

GOVERNMENT CONTRACTING IN AUSTRALIA

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By: Warwick Andersen

This is the first in a series of insights intended to demystify government technology contracting in Australia. Australia started off on the right track in the early 1990s by developing the standard form GITC technology procurement contract that was used by the Federal and all State governments in Australia.

However, every jurisdiction has now diverged and uses a different contract. Some of these are loosely based on GITC, and some are loosely based on each other so there is at least some level of consistency.

There are a number of key themes from the contracts:

FILL IN THE FORM

- Completing the contracts is generally a form filling exercise. There are boxes for all variables imaginable in the contract from liability to liquidated damages and milestones.
- In addition to the forms, there are some variable documents. These include the service descriptions, service level agreements and implementation plans. These documents are key for any vendor as it's often the only opportunity to insert the vendor's preferred positions on key issues.

NEGOTIATION IS DIFFICULT, BUT NOT IMPOSSIBLE

- Australian governments generally win the battle of the forms and will not accept supplier documents. Even the large vendors (eg SAP) are unable to use their own contract form. Likewise even highly bespoke cloud services have to be slotted into the frameworks.
- Even if they are not mandatory by policy, government departments will generally issue a contract based on their standard form with the tender and make it requirement of the tender to use that contract.
- This doesn't mean however that it is impossible to introduce elements of a supplier's terms. The key is to know where the flexibility lies. It is often possible to introduce preferred positions in the relevant forms or by using ancillary documents which are not prescribed such as a service description, service level agreement or implementation plan.

WHICH MODULE?

- GITC was a modular contract and as a result many of the jurisdictions still follow this approach. A main set of terms will apply and then additional terms apply depending on the products or services. There may for example be modules for software licensing, professional services, managed services, cloud, hardware, telecommunications services and others.

- For each module there is generally an additional form to complete.

MAKE SURE YOU ARE ON THE PANEL

- Government contracting is a world of panels. Some jurisdictions choose to have a single panel split by category for all technology suppliers. Other jurisdictions choose to have panels for specific services, such as the Federal Cloud Services Panel.
- The panels are often mandatory. Generally in the case of mandatory panels however they are open and can be joined at any time.
- Non-mandatory panels can usually only be joined when a refresh is completed (keep an eye on the relevant tenders website for this). These often require the relevant contract to be executed at the time of joining the panel so that government agencies can simply complete an order for the relevant product or service.

BE CAREFUL WHAT YOU WISH FOR

- If you enter into a government contract (for example, on a panel), it may be open for a broad range of government, semi-government and non-government agencies to purchase from. This includes for example, universities, government and non-government schools and local municipal councils. If you offer a heavily discounted price, be warned there may be many more purchasers of your products at these prices than you expect.
- Some jurisdictions (notably federal) permit agencies from other jurisdictions to also purchase under their contracts. We have seen state government agencies purchase under federal contracts for prices significantly less than they were themselves able to negotiate.

Contracting with government in Australia is different but not necessarily difficult. We always recommend our clients on a proposed entry to Australia to review the standard form contracts in relevant jurisdictions to ensure they are comfortable with the terms and formulate an approach and proposed responses to the relevant order forms. It is also important to ensure that you are on the relevant panels, and also to review the tender websites for opportunities.

We will, in future insights, provide more detail on regimes in key jurisdictions in Australia.

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