whether the Supplier has complied with the insurance policy. If the particular loss is excluded or if the Supplier has not complied with the policy, the insurer may reject a claim. For this reason, it is prudent for a Customer to not merely rely on the Supplier's maintenance of insurances as the sole measure to manage risk under the Contract.

The General and Comprehensive Contract Conditions allow a Customer to specify:

- the types of insurances the Supplier must take out and maintain
- the levels of insurance to be obtained

- the duration in which ‘claims made’ insurance policies are to be maintained after the end of the Term and
- whether the Supplier can be self-insured.

Under the General and Comprehensive Contract Conditions, for insurance which is provided on a ‘claims made’ basis, the minimum period for which the Supplier is required to maintain insurance is four years after the Contract ends. If the Customer requires a different period, this should be specified in the Details. In Queensland, a contractual or tortious claim must be commenced within six years from the date on which the cause of action arose. A Customer may wish to extend the default period for the maintenance of a Supplier’s ‘claims made’ insurance policies from four years to six years if the risk profile of the procurement requires it.

In the Comprehensive Contract Conditions, a Customer can specify what evidence it may require other than a certificate of currency. Further, if specified in the Details, the Supplier must notify the Customer of any exclusions and deductibles relevant to the insurance policies that it is required to have in place. It is recommended that the Customer specifies in the Details that it requires this, so as to be better informed of insurance coverage and, in particular, decide whether it is appropriate to enter into a contract with the Supplier and, if so, any appropriate risk mitigation strategies to adopt.

It is recommended that a Customer carefully reviews the Supplier’s certificates of currency or other evidence obtained, prior to entering into a Contract with the Supplier, to ensure that the insurance:

- is current
- covers the Supplier (some certificates may name multiple parties as ‘insureds’)
- identifies the Supplier’s occupation and/or activities which are covered by the policy
- covers the types of losses anticipated under the Contract
- provides for coverage up to the required amount
- does not contain significant exclusions which will substantially limit the insurance cover and
- is subject to reasonable/acceptable deductibles.

Insurance policies typically contain a range of terms that can impact on whether or not a claim may be made by the Supplier in particular circumstances. Those terms can have a significant impact on the effectiveness of the insurance policy from the Customer’s perspective.

The types of insurance cover

The most common forms of insurance requested by Customers are:

- Public liability insurance
- Products liability insurance
- Professional indemnity insurance
- Broad form liability insurance
- Cyber insurance
- Workers Compensation.

Most insurance policies run for a 12 month period.

In determining what insurances the Supplier must maintain, a Customer needs to consider the risks and which ones can be insured.

The following information is provided as a general overview of insurance. As mentioned earlier, a Customer does not exercise any direct rights over a Supplier’s insurance policies. A Customer will need to determine

what insurances and insurance levels are required to be maintained by the Supplier, taking into account the risks of the procurement and the terms of the Contract, including any liability caps applying to the Supplier.

Contact the *Queensland Government Insurance Fund* for further assistance.

(a) Public liability insurance

Under this type of policy, an insurer agrees to indemnify the Supplier for legal liability (up to the sum insured) owed to another person (e.g. the Customer) for loss or damage (such as property damage or personal injury) as a result of the Supplier's business activities, other than the Supplier's supply of products.

A public liability insurance claim is based on when the incident which gave rise to the damage occurred and not when the claim is made. So long as there was insurance cover during the period in which the injury or damage occurred, even if the claim is made after the policy has ended, the insurance policy should cover the claim.

Public liability policies (unlike product liability policies) ordinarily pay per occurrence during its term. Each legitimate claim, irrespective of how many, can normally be made against the policy up to the full limit of the coverage. However, it does not cover liabilities to third parties arising from the supply, manufacture or distribution of a product.

(b) Product liability insurance

This form of insurance policy is important where a Supplier is the manufacturer, importer and/or distributor of a product.

This policy covers the Supplier's liability for personal injury or property damage caused by a defect in a product which is imported, manufactured, distributed or otherwise supplied by the Supplier to a Customer. The policy also covers the liability of a Supplier for any loss or damage resulting from improperly performed work (i.e. completed operations insurance). The loss or damage could have been caused, for example, by:

- negligent design
- failing to adequately test
- failing to provide adequate instructions, warnings and labels
- failing to issue an adequate recall notice.

Product liability insurance coverage is usually limited in the aggregate, rather than per occurrence although the latter is possible. This means that any significant claim which exceeds the limit against the policy would exhaust the coverage of the policy until it is renewed (which is annually in most cases).

(c) Professional indemnity insurance or errors and omissions insurance

This policy covers a Supplier against the consequences of a breach of professional duty, particularly professional negligence, where that breach or negligence causes loss or damage to a Customer.

It is recommended that this form of insurance be required when a Customer is obtaining professional services (for example for a Comprehensive Contract, under *Module 7 – ICT Professional Services* and any ancillary services specified in Modules 1, 2, 3 and 4).

However, a Customer may also require this insurance where a Supplier is providing any advice as part of its engagement (e.g. helping to design a solution to meet the Customer's requirements).

Unlike public liability insurance policies, professional indemnity insurance policies are usually 'claims made' policies. This means that the policy will cover claims which are made during the policy period regardless of when the incident which caused the loss or damage occurs.

For example, if the act, omission or error leading to the damage occurs in 2014 but a Customer only notices and makes a claim in 2017, the policy which will cover the claim is the policy which is in place in 2017 (when the claim was made), not the 2014 policy in place when the act occurred.

The implications are significant because if the Contract was completed in 2014, the Supplier would only be able to access an insurance payment if it held professional indemnity insurance in 2017.

Accordingly, where a Supplier is providing professional services, it is important that the Contract requires the Supplier to obtain, hold and maintain professional indemnity insurance not just for the Term, but for a period of time (e.g. 4 - 6 years) after the Contract has been completed.

Under the General and Comprehensive Contract Conditions, the default period of time in which the Supplier is required to maintain 'claims made' policies is four years. However, there may be occasions where it is appropriate for these types of insurances to be held for the period commensurate with the statutory limitation period in Queensland for claims for breach of contract and tort. As mentioned earlier, the statutory limitation period in Queensland for these types of claims is six years. Extending the default period of time from four years to six years may be considered where the risk profile of the procurement justifies it.

(d) Broad form liability insurance

This form of insurance combines a number of policies under a single policy and usually includes public liability and product liability insurances. However, care should be taken to check that these types of insurance are necessarily covered, as policies may sometimes exclude particular types of standard cover in Broad Form policies.

(e) Cyber insurance

Cyber insurance is a type of insurance which is designed to protect against risks relating to information technology infrastructure and activities, including internet based risks and cyber incidents. Risks of this nature are often excluded from the other types of general liability policies commonly required to be held and maintained by Suppliers or at least are not specifically defined in those policies.

The coverage varies but may include indemnifying the Supplier:

- against its losses in relation to data destruction, extortion, theft, hacking and denial of service attacks
- for losses sustained by the third parties (including the Supplier's clients) caused, for example, by the Supplier's errors and omissions or failure to safeguard data; and
- for the Supplier's internal costs of having to respond to a data breach, including post-incident public relations and investigative expenses and loss of management time to rectify data loss or misuse.

As what is covered in a cyber insurance policy may vary, it is best to make enquiries so as to ensure that the insurance which is obtained by the Supplier covers exactly what is required for a particular procurement. There is no benefit in requiring a Supplier to hold cyber insurance if it does not cover the loss or damage which the Customer is seeking to protect against.

Cyber insurance is particularly relevant to Contracts for As a Service and some Managed Services. In those instances, where the Supplier is responsible for holding or storing the Customer's data, cyber insurance should be considered.

Although increasingly popular, not all Suppliers will hold cyber insurance by default. Therefore, if a Customer requires the Supplier to hold and maintain cyber insurance, the Supplier may seek to pass on some or all of the Supplier's costs to the Customer, either directly or through an increased price for the Deliverables. The Customer will need to determine if the benefit of the Supplier holding cyber insurance outweighs the potential increased price.

(f) Workers compensation insurance

This form of insurance covers the medical expenses and loss of income of the Supplier's employees if they are hurt or injured in the course of conducting work-related activities.

As it is a legislative requirement for most Suppliers to hold Workers Compensation insurance, a Customer does not need a particular level of insurance.

The Details stipulate that Workers Compensation insurance is '*as required by law*'.

Level of insurance

As a way of managing risk, a Customer needs to require the Supplier to maintain adequate levels of insurance which is commensurate with the risks of a specific Contract. The level of insurance required will ultimately depend on an assessment of the likely risks.

Requesting an unnecessarily high level of insurance may result in increased costs in the Contract as the Supplier will build its costs associated with obtaining the additional insurance into the price payable by the Customer.

In determining what would be an adequate level of insurance for a specific Contract, a Customer should consider:

- What are the Products and/or Services being purchased?
- Who is likely to be injured or harmed and what is the likelihood of it occurring?
- What property could be damaged and how severely?
- What are the likely losses that might flow from a Product failure?
- Will there be a risk of loss or misuse of data?
- What are the likely losses that might flow from incorrect professional advice?
- Is the Deliverable a leading-edge solution or a simple rollout of standard and proven products, methodologies and processes?
- What are the costs of obtaining any additional insurance and would it be commercially available to the Supplier?
- What is the Supplier's maximum liability to the Customer under the Contract and what losses are uncapped?

See the *Queensland Government Insurance Information Fund* for further guidance.

Specific insurance for the Contract

In most cases, the Supplier's insurance policies cover all of its activities, including those supplied to other customers. If the insurance policies are subject to an aggregate limit, the insurance amount could be depleted by unrelated claims made by the Supplier's other customers during the policy year.

If the Supplier's policy has an aggregate limit, a Customer may want to consider requiring the Supplier to obtain an insurance policy to exclusively cover the Contract or project. However, that could be an additional cost for the Supplier which is likely to be passed on to the Customer.

Alternatively, a Customer may wish to require the Supplier to maintain a higher aggregate limit of insurance. This may also result in an additional cost for the Supplier, but it is likely to be less than the cost of obtaining a separate insurance policy.

A further alternative is to require the Supplier to provide security, such as financial security, for a specified amount.

7. Security

The General and Comprehensive Contract Conditions enable a Customer to require the Supplier to provide security.

Security is a contract risk management tool that can help protect a Customer from the Supplier's failure to perform its contractual obligations. There are two main types of security, being a performance guarantee and financial security.

The advice of the Customer's procurement, contracting, financial or legal advisors should be sought when considering if security should be requested and, for a financial security, in setting the appropriate value of the security.

Security is no substitute for considered judgments about the risks of a particular Contract and the capabilities and financial resources of the Supplier. As a guiding principle, a Contract should not be placed with a Supplier if there are reasonable doubts about its ability to comply with the Contract.

If a Customer considers that security may be relevant to a particular project, it is recommended that this be highlighted very early to suppliers, ideally at the invitation to offer stage. This is especially important if a Customer is considering requesting the provision of a financial security. In those instances, the Customer's invitation to offer should state that securities may be considered during the evaluation of suitable suppliers. This allows potential suppliers to consider the extra costs of obtaining a financial security, address process issues and more accurately price their tender response.

Performance Guarantee

A performance guarantee is a legal undertaking by a third party to make good on a failed contractual obligation. It is signed by an entity ('the guarantor'), which is often related to the Supplier, such as a parent or holding company, that has the ability and technical know-how to complete the obligations of the Supplier and financial means to meet the Supplier's liabilities under the Contract, if the Supplier fails to comply with its contractual obligations.

Schedule 7 – Performance Guarantee is a template performance guarantee. Under the template Schedule 7:

- if the Supplier fails to comply with its contractual obligations and the Customer calls on the performance guarantee, the guarantor is required to complete those obligations itself or causing them to be completed
- if the Supplier breaches any contractual obligation and fails to remedy the breach, which results in the Contract being terminated for default, the guarantor must indemnify the Customer to the full extent of the Supplier's liability to the Customer under the Contract and
- the guarantor must also pay the Customer on demand any sum which is due and payable by the Supplier to the Customer as a result of a breach or failure to comply with the Supplier's contractual obligations and which has not been paid by the Supplier to the Customer.

Financial Security

A financial security is an undertaking provided by a third party, usually by a bank, to make an agreed amount of money available to a Customer on the Supplier's failure to properly perform its contractual obligations where the Customer suffers loss or damage as a result. A Customer may directly claim against the financial security.

In considering whether to obtain a financial security, departments and statutory bodies will need to comply with the *Financial and Performance Management Standard* 2009 (Part 2, Division 6) (Standard) which is made under the *Financial Accountability Act* 2009 (Qld).

Schedule 6 – Financial Security has been developed for use where the security provider is an 'approved security provider' for the purposes of the Standard. Schedule 6 requires the approved security provider to unconditionally agree to pay on demand a sum to the Customer up to a maximum agreed sum.

Further information on the types of security to be obtained in accordance with the Standard can be found in the *Information Sheet 3.16 – Contract Performance Guarantee* in the *Financial Accountability Handbook*.

If financial security is to be obtained from an entity which is not an 'approved security provider' under the Standard, *Schedule 6 – Financial Security* would need to be modified. Legal assistance is recommended.

When to require security

The Customer may wish to consider requiring security where a number of the following elements are in place:

- there are concerns about the Supplier's financial viability
- there is uncertainty as to the adequacy of the Supplier's resources to deliver on time and to the required quality and standard
- the Supplier is dependent on specified Personnel, third parties or subcontractors to perform the Contract, particularly for licensing, technical know-how and prior experience which is essential to the Supplier's ability to perform the Contract
- the Customer is considering committing to a long term strategic relationship for the implementation of business critical Deliverables with a Supplier
- the Contract is high in value and/or risk or complexity
- the Supplier is required to make significant financial outlays without immediate prospect of payment (however, this may be able to be managed using staged payment arrangements) or
- the Supplier has little or no proven experience in providing the Deliverables.

It may not be appropriate where:

- the Customer is purchasing commercially available, low risk Products which can be easily sourced from alternative suppliers
- the purchase is solely for Licensed Software for which a large supply and support base exists and which can be easily licensed from alternative suppliers or
- the supply is for ICT Professional Services, particularly those for shorter term engagements on a time and materials basis.

A performance guarantee is only as good as the strength of the guarantor. A guarantor, while solvent, may not have the resources or capacity to take over the Contract, which might make the performance guarantee difficult to enforce. Furthermore, performance guarantees from overseas companies can also be difficult to enforce. The time and cost involved in seeking to enforce a performance guarantee against a foreign company may be outweighed by any potential benefit of successfully requiring that unwilling guarantor to comply.

If a decision is made to seek a performance guarantee, the following should be noted:

- Checks should be made of the guarantor's financial viability and its ability to take over the performance of the Contract. For example, whether the guarantor has any value, in terms of assets, cash or retained profits, whether its past performance indicates a positive trend and whether the guarantor would have the technical capability and necessary experience to perform the Supplier's obligations under the Contract.
- If a Supplier offers its own performance guarantee it should be checked by a lawyer to ensure it does not depart substantially from Schedule 7. In some instances, an organisation may offer to simply issue a 'letter of comfort' which may not have contractual force.
- The Customer should determine whether it will be expedient and practical to enforce the performance guarantee against the guarantor. If the guarantor is located outside of Australia, then the potentially substantial time and costs required to enforce the performance guarantee may mean that the performance guarantee is of questionable benefit to the Customer.
- If one or more of the directors is giving a performance guarantee (which would be in reality a personal performance guarantee), checks may be appropriate to determine whether the directors have sufficient resources to cover the performance guarantee.

There are sometimes significant costs to a Supplier in arranging a financial security for a Customer. In many cases, a Supplier will have difficulty providing a financial security, either because of its internal policies, the impact on its published accounts or the fact that it will need to have a similar amount of cash in its bank account to provide the financial security provider with the appropriate cross-indemnities.

Often the Supplier will seek to pass on some or all of the costs associated with obtaining and maintaining security to a Customer either directly as a separate price which is attributed to the financial security obligation or through an increased price for the Deliverables. The Customer needs to determine if the higher price is appropriate given the prospective benefit afforded by having access to the financial security if and when required.

The type and amount of any security to be required is a commercial decision and procurement or financial advice may be required.

A Customer may want to consider additional ways to manage a Supplier in addition to, or in place of a security.

8. Liquidated Damages

Clause 7.7 of the Comprehensive Contract Conditions permit a Customer to require a Supplier to pay liquidated damages if the Supplier fails to complete a critical obligation, called a LD Obligation, by the Due Date.

Liquidated damages is an amount fixed by the Contract which may be recovered by a Customer as a debt.

Liquidated damages is a substitute for damages which might otherwise be awarded by a court in cases of delay. By agreeing on liquidated damages, the parties agree at the outset the rate or how much damages will be payable upon the failure by the Supplier to meet a LD Obligation by the Due Date. They are the Customer's sole and exclusive financial remedy for the corresponding failure.

The advantage of a liquidated damages regime is that a Customer does not have to prove the loss that is suffered. If the sum stipulated as payable on breach is a genuine pre-estimate of the loss, it will be accepted as the amount payable without proof of the actual loss.

If the Customer wishes to introduce liquidated damages in a Comprehensive Contract, the Customer will need to determine the amount of liquidated damages which may be payable.

To be enforceable, liquidated damages must be a genuine pre-estimate of the loss, damage or expense that the Customer will suffer during the period in which liquidated damages are payable as a result of the Supplier not completing the LD Obligation by the LD Due Date. Liquidated damages which are not a genuine pre-estimate may constitute an unenforceable penalty.

The method for calculating liquidated damages is important in demonstrating that the damages claimed are based on a genuine pre estimate. In calculating liquidated damages, tangible costs in relation to project delay should be considered.

In the context of the procurement of an ICT solution, the following costs may be relevant to estimating a Customer's loss:

- fees to extend the continued provision, maintenance and support of the Customer's existing ICT solution
- fees to urgently implement an interim ICT solution if the existing ICT solution cannot be extended
- fees to establish a manual system as an alternative to the new ICT solution, including hiring and training casual staff to manually process or perform the functions of the new ICT solution, leasing office space for those staff and other costs associated with establishing a manual system
- costs incurred by the Customer in retaining personnel who are engaged to implement, test or operate the new ICT solution, but who are unable to commence performing their duties and
- internal project costs which will be incurred if the new ICT solution is not successfully delivered and operational by the LD Due Date.

The Details require the Customer to specify the calculation of the liquidated damages. This should be done in sufficient detail to be able to demonstrate that it was a genuine pre-estimate of the Customer's losses.

A Customer will also need to determine a LD Cap, which will be the monetary cap that may be payable by way of liquidated damages.

The calculation of liquidated damages and the LD Cap is a commercial decision and procurement or financial advice may be required.

9. Warranty periods

The General and Comprehensive Contract Conditions contemplate that Warranty Periods may be stipulated in relation to the provision of particular Deliverables, namely:

- Hardware
- Licenced Software
- Developed Software
- Deliverables provided in the course of the provision of ICT Professional Services
- the System provided pursuant to *Module 4 – Systems Integration* (for Comprehensive Contracts only).

The General and Comprehensive Contract Conditions and Modules 1, 2, 4 and 7 impose a number of obligations on the Supplier, which apply only during the applicable Warranty Period. These include various warranties and defect rectification obligations.

In determining a Warranty Period, take into account:

- the obligations imposed on the Supplier under the General or Comprehensive Contract Conditions or Module
- the period during which Defects are most likely to arise or be discovered in the Deliverables supplied
- the period in which the Customer requires the Deliverables to be free of all Defects; and
- the support and maintenance which is to be provided by the Supplier.

Ordinarily, a Customer's obligation to pay for support and maintenance services should not commence until the Warranty Period has expired because the Customer should receive the benefit of support services during the Warranty Period at no additional cost.

10. Data security and privacy

A Supplier may have access to or receive Personal Information, Confidential Information, Customer Data and other sensitive information (such as names, contact details, credit card details or health information about Customer personnel or customers) in the course of providing the ICT Products and/or Services to the Customer.

In particular, As a Service and Managed Services may involve the hosting and storage of information in data centres, some of which may be located overseas. In addition, that data is often accessed by the Supplier or third parties, sometimes from outside of Australia, as part of the provision of support services.

The General and Comprehensive Contract Conditions impose various obligations on the Supplier in relation to the handling and use of Personal Information, Confidential Information and Customer Data which it collects or accesses in connection with the Contract. This includes an obligation on the Supplier to comply with relevant provisions of the *Information Privacy Act 2009* (Qld).

Customers need to be aware of their privacy and data security obligations when transferring Personal Information into an As a Service environment. If privacy issues cannot be adequately addressed, it may not be appropriate to transfer Personal Information into an As a Service environment.

Due diligence

Notwithstanding the existence of various contractual protections in the General and Comprehensive Contract Conditions, it is recommended a Customer conduct data security due diligence on the Supplier as part of its evaluation of the Supplier's offering, particularly in relation to:

- the jurisdiction in which it will hold data and associated laws
- its information governance arrangements and
- its controls relating to software security, access security and network security.

This will assist a Customer to:

- select the appropriate Supplier
- ensure compliance with applicable legislation and policies and
- enable the Customer to identify and mitigate risks associated with a Supplier.

The Customer should review the Supplier's existing security protocols, security policies and any prior security audit reports to determine if the Supplier's existing arrangements are sufficient. If they are sufficient, then full and complete details of those existing arrangements should be specified in the Contract. This is to prevent the Supplier from downgrading its security arrangements following the commencement of the Contract.

In carrying out the due diligence, a Customer should, as a minimum, determine its requirements for:

- electronic security measures
- physical security measures
- selection of Supplier Personnel, including mandatory criminal history checks or other background checks
- access controls, including password protection
- encryption requirements, including when at rest and during transmission
- security protocols and
- the Supplier's compliance with the Customer's privacy policies and security protocols (if any).

Policy and legislative compliance

Customers will need to comply with applicable legislation and Queensland Government policies and standards which relate to the handling of information, data and records, including:

- *the Information Privacy Act 2009 (Qld)*
- *the Public Records Act 2002 (Qld)*
- *the Queensland Procurement Policy*
- *QGEA Policy - Procurement and Disposal of ICT Products and Services (IS13)*
- *Information Standard 18 – Information Security*
- *the Queensland Government Information Security Classification Framework (QGISCF)*
- *Information Standard 31 – Retention and Disposal of Public Records*
- *Information Standard 40 – Recordkeeping*
- *QGEA Policy - Information Asset Custodianship (IS44)*
- the Queensland Government Enterprise Architecture's ICT as-a service Decision Framework, which is made up of a range of documents to help a Customer to determine whether externally provisioned ICT services are appropriate. It includes:

- *ICT as-a-service: Decision Framework - Overview*
- *QGEA ICT-as-a-service policy* [5]
- *QGEA ICT as-a-service offshore data storage and processing policy and*
- *ICT-as-a-service risk assessment guideline.*

Information Standard 18 requires, among other things, all agency information assets to be assigned an appropriate classification and control in accordance with the *QGISCF*. The QGISCF requires agencies to determine the security classification which attaches to the type of information assets which will be handled by the Supplier in the course of the contract and the types of controls which will need to be imposed. *Information Standard 18* provides a starting point for determining a Customer's compliance with the obligation to protect Personal Information under Information Privacy Principle 4 (Storage and security of personal information) of the *Information Privacy Act 2009* (Qld).

Data held overseas

Entering into a Contract in which data is held offshore can have additional risks. It is recommended that a Customer consider:

- the nature of the legal powers to access or restrict access to data
- complications arising from the fact data may be simultaneously subject to multiple legal jurisdictions
- the lack of transparency and reduced ability to directly monitor operations and
- the applicability of foreign legal powers in other countries.

There are some special considerations where it is proposed that data be transferred outside of Australia:

- The General and Comprehensive Contract Conditions prohibit a Supplier from transferring Personal Information outside of Australia without the Customer's prior written consent. Accordingly, Customers may need to consider whether to permit the transfer of Personal Information outside of Australia, either during contractual negotiations or during the Term.
- The *ICT as a service offshore data storage and processing policy*, which is part of the QGEA's ICT as a Service Decision Framework, prohibits the offshore storage of certain types of data classified under the QGISCF.
- Under section 33 of the *Information Privacy Act 2009 (Qld)* a Customer (which is subject to that Act) can only transfer Personal Information outside of Australia in certain circumstances.

  The Office of the Information Commissioner Queensland website contains information about the requirements of the *Information Privacy Act 2009 (Qld)* in relation to transferring personal information outside of Australia, including its guideline *'Sending personal information out of Australia'* and *'Cloud Computing and the Privacy Principles".*

[5] For the purposes of the QGEA policy *'ICT as a service policy'*, which should be read in conjunction with the above mentioned Framework, '*ICT as a service'* includes all forms of externally provisioned ICT services, from managed services to cloud services.

11. Where the Supplier is a Reseller (Comprehensive Contracts only)

Modules 1, 2 and 3 cater for circumstances where the Supplier is a Reseller. A Supplier can be a Reseller of Hardware or Hardware Maintenance Services (in Module 1), Licensed Software or Software Support Services (in Module 2) or As a Service (in Module 3).

Under these Modules, the Reseller provides, or helps facilitate the provision of the Products or Services of a third party (called a 'Third Party Provider').

Third Party Provider is defined differently for each Module. Third Party Provider means:

- for Module 1, the manufacturer of the Hardware or Supported Hardware (as applicable)
- for Module 2, the owner of the Intellectual Property Rights in the Licensed Software or Supported Software (as applicable)
- for Module 3, the owner of the Intellectual Property Rights in the As a Service.

Modules 1 and 2 provide for two different types of Reseller arrangements, whereas Module 3 only provides for one type of arrangement.

Customers need to assess the risk profile for each type of Reseller arrangement for their particular procurement. In both types of arrangements, a Customer's rights are reduced from those in the Comprehensive Contract Conditions and the applicable Module. It is recommended that legal assistance be obtained where the Customer is procuring via a Reseller.

(a) Reseller is responsible for the Supply

In this first type of Reseller arrangement, which is available under Modules 1 and 2, the Reseller is responsible for supplying the Products or Services, in accordance with the Comprehensive Contract Conditions and the applicable Module. However:

- the Reseller does not provide certain warranties in relation to the Products or Services and
- in the case of Hardware, Licensed Software and Software Support Services, the Reseller does not assume responsibility for Defect rectification.

In this scenario, the Customer's primary contractual relationship is with the Reseller. The Customer may receive the benefit of any Third Party Provider warranties in respect of the Products or Services (if there are any). The Reseller is required to ensure the Customer receives a copy and is fully advised of, and approves of any Third Party Provider warranties before buying the Products or Services.

It is recommended that a Customer carefully reviews the terms of any proposed warranty to see what it covers before entering into the Contract.

(b) Where the Reseller facilitates the Supply

In this second type of Reseller arrangement, the Reseller provides '*reseller services which facilitate the supply*' of the Products or Services from the Third Party Provider. This is available under Modules 1 and 2, and is the only As a Service Reseller scenario available under Module 3.

Engaging a Reseller under this scenario brings a higher degree of risk than the first scenario because:

- the Customer enters into a separate contract with the Third Party Provider for the supply of the Products or Services and
- a number of provisions in the Comprehensive Contract Conditions and the Module are deemed not to apply to the supply of the As a Service by the Reseller.

I. Contract with Third Party Provider

The contract which the Customer will need to enter with the Third Party Provider will be separate from the Contract which the Customer enters into with the Reseller. However, the terms of that contract are not prescribed or governed by the Comprehensive Contract Conditions or the Modules.

It is common in a Reseller arrangement that the terms of the contract with the Third Party Provider are not negotiable and the Reseller is required to pass through the terms of the Third Party Provider's contract to the Customer.

The Customer may wish to consider the *Guidelines for using Supplier Terms and Conditions,* developed to assist a Customer determine whether a Supplier's terms and conditions are acceptable for a procurement. It should be noted, however, that these were designed for low value – low risk procurements.

It will be necessary to ascertain, among other things, whether the Third Party Provider will provide any warranties or support services or carry out defect rectification. It will also be necessary to check whether the terms of the Third Party Provider's contract can be unilaterally changed by the Third Party Provider. If so, the Customer will have no certainty as to the terms of its contract with the Third Party Provider.

The Customer should consider, based on the risk and value of the procurement, whether the Third Party Provider's terms and conditions are acceptable. If not acceptable, negotiation of terms (more aligned with the General or Comprehensive Contract Conditions and Modules) or re-assessment of the procurement may need to be considered.

II. Contract with Reseller

In this scenario, the Customer also enters a Comprehensive Contract with the Reseller but a number of terms in the Comprehensive Contract Conditions and applicable Module will not apply.

Firstly, clause 4.1(d) of the Comprehensive Contract Conditions does not apply, which means that the Reseller is not obliged to ensure that the Deliverable which is the subject of the Module is of a high quality, professional standard and is fit for its usual purpose and meets the Requirements.

The terms of each Module which do not apply vary depending on the Module but generally exclude warranties and obligations to rectify Defects. This is because the Supplier (as Reseller) is facilitating the supply of the As a Service by the Third Party Provider and so the Supplier cannot be responsible for a number of the operative obligations in the applicable Module for the supply of the As a Service.

It is recommended that a Customer carefully reviews the terms of the Module to identify and understand which clauses in the Module do not apply. The Customer should then review the Third Party Provider's contract to identify equivalent terms, if any, which may apply instead of the standard Module terms.

In the second Reseller arrangement, as a Customer's rights against the Reseller under the Comprehensive Contract Conditions and Modules are reduced and, as the proposed contract with the Third Party Provider will need to be considered on a case by case basis, it is recommended that legal advice be sought.

In both Reseller scenarios (a) and (b) above, the Reseller must co-ordinate and manage any warranty claim or support services that is to be provided by the Third Party Provider and co-ordinate payment of any monies under the contract with the Third Party Provider.

Careful consideration must be given to the suitability of contracting under a Reseller arrangement, including the risk and value add from such an arrangement.

12. Escrow

The Comprehensive Contract Conditions enable a Customer to specify if an escrow arrangement is required.

If escrow is required, the Details require the Supplier to:

- arrange for an escrow arrangement be entered into, substantially in the form of the *Schedule 5 – Escrow Agreement,* or some other form acceptable to the Customer or
- allow the Customer to become a party to an existing escrow arrangement.

An escrow arrangement is an agreement between the Customer, Supplier and a third party called an escrow agent (often a commercial escrow agent or a bank). Under an escrow arrangement, the Supplier is required to deposit escrow materials (usually software source code and/or object code and supporting material) with the escrow agent.

The escrow agent can release the escrow materials to a Customer in certain circumstances, such as on the Supplier's insolvency or the Supplier's failure to maintain or support the Deliverables as required in the Contract. The terms of the release are specified in the escrow arrangement, not in the Contract.

The release of the escrow material to a Customer in these circumstances enables the Customer to use the materials for the purposes of the Contract. For example, it may be able to host or develop the software elsewhere in order to ensure continuity of service as specified in terms of the escrow arrangement.

An escrow arrangement is often used as part of a Customer's business contingency plan to protect a Customer's access to Licensed or Developed Software should the Supplier go into administration or otherwise fail to maintain and update the Software as required in the Contract.

Escrow may be required:

- for software development or
- for some licensed software where there is potential for the Supplier to go out of business or to dispose of the rights to maintain or licence the software.

The terms of the escrow arrangement will need to be negotiated and agreed by the Customer, the escrow agent and the Supplier. A Customer may wish to find an escrow agent which will agree to the terms of the template *Schedule 5 - Escrow Agreement* rather than using the escrow agent's escrow agreement or the Supplier's escrow agreement.

To establish an escrow arrangement, a Customer will need to:

- determine whether it needs escrow of the source or object code in Pre-Existing Material (e.g. existing software code owned by the Supplier) or New Material (e.g. new software code developed by the Supplier for the Customer, but the Intellectual Property Rights is owned by the Supplier) or both

- complete *Schedule 5 – Escrow Agreement* (or another form which is acceptable to the Customer) and
- determine the cost of establishing and maintaining the escrow arrangement (if any or indicate if the cost is included in the Licensed Software or Software Support Services charge).

There are two major risks with escrow arrangements:

- the Supplier may not keep the materials deposited with the escrow agent up-to-date. To minimise the risk, the Customer may need to obtain deposit reports from the Supplier and/or test the deposited materials to verify the report (e.g. monthly, annually). Both may have a cost attached.
- even if the materials are kept up to date, a Customer may not have the expertise to use the material on their release.

If the software can be obtained from an alternative service provider or substituted by another software product at the same or a relatively low additional cost, then escrow may not be appropriate, given the costs in both time and money involved in establishing an escrow arrangement.

Some Suppliers may have pre-existing escrow agreements where these agreements can have multiple parties. Where a Supplier has such an arrangement in place, it may be willing to allow the Customer to join the pre-existing agreement. A Customer would need to check that the pre-existing escrow agreement covers the relevant escrow materials and review the terms of that pre-existing escrow agreement to ensure that they are acceptable to the Customer.

Customers should seek legal advice if considering an escrow arrangement.

Part C: Risk management in ICT contracting

When entering into a contract for ICT Products and/or Services, it is important to understand the risks involved, allocate the management of the risks to the most appropriate party and take reasonable action to eliminate or reduce the risks to an acceptable level.

Undertaking a risk assessment can assist a Customer to determine the contract type to use under the Framework and the key positions to adopt in a contract in order to allocate and manage risk. It may assist, for example, in determining:

- liability caps
- the levels and types of insurance the Supplier is required to maintain during the Contract
- whether to permit a Supplier to subcontract obligations to a third party
- whether to permit a Supplier to offshore Customer Data or Personal Information or confidential information
- whether to require a performance guarantee and/or financial security
- whether to require a Supplier to deposit material into escrow with an escrow agent.

Some of the typical risks inherent in ICT procurement are:

- Supplier insolvency
- late delivery or non-delivery
- third party intellectual property rights infringement claims
- failing to deliver in accordance with the Requirements
- integration problems
- failure to maintain and support
- data loss or misuse
- availability disruptions
- failing to appropriately define roles/responsibilities of both parties
- poorly drafted Requirements and Specifications
- poor contract management, particularly where minor performance issues are ignored or otherwise allowed to accumulate until they become critical or insurmountable problems
- failing to monitor the Supplier's performance of its obligations
- failing to identify appropriately Authorised Representatives of both parties who are responsible for managing the Contract and
- failing to enforce the Supplier's performance and obligations.

There are various tools that may assist in identifying the type of contract to use and the legal and risk allocation positions to adopt in a Contract.

The Contract Type Decision Tool can assist Customers in selecting the appropriate contract type under the Framework for low to high risk procurements.

The Queensland Government Chief Information Office (QGCIO) sets out the range of *risk management related tools and techniques* that are currently available to the Queensland Government. These include:

- Queensland Treasury's *A Guide to Risk Management*
- the *International Standard ISO 31000:2009: Risk management – Principles and guidelines (ISO 31000:2009)*

- the *ICT Risk Matrix*
- the Procurement process and *Value Risk Matrix (VRM)* for Sourcing which is available on the Department of Housing and Public Works website.

A number of as a service resources are also available on the QGCIO website, including:

- the Queensland Government Enterprise Architect's *ICT as a service Decision Framework*. This framework contains a '*ICT as a service risk assessment guideline'* and '*ICT as a service risk assessment guideline annexe – risks/considerations'* which are designed to assist Customers in developing a risk assessment when considering the use of externally provisioned ICT services. The annexe provides details regarding key as a service risks and potential mitigations, that agencies should consider during their risk assessment of as a service options.
- the *As a Service Offshore Data Storage and Processing Policy*. This policy makes reference to the requirement for information to be classified under the *Queensland Government Information Security Classification Framework* and a risk assessment being undertaken prior to permitting the offshore storage or transfer of permissible classified information.
- the *Cloud Solution Risk Framework*, which is available to Queensland Government. This provides a template to conduct a risk assessment for providing a cloud solution, which can be used as a starting point.