
Can Queensland Government buy ICT Products and Services from You?

Queensland's New Mandatory Contracting Framework for Buying ICT explained

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Introduction

Queensland Government spends about \$600m each year on ICT products and services. Clearly, this is a significant market for ICT suppliers, both from Queensland and elsewhere. In order to sell ICT products and services to Queensland Government Departments and Agencies ICT suppliers have to:

- (a) obtain accreditation as an approved ICT supplier from the Queensland Office of Government ICT (Department of Public Works) through the division responsible for managing ICT procurement framework, known as **GITC Services**;
- (b) win a tender for their particular products and services issued by the purchasing Department or Agency;
- (c) contract for those products and services with the purchasing Department or Agency on the Government's standard terms and conditions known as GITC v5.01 (the Government Information Technology Contracting Framework).

Purpose of this Article

This article (the first of a two part series) describes the steps that ICT suppliers must take in order to obtain accreditation, and explains what GITC v5.01 is, and how it works.

The article also describes how GITC v5.01 deals with different distribution models such as resellers, distributors, agency arrangements and sub-contracting, and points out some significant practical issues arising

from GITC v.5.01 that ICT suppliers must address.

Part 2 of the article, (which will appear in the next issue of this journal), will provide a high level analysis of some of the key legal and commercial issues in the GITC v5.01 contract, and some suggested risk mitigation strategies.

Background

The Queensland Government has produced a new contract which must be used by Government Departments and Agencies, (and is optional for use by Eligible non-Government Bodies (such as private schools), (collectively referred to in GITC v5.01 as **Customers**) to purchase all ICT products and services, ranging from hardware, software, support, telecommunications services, IT recruitment services, consulting services, internet services, managed services, data services and systems integration services.

Information Standard 13, issued under the authority of *Financial Administration and Audit Act 1977* and the *Public Records Act 2002*, makes it mandatory for all Departments and Agencies to procure ICT products and services using GITC as the basis of their contract with suppliers.

Prior to GITC v5.01 the Queensland Government used a contract known as GITC v2 for most ICT procurement in Queensland. Over the past two to three years the Queensland Government has made a significant investment of time and resources in producing GITC v5.01 as an improvement to GITC v2.

The Office of Government ICT (Department of Public Works) through GITC Services went through considerable consultation with other Departments and with the peak industry bodies, such as AIIA (the Australian Information Industry Association) and ITCRA (Information Technology Contract and Recruitment Association) during the preparation of GITC v5.01. This consultation process contributed to GITC v5.01 being a significant improvement on GITC v2. GITC v5.01 covers a broader range of ICT products and services, provides a better reflection of ICT service delivery models, better allocates risk to the party most likely to be able to manage that risk, and provides a more flexible contracting framework for Customers and ICT suppliers alike.

Accreditation

The first step for an ICT supplier that wishes to sell its products and services to Queensland Departments and Agencies is to obtain accreditation as an approved ICT supplier.

To obtain accreditation it is necessary to either complete the on-line application form (www.gitc.qld.gov.au) or complete a hard copy version, and submit it to GITC Services, together with the supporting documentation. The supporting documentation includes insurance certificates; financial reports for the two previous financial years; details of the ICT supplier's organisation; a list of capabilities, products and services (including pricing); details of ICT major projects, clients and sales; details of any quality accreditation (e.g. ISO 9001); and a list of any agents through which the

ICT supplier's products or services are supplied.

As part of the accreditation the ICT supplier will be asked to sign the pro forma Deed of Agreement (**Head Agreement**).

The purpose of the Head Agreement is to:

- (a) establish a panel arrangement to allow Customers to buy the ICT supplier's products and services, using an agreed set of terms and conditions (the Customer Contract in Part 2 of GITC v 5.01);
- (b) determine which products and services can be provided by the ICT supplier. This is done by the ICT supplier selecting which Modules are to be included in the accreditation and providing details of its products and pricing (see below for more details on the Modules);
- (c) establish a most favoured price arrangement for the benefit of all Customers;
- (d) establish whether the ICT supplier is to provide any of its products or services using agents, and if so, to provide approval of those agents as organisations that can supply the ICT supplier's products and services on behalf of the ICT supplier;
- (e) provide for insurances, financial securities and performance guarantees to be held centrally by the GITC Services (who are defined in the GITC v5.01 as the Contract Authority) for the benefit of the Contract Authority and/or Customers under Customer Contracts; and
- (f) require the ICT supplier to report on certain details on an on-going basis and provide for GITC Services to undertake periodic reviews of the financial standing and performance of the ICT supplier.

Details of some of the obligations in the Head Agreement and the Customer Contract (Part 2 of GITC v5.01) will be in Part 2 of this article which will appear in the next edition of this journal.

Which Products and Services?

When an ICT supplier seeks accreditation it will set out its capabilities and select the appropriate Modules that are to be included in its accreditation. The Modules describe the type of products or services that can be provided by the ICT supplier to a Customer under a Customer Contract and the operational and legal requirements that are specific to that type of product or service. Each Module has a Module Order Form which sets out the order specific details from that Module, for example the Warranty Period for a particular product.

There are 14 Modules within GITC v5.01. The modules are:

- (a) Module 1 – Hardware Acquisition and Installation;
- (b) Module 2 – Hardware Maintenance Services;
- (c) Module 3 – Licensed Software;
- (d) Module 4 – Software Development and Modification;
- (e) Module 5 – Software Support Services;
- (f) Module 6 – Packaged Software;
- (g) Module 7 – ICT Personnel Recruitment Services;
- (h) Module 8 – ICT Contracting Services;
- (i) Module 9 – ICT Consultancy Services;
- (j) Module 10 – Managed Services;
- (k) Module 11 – Systems Integration Services;
- (l) Module 12 – Telecommunications Services;
- (m) Module 13 – Internet Services;
- (n) Module 14 – Data Services.

Amending the Standard GITC v 5.01 Contract

Although the Queensland Government prefers ICT suppliers to sign the standard pro forma contract, GITC v5.01 allows each ICT supplier and GITC Services to agree changes to the standard contract. The changes that can be agreed include changes to better reflect the business model and service offering of the ICT supplier,

amendments to clarify the intent of the GITC v5.01, and amendments that vary the liability and obligations of the parties.

These changes will then apply to every Customer Contract that is entered into between a Customer and the ICT supplier. There is a significant advantage to obtaining amendments to the standard GITC v5.01 at the time of accreditation. This is because these changes only have to be agreed once with GITC Services for them to apply to all Customer Contracts.

Consequently when a tender is issued by a purchasing Department or Agency there may be no need for the ICT supplier to put forward (or the Customer to have to review) and negotiate, statements of departure for that tender. The ICT supplier may be able to submit a 'compliant' response to the GITC v5.01 terms and conditions on which the purchasing Department or Agency will acquire the products or services. The intention behind allowing these changes to apply to all Customer Contracts is that the purchasing Department or Agency will have the comfort that GITC Services has approved any changes to GITC v5.01, and the ICT supplier will have the confidence that the changes agreed with GITC Services will be adopted by the purchasing Department or Agency. This saves everyone time and money.

However, any further changes that are required by either party in a Customer Contract that "derogate" from the version of the GITC v5.01 that was agreed between the ICT supplier and GITC Services at the time of accreditation, must be approved by GITC Services as well as the Customer and the ICT supplier.

Obtaining Accreditation is a Simple Process

The process of obtaining accreditation is relatively easy and usually takes between 4-6 weeks (although it may take longer if changes to GITC v5.01 are negotiated).

At the time of writing this article over 1000 ICT suppliers have received accreditation.

GITC Services maintains a list of accredited ICT suppliers, and the

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Modules that they have signed up to, on its website.

How does an ICT supplier secure a contract with a Department or Agency?

It is a three step process for an ICT supplier to secure a contract with a Department or an Agency. Firstly, the ICT supplier must become an accredited supplier.

Secondly, the Department or Agency that wishes to procure ICT products or services must (except in very limited circumstances) issue a tender. This tender must use GITC v 5.01 as the basis of the terms and conditions of purchase of the products or services. Of course the ICT supplier will have to 'win' the tender.

Finally, the procuring Department or Agency must sign a contract based on GITC v 5.01 with the ICT supplier for the products and services that the ICT supplier is accredited to provide.

What constitutes a GITC v 5.01 contract?

In order to have a contract for the supply of ICT products and services the following documentation is needed:

(1) Head Agreement

The Head Agreement is between the Contract Authority and the Contractor and is signed as part of the accreditation process. The Contract Authority represents the State of Queensland and acts through the Department of Public Works and is responsible for the administration of the Head Agreement. The ICT supplier's products or services that the Customer wishes to buy must be listed on the Head Agreement in order to be sold to a Customer.

(2) Customer Contract

The Head Agreement requires the Customer and the ICT supplier to enter into a contract in the form set out in Part 2 of GITC v5.01 (the **Customer Contract**). The Customer Contract is the contract for each specific order between a Customer and the ICT supplier. The documents included in a Customer Contract will include:

- (a) Part 2 of GITC v5.01 terms and conditions;

- (b) relevant Modules from Part 3 of GITC v5.01;
- (c) Module Orders;
- (d) relevant Customer Contract Schedules, such as the Project, and Implementation Payment Plan, Performance Guarantee, list of Customer Supplied Items, Escrow Agreement etc; and
- (e) the General Order.

The General Order is a critical document as this is where the parties agree a number of key variables that will apply to that particular order. These details include the identity of the parties; description of the deliverable and its specifications; the price and payment terms; whether "time is of the essence" or whether liquidated damages apply; requirements for insurance, financial securities and performance guarantees; intellectual property right arrangements (who will own and/or the terms of licence for newly created intellectual property and pre-existing intellectual property); limits of liability, application of consequential loss and indemnity clauses; identity of approved subcontractors; acceptance testing requirements; delivery, title and risk provisions etc.

The Customer Contract comes into force where either the General Order is signed by the Customer and the Contractor, or the Customer Contract is otherwise agreed (e.g. telephone orders).

Distributors, Resellers, Agents and Subcontractors

There are a number of important considerations for an ICT supplier that wishes to provide products and services to a Department or Agency under GITC v5.01 if the ICT supplier sources those products and services from a third party. These considerations substantially affect which products can be sold under the ICT supplier's accreditation, and indeed, the whole distribution model for third party products.

There are a number of business models for the distribution of third party products and services including:

- (a) the accredited ICT supplier enters into a sub-contract with its sub-contractor, and the ICT

supplier enters into a prime contract with the Customer on the terms of the Customer Contract (Sub-contracting);

- (b) the accredited ICT supplier has a master reseller/distribution contract with a third party which allows the ICT supplier to buy the product or service from the third party on an "as-needed" basis (and at the risk of the ICT supplier) and resell (or sub-licence in the case of software) the product or service to Customers (Reselling);
- (c) the accredited ICT supplier uses an agent to fulfill orders. In this case the contract for the supply of product or service is made between the ICT supplier and the Customer (Fulfillment).

GITC v5.01 deals with each of these business models as follows:

- (a) Sub-contracting. The accredited ICT supplier enters into a Customer Contract, and obtains the Customer's approval in the Customer Contract to the identity of the sub-contractor for the purpose of that Customer Contract only.
- (b) Reselling. In the same way, the accredited ICT supplier enters into a Customer Contract with a Customer and obtains the Customer's approval in the Customer Contract to the identity of the sub-contractor (the third party "owner" of the product or service).
- (c) Fulfillment. Where an ICT supplier uses an agent (in the legal sense of the word) to fulfill some or all of the ICT supplier's obligations, then the ICT supplier must obtain the Contract Authority's approval for each of those agents (defined in GITC v5.01 as an AP Agent) primarily at the time of accreditation. The approval is not sought from a Customer at the time of the order. The ICT supplier must list all products and services that it may supply using AP Agents as part of the ICT supplier's accreditation.

Importantly agents (in the legal sense of the word) cannot supply products

and services under the agents' own accreditation. A Customer can only order from the "principal", ie a Customer must obtain products and services from the principal's GITC accreditation and not the agent.

It is essential for companies to review their distribution/reseller/agency agreements to determine whether they on-sell or sub-license the products, or whether they supply as agents. Providers of shrink-wrap software should be particularly careful, as they often only have the right to issue the media to a customer, they have no rights to sub-licence the software to a customer. The shrink-wrap licence will usually have the owner of the intellectual property in the software as the licensor.

Conclusion

GITC v5.01 is a mandatory contract for the supply of all ICT products and services to Queensland Government Departments and Agencies.

Seeking accreditation is a simple process, however, great care should be taken where the ICT supplier is reselling or distributing third party products or services to the Customer.

There are significant advantages in terms of costs, risk management and sales process in the GITC v5.01 at the time of accreditation.

Next Issue of Computers and Law

In the next issue of Computers and Law we will provide a high level review of some of the key legal and

commercial issues in GITC v5.01 and some suggested mitigation strategies.

* *Mike Pym represented AIIA in the consultations with GITC Services on early drafts of GITC v 5.01, and currently represents a number of large and small suppliers on obtaining amendments to the standard GITC v 5.01 as part of their accreditation process.*

* *This article is based on a seminar paper presented by the authors at the AIIA "Briefing on GITC v5" in Brisbane on 28 February 2006.*

Free Flights and Sports TV: an Update on Recent .au Administrative Panel Decisions

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On 25 January 2006, the World Intellectual Property Organisation (WIPO) issued a press release alerting the public to a significant increase in cybersquatting activity. WIPO noted a 20% rise in the number of cybersquatting cases filed in 2005 compared to 2004, raising concerns that the incidence of trade mark infringement on the internet is increasing.

Cybersquatting is the abusive registration of trade marks as domain names. It occurs where a party sets out to profit from the goodwill of another party's trade mark by deliberately and unlawfully registering a domain name that incorporates a trade mark that is identical with or similar to a trade mark owned by a third person.

The WIPO Arbitration and Mediation Centre (the **Centre**) offers dispute resolution mechanisms for domain name disputes, which are handled under the Uniform Domain Name Dispute Resolution Policy (the **UDRP**). Disputes concerning .au

domain names are dealt with under an adaptation of the UDRP known as the .au Dispute Resolution Policy (the **auDRP**), which commenced on 1 August 2002.

To bring a successful complaint under the auDRP, a complainant has the onus of proving three elements:

- that the respondent has registered a domain name which is identical or confusingly similar to a name, trade mark or service mark in which the complainant has rights;
- that the respondent has no rights or legitimate interests in respect of the domain name; and
- that the domain name has been registered or subsequently used in bad faith.

If these elements are satisfied, the .au Administrative Panel (the **Panel**) will order that the domain name be transferred to the complainant. The domain name will be transferred to the complainant provided that the complainant is eligible to hold the

domain name according to the relevant eligibility and allocation rules.

The following recent Panel decisions illustrate the kinds of disputes heard under the auDRP and how these elements have been applied in resolving domain name disputes.

***ESPN Inc v IMCO Corporation Pty Ltd*¹**

Background

On 10 November 2005, ESPN Inc (ESPN) filed a complaint against IMCO Corporation Pty Ltd (IMCO) in relation to IMCO's registration of the domain name "espn.com.au".

ESPN is a well known multimedia sports information and entertainment company with numerous television networks internationally, including ESPN Australia. ESPN owns Australian trade mark registrations for the mark "ESPN" across a number of classes.

IMCO, an internet outsourcing company, registered the disputed domain name on 19 October 2004.