# ADDENDUM NO 1 TO ICT SERVICES SCHEME SCM0020

## ATTENTION ALL APPLICANTS
## URGENT CORRESPONDENCE REGARDING AMENDMENTS TO PROCURE IT

**From:** Shae Howard

**Date:** 16 August 2017

**Pages including this:** 5

Please note the following:

**Procure IT v3.2**

The NSW Procurement Board approved key changes to Procure IT on 1 March 2017. Procure IT v.3.2 was released on 1 July 2017 with a 3 month implementation program.

Procure IT v3.2 replaces version 3.1. Procure IT v.3.2 is mandatory for all ICT procurement made on or after 1 September 2017– see Procurement Board Direction 2017-02.

**Summary of Key Changes**

Key changes to Customer Contract (compared to the v.3.1 Customer Contract) include amendments:

For compliance with applicable laws including:

- Privacy Act 1988 (Cth)
- Privacy and Personal Information Protection Act 1998 (NSW)
- Health Records and Information Privacy Information Act 2002 (NSW) and
- Government Information (Public Access) Act 2009 (NSW).

To assist industry and Government in complying with relevant Government policies, including:

- NSW Government Cloud Policy, v.2.0, August 2015 and
- NSW Government Digital Information Security Policy, v.2.0, April 2015.

- State Records Authority for transferring records out of NSW for storage with or maintenance by service providers based outside the State (GA35).

The following Procure IT documentation has been updated:

1. Head Agreement
2. Customer Contract
3. Dictionary
4. Modules 1-13A (new Module 13 and 13A introduced based on previous Procure IT versions, no major changes)
5. Module Order Forms (no major changes).

The revised documentation implements the key changes, and updates references to DFSI, corrects typographical issues, cross referencing and other minor drafting issues.

| Procure IT v3.2 | Key Changes | Why the change? |
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| **Customer Data:** | o Inclusion of Customer Data provisions in Customer Contract<br>o Some duplicate current Mod 10.<br>o Contractor does not own/have interest/rights in Customer Data<br>o Requirement for prior written Customer consent for transfer of Customer Data outside NSW or transfer of possession of Customer Data. This can be agreed up front in General Order Form.<br>o Contractor retention, back up and destruction of Customer Data as agreed by Customer (see also Consequences of Termination) | ✓ Inclusion of Customer Data provisions in Customer Contract.<br>✓ Enables agencies to demonstrate compliance with NSW privacy and State records management laws |
| **Security:** | o Contractor to establish and maintain security procedures and safeguards against unauthorised access, use, destruction or alteration of Customer Data<br>o Requirement for Contractor to notify the agency immediately if it becomes aware of actual, alleged or suspected security issue, investigate security issue within 48 hours and report to Customer, and remedy any actual breach within 24 hours.<br>o Flexibility for alternate security issue resolution arrangements to be approved by CIO and agreed up front in General Order. | ✓ It imposes a baseline standard for security and requirement for data breach notifications in accordance with the NSW Government Digital Information Security Policy and the NSW Government Cloud Policy.<br>✓ Consistent with current Procure IT requirement for immediate notification of breach of privacy-related obligations |
| **Privacy:** | Procure IT privacy obligations have been updated to require Contractors to comply with all applicable privacy laws, and to:<br><br>o Enhance compliance with the Privacy and Personal Information Protection Act 1998 (NSW) (PPIPA)<br>o Take account of changes to the Privacy Act 1988 (Cth) impacting on Contractors<br>o Update privacy requirements in light of | ✓ Enables agencies to demonstrate compliance with privacy laws |

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| | cloud-related cross border data flows, e.g. by requiring prior Customer consent for access/transfer of any Personal Information outside NSW. Such consent can be agreed up front in the General Order Form. | |
| **Intellectual Property- Open source software:** | o Requirement for the Customer's prior written consent for use of any open source software in the Deliverables<br>o Any approved use of open source software must not result in an obligation to disclose, license or make available any part of the Customer's environment, data or confidential information to any third party, or diminish the Contractor's obligations under the Contract.<br>o New definition of "open source software"- to align with Open Source Initiative definition | ✓ This clarifies the rights and obligations of all parties<br>✓ Need for greater Agency oversight of use of open source to ensure contractual obligations, Customer environment, data and confidentiality not compromised |
| **Intellectual Property- An irrevocable licence for existing materials:** | o Procure IT v.3.2 will introduce a requirement that licences to use existing material incorporated in a deliverable are perpetual and irrevocable to the extent required for the Customer to receive the benefit of the Products and Services in accordance with the Customer Contract<br>o Flexibility to agree otherwise in General Order Form (e.g. where licence is for a fixed term) | ✓ Agencies need greater certainty re their rights to use Products and Services. Also, this amendment clarifies the Customer's rights to use all components of the Products and Services they are paying for, in accordance with the terms and conditions of the Customer Contract |
| **Intellectual Property- Customer Owned New Material:** | o No change to default Contractor ownership of New Material<br>o For Customer Owned New Material, Customer to retain discretion as to whether Customer chooses to grant Contractor a licence to use the New Material, and the terms of such licence.<br>o Licence of Customer Owned New Material to Contractor can be agreed in General Order Form. | ✓ Customer feedback re: need to retain control of Customer Owned New Material eg. for security reasons. |
| **Liability: Clarifying the definition of loss** | o Procure IT v.3.2 will phrase 'loss, damage or expense' throughout the revised contract. | ✓ Provides greater consistency in the treatment of loss. |
| **Liability: Consequential loss** | o Procure IT v.3.2 will retain the general position that neither party is liable for the other's consequential loss | ✓ Current risk/reward balance as reflected in the Liability provisions of the Customer Contract to be retained. |
| **Indemnity** | Contractor indemnity exclusions to be removed for IP claims caused by Contractor-approved uses of Deliverables:<br>o any approved use of Deliverables with other products, equipment etc.<br>o any approved modification of a Deliverable by any other person<br>Consequential removal of Contractor indemnity exclusion for IP claims | ✓ These amendments address an anomaly concerning the Contractor's exclusion of indemnity for Contractor approved uses of Deliverables |
| **Termination for Convenience:** | Procure IT v.3.2 will clarify that the Contractor will either be paid:<br>o an amount specified on the order form, or<br>o if no amount is specified in the order form, any losses, damages or expenses which are reasonably and | ✓ Previous Procure IT was worded in a way which could be construed as entitling the Contractor to double-dip on payments. |

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| | properly incurred by the Contractor as a direct result of the termination of the contract. | |
| **Systems:** | o The Procure IT v.3.2 Customer Contract will introduce a Contractor warranty and contractual obligations in relation to products and services that comprise a system<br>o There will be a cap on liability for a system of two times the contract value for the non-recurring service or product comprising the system | ✓ Previously, when customers acquired a system of components covered by different Procure IT modules, individual warranties under those modules were found to be insufficient, with the contractor required to add additional warranties for the system |
| **Warranties** | o Procure IT v.3.2 Contractor and Customer warranties will continue to be "to the best of its knowledge and belief". | ✓ Concerns in relation to reciprocal operation<br>✓ Absolute warranties to be discussed further at a later date. |
| **Audit** | Introduction of audit requirements:<br>  o No more than once in any calendar year<br>  o On at least 5 Business Days' Notice<br>  o Subject to Customer compliance with Contractor's reasonable security requirements<br>  o Requirement to remedy any breaches shown by audit<br><br>Flexibility to agree alternate audit mechanism in General Order Form. | ✓ To give Customers greater scrutiny of compliance by Contractors in line with procurement policy requirements |
| **Escrow:** | o Introduction of more flexibility in relation to escrow arrangements | ✓ To permit the Customer and Contractor to agree on alternate escrow arrangements. |
| **Legislative Requirements:** | Introduction of amendments addressing:<br><br>  o Legislative requirements under the Government Information (Public Access) Act 2009 (NSW) ("GIPA Act").<br>  o Changes under the Government Sector Employment Act 2013 (NSW) since release of Procure IT v.3.1. | ✓ Compliance with legislative requirements |

## ICT Procurement from 1 September 2017

From 1 September 2017, the Procure IT Framework comprises Procure IT v.3.2 for all ICT procurement over $150,000 and all high risk ICT procurement, and the Short Form Contract for ICT procurement contracts below $150,000 that is not high risk.

From 1 September 2017 all new ICT Contracts entered into under the ICT Services Scheme must comply with the Procure IT Framework, including Procure IT v.3.2 for all ICT procurement over $150,000 and all high risk ICT procurement.

All RFT and other market engagement processes commenced after 1 September 2017 or with proposed commencement dates after 1 September 2017 must comply with the Procure IT Framework, including v.3.2.

Procure IT v.3.2 includes some key changes to the Customer Contract, Dictionary and General Order Form, and minor revisions to the Schedules, Modules and Module Order Forms. See [Procure IT v.3.2 Guidance Note](#) for more information on Procure IT v.3.2.

Procurement Board Direction 2017-02 now permits variations to Procure IT v.3.2 in certain restricted circumstances. All other variations and exemptions require approval from the Department of Finance, Services and Innovation.

***Pre-1 September 2017 Contracts***: All current contracts executed prior to 1 September 2017 will continue on the same terms until expiry i.e. current contracts will continue as Procure IT v.3.1 contracts (or an earlier Procure IT version if executed prior to Procure IT v.3.1), unless and until the supplier and agency vary the Contract to include Procure IT v.3.2 terms and conditions.

If a pre-1 September 2017 contract is extended or "renewed" in accordance with its terms after 1 September 2017 (i.e. if the Customer exercises an option to extend or "renew" the term), the contract continues on the same Procure IT v.3.1 (or earlier) terms unless both parties (i.e. the Government Customer and supplier) agree in writing otherwise.

From 1 September, DFSI approval is required to vary a Procure IT v.3.1 (or earlier Procure IT version) contract so as to extend its terms (rather than moving to a Procure IT v.3.2 contract) where there are no remaining options to extend.

***Pre-1 September RFT processes***: RFT processes commenced before 1 September 2017 with likely commencement dates before 1 September 2017 may use Procure IT v.3.1 however agencies are strongly encouraged to include Procure IT v.3.2 terms where possible.

**More Information**

- [Procure IT v.3.2](#)
- [Beta Procure IT v.3.2 website](#)
- [ICT Services page](#)

Thank you for your interest in the Scheme.

Yours sincerely,

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