

From the editors...

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

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

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

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

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

Martin Squires and Vinod Sharma

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

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

Expected Benefits

Both the ICT industry, represented by the Australian Information Industry Association (AIIA²), and NSW Government, represented by the Department of Services, Technology and Administration (DSTA³), agreed that there could be significant gains in productivity, reduced costs, increased competition and additional ICT industry development if the standard contract (*Procure IT*)⁴ used by NSW Government to buy ICT products and services was improved.

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

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

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

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

Background and Process

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

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