



# Revised NSW Government ICT Contracting Framework – a marked improvement?

Author: Jason Sprague

**With councils' increasing reliance on information and communications technology (ICT), it is essential that their ICT contracts are sufficiently robust to mitigate risk, secure value for money and deliver benefits to the community.**

While the ICT procurement process can be complicated, the “lynch pin” in the whole puzzle is the contract. This sets out the rights and obligations of the parties and provides the framework for the acquisition, implementation, operation and maintenance of the ICT being acquired. It is also what council will rely on if things do not go to plan or disputes arise.

Surprisingly, we are often asked what contract should be used after the tender has been awarded. One reason for this is that tenderers will often largely agree to a contract framework in their submissions only to seek to impose their own terms and conditions when the “real contract” negotiations start. Having endured a lengthy and often arduous tender process, councils are understandably reluctant to reopen the tender and are then left to negotiate a contract that is less than ideal.

To minimise possible problems down the track, it is important to get the contractual terms right at the start. Which contract framework and terms are suitable will depend on the complexity, size and cost of the ICT procurement. We consider here what councils need to bear in mind when looking at particular frameworks.

## USING OLD CONTRACTS– NOT ALWAYS THE BEST OPTION

To save time, many councils will use their own ICT contracts which have been developed over time. However, in many cases those contracts no longer fit with the type of ICT being acquired.

That can lead to the successful tenderer insisting on their own terms being applied. Those terms invariably favor the tenderer, resulting in extra time spent negotiating and rewriting the contract.

## REVISED GOVERNMENT SUITE A POSSIBLE ALTERNATIVE

One resource which contract managers may find useful is the NSW Government Procure IT contracts suite. This was developed to provide a standard document for all NSW Government ICT procurements.

While councils are not obliged to use these contracts, we have found them useful when developing ICT contracts between council and suppliers. Their terms are up to date and they provide a commercially realistic balance for risk allocation and liability between the parties.

A criticism of the Procure IT contracts suite has been their complexity and lack of user friendliness. Contract managers and suppliers, not familiar with the suite, often find them challenging to navigate and negotiate.

That prompted the NSW Government to revamp them. The recently released new contracting framework aims to:

- > be more streamlined and simplified
- > allow procurement and contracting flexibility and agility
- > reflect best industry practice
- > modernise legacy contract concepts, positions and language
- > improve the user experience in a number of ways, for example, by reducing the number of order forms and the number of documents to sign.

## DIFFERENT CONTRACTS FOR DIFFERENT SCENARIOS

As previously, the new Procure IT document suite has contracts for complex, high risk or high value procurements and contracts for simple, low risk and low value procurements. They are as follows:

- > MICTA/ICTA Contracting Framework for use when buying high-risk or high-value (over \$1 million) ICT goods and services. It replaces ProcureIT version 3.2
- > Core& contracts for the procurement of ICT/digital solutions that are low risk and involve expenditure of up to \$1 million (excluding GST). The Core& contracts have two versions:
  - Core&One when procuring one individual solution in one transaction
  - Core&Combined when procuring more than one solution in one transaction.

The Core& contracts have been available since late 2018 but were updated into a more concise format

in 2021, while the MICTA/ICTA contracts have only been in their current form since November 2021.

We believe the Core& contract document suite provides a good starting point for low risk and low value ICT procurement. The terms reflect current commercial practice and provide a sensible balancing of risk and liability between the parties.

Key changes to terms in the ICTA template include:

- > providing a default general liability cap of two x fees paid or payable where contract value is over \$1 million and a cap of \$2m where the fees are less than \$1 million
- > clearly carving out from the general indemnity caps supplier liability for breaches of privacy, confidentiality, security, fraud/recklessness/wilful misconduct, personal injury/death and third-party claims in relation to IP infringement, although the parties can negotiate different limitations
- > requiring suppliers to have a data management and protection plan for personal information and compliance with privacy laws
- > mandating a formal program of technical and organisational security measures for ICT and cyber security that suppliers implement and enforce and have audited at least annually
- > greater flexibility for the parties to negotiate on intellectual property ownership in developments and modifications of a supplier's pre-existing IP.

### WHICH CONTRACT TO USE?

When determining which version of the new contracts to use, the value of the contract and risks associated with the ICT procurement need to be assessed.

Determining contract value is reasonably straightforward. It should be calculated by reference to the total value of the procurement over the contract term including any option/renewal period/s. If it cannot be reasonably determined from the contract, then by

reference to a reasonably estimated contract value over the term and any option/renewal period/s.

Assessing risk is much harder. The NSW Government has produced tools to assist with this, including the Risk Identification Toolkit and the ICT/Digital sourcing checklist. These are useful and we recommend council procurement teams and contract managers take advantage of them.

Note, however, that they are not designed to replace a comprehensive risk assessment or override a council's own policies on risk management and contracting requirements.

Which contract framework to use can be a subtle question, requiring an assessment of both value and risk. Some procurements may be under \$1 million in value but still be high risk. In that case, the ICTA framework may be most appropriate.

### THE VERDICT

Our view is the new ICTA contract framework is worth consideration by councils for their ICT procurements. It is an improvement on Procure IT 3.2. The documents are streamlined and consolidated. In particular the ICTA framework has gone from core contract + 14 modules + 14 order forms, to core contract + and 4 modules. This should make it easier to navigate and negotiate the ICTA contract for larger scale ICT procurements.

However, this consolidation comes with a trade-off. Many terms in the old modules have simply been incorporated into the core ICTA template. As a result, the core contract is longer: 185 pages compared to the previous 152.

Finally, while the new ICT contract suite appears to be more user friendly, it does not address all problems. The need for robust negotiation in complex and high-risk ICT procurements remains.