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31 August 2006

Limited liability in ICT contracts: Finance Circular 2006/03

The Department of Finance and Administration has released Finance Circular 2006/03 dealing with limiting liability in information and communications technology (ICT) contracts.

The release of the circular coincided with the release of the Department of Communications, Information Technology and the Arts' *A guide to limiting supplier liability in ICT contracts with Australian Government agencies* (the DCITA Guide).

The Hon Gary Nairn MP, Special Minister of State, referred to this policy change in his keynote address to industry representatives on [17 August](#).

Changes to Australian Government policy regarding liability capping in ICT contracts

The circular states that liability of ICT suppliers should be capped at 'appropriate levels' in most cases. This policy applies to agencies subject to the *Financial Management and Accountability Act 1997* (FMA Act) and only applies to contracts for ICT supplies (whether or not the contractor in question is an ICT supplier or not). The DCITA Guide indicates that the ICT supplies subject to the policy are those falling within Finance's Endorsed Supplier Arrangement, but not those subject to the Whole of Government Telecommunications Arrangement.

The exception to the policy is where there is a 'compelling reason' to require unlimited liability. The circular indicates that a 'compelling reason' would be where unlimited liability represents an 'accurate reflection of the potential risks' of a particular procurement.

The circular is stated to be policy for the purposes of regulation 9 of the Financial Management and Accountability Regulations 1997 (FMA Regulations) and for the purposes of the *Commonwealth Procurement Guidelines* (CPGs). Implicitly it has to be read that, in respect of ICT procurements, the circular amends the statements of policy in the CPGs and previous circulars regarding the policy preference for agencies to seek unlimited liability.

The circular does not require agencies to modify either their Chief Executive Instructions or other procedures regarding risk assessment and procurement, but provides a step-by-step approach that agencies can follow when applying the general policy on capping liability for ICT suppliers. The circular sets out the following steps for agencies:

- 1) Determine the appropriate liability regime for the project (i.e. whether liability should be limited or unlimited).
- 2) Determine the appropriate level for the initial estimate of the liability cap.

- 3) Determine how the liability issues will be handled in the procurement process and the contract (i.e. which liabilities should be capped, and the level of the proposed cap).
- 4) Establish agreement and complete the contract.

Which liabilities can be capped?

The circular states that it is *particularly appropriate* to include caps for:

- 'standard breach of contract'
- supplier negligence, except to the extent the supplier's negligence relates to personal injury, property damage, breach of intellectual property rights, confidentiality, privacy and security obligations or unlawful conduct.

The circular proceeds to state that it is *generally appropriate* to retain unlimited liability (unless there is a compelling reason) for liabilities involving:

- personal injury including sickness or death
- unlawful or illegal acts
- damage to tangible property
- intellectual property obligations
- confidentiality and privacy obligations
- security obligations.

How do agencies set the amount for a cap?

Agencies will need to conduct a risk assessment prior to issuing request documentation to set an appropriate level for the cap. The circular does not require that the cap represent a best or worst case scenario established by the risk assessment – agencies therefore remain free to state a dollar figure that represents a plausible worst case scenario. The figure should represent a realistic amount in the context of both the agency's risk assessment and the prevailing market conditions.

Following selection of a preferred tenderer, agencies will need to conduct a further risk assessment to reassess the appropriate level for the cap (this level could be expressed as a contract multiple equivalent to that assessed level in the final negotiated contract).

Relevance of SourceIT model contracts

Finance has released draft SourceIT model contracts (available [here on Finance's website](#)). The circular does not refer to these contracts, but the DCITA Guide refers to them as an example of a limited liability regime that will be consistent with the circular. We understand that new drafts of the SourceIT model contracts are to be released in next few weeks.

Application of the DCITA Guide

The DCITA Guide provides guidance to assist agencies in implementing the policy in the circular. It provides valuable information in respect to the potentially complex issues that need to be considered to ensure that an agency achieves value for money from limiting supplier liability as appropriate in accordance with the policy.

The DCITA Guide provides a discussion of issues to be considered by agencies in both setting caps and negotiating liability caps with ICT suppliers. It also describes a useful

process for developing and implementing a risk assessment and risk mitigation strategy for less complex ICT projects.

It is worth noting that the DCITA Guide does not represent Australian Government policy for the purposes of regulation 9 of the FMA Regulations – it is stated to be a guide that only provides examples of how agencies may choose to implement the circular. Agencies may choose to adapt and amend their existing Chief Executive Instructions or other procedures regarding risk assessment and procurement to reflect aspects of the DCITA Guide as they see fit.

Where can Finance Circular 2006/03 and DCITA Guide be found?

The circular is available [here on Finance's website](#).

The DCITA Guide and the Companion to the DCITA Guide are available [here on DCITA's website](#).

A more general discussion of risk management in the Commonwealth context can be found in [AGS' Legal Briefing No.79: Indemnities in Commonwealth Contracting](#).

Next steps for agencies

Many agencies will need to revisit their template procurement documentation and their procedures for developing requests for tender in relation to ICT contracts to reflect the requirements of the circular.

If you require further information or advice regarding the application of the circular or the DCITA Guide to your template procurement documentation or a particular procurement process please contact:

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