Discussion Paper

Contracting for cloud services

We want your feedback

The Cloud Agreement is a draft agreement released for consultation and will not be available for use until 2019.

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Contracting for Cloud Services

Introduction

We’re on a journey to transform ICT procurement across NSW Government.

We started with low value, low risk ICT procurement. We created a new Core& contract framework that is simple to use, and fit for purpose for the digital environment. The Core& Agreement (Low Risk) is available for low risk ICT procurement up to $500,000.

We’ve also started developing the buy.nsw digital platform, with an initial focus on cloud services. Sellers can upload details of their cloud services on buy.nsw, making them accessible and comparable for agencies. We’re continuing to develop and refine the buy.nsw platform.

Our transformation approach

We’re still in the early stages of our journey to transform ICT procurement on a holistic basis – across procurement processes, procurement schemes, digital platforms and the contracting framework.

We recognise that a fresh approach to the contracting framework is critical to this transformation program. We will progressively transform the ICT contracting framework so that it is fit for purpose in the digital world – and also works in conjunction with our digital platforms.

We’re taking an agile approach: trialling and testing, iterating and learning, and making continuous improvement. This transformation will be ongoing - we’re designing a system that is flexible to adapt and evolve, and will continue to improve over time.

Next steps

We’re now moving on to contracting for cloud services. We’re developing a Cloud Agreement for the procurement of a broad range of cloud services (across both low risk and high risk scenarios) – and we’re designing it so that it works in conjunction with the buy.nsw digital platform.

We’ll fine-tune the content for various types of cloud services, taking your feedback into account. We’ll also refine the end-to-end processes for procuring cloud services, leveraging our buy.nsw digital platform where it makes sense.

Then we’ll take the learnings and apply them across the broader ICT contracting framework. We’ll move on to areas such as professional services, managed services and as-a-service – but at this stage we’re just focusing on cloud services.

We’d love your feedback on the draft Cloud Agreement and the proposed approach to contracting for cloud services – including any suggestions around making it flexible and adaptable for different types of cloud services and risk scenarios.
Why we’re taking a new approach to cloud contracting

We recognise that cloud services are the fastest growing area of ICT procurement, and our contracting frameworks need to evolve and adapt.

The Procure IT Framework was developed for the procurement of ICT products and services at a time when ICT solutions were largely “on premises”.

As we move into the cloud environment, the challenges are multi-faceted:

- First, there are challenges in ensuring that our contracts leverage the opportunities and manage the risks around data, security and other changes in the cloud environment.

- Second, there are challenges around capturing the critical requirements for cloud services – including across areas such as:
  - data location
  - data access controls
  - data storage
  - data encryption
  - detailed security requirements
  - performance management
  - disengagement arrangements

- Third, the ordering process is changing rapidly. Digital tools are evolving that enable us to move away from paper-based orders – and configure our ongoing requirements for cloud services on a dynamic, real-time basis.

- Finally, we need to remove the impediments to going digital – and this includes making the contracting process fast and efficient.

The new **Cloud Agreement** is designed to address these challenges. We used the Core& Agreement (Low Risk) as a starting point - and we’ve modified and expanded it to address to the broader range of procurement and risk scenarios for cloud services, applying the same design principles and approach.

**Contract design principles**

- The agreement is for everyone, it is easy to use and understand
- Clear and simple with the right protections
- Don’t re-state legislation and common law
- Only include relevant terms
- Contract approach needs to evolve over time
- Less process, more mindful procurement
- Contracts are part of the integrated procurement environment
Leveraging the new buy.nsw digital platform

Since we developed the Core Agreement (Low Risk), we’ve also started developing the buy.nsw digital platform with an initial focus on cloud services.

We’re keen to explore opportunities to simplify contracting for cloud services by leveraging those cloud service details posted on buy.nsw. Where those details can be incorporated into a contract (by reference), this removes the need to document them separately in each individual contract for that cloud service.

We recognise that all cloud service providers are different. For example, some sellers offer standardised “hyperscale” cloud services, while others offer more bespoke cloud services. Sellers will want to interface with the buy.nsw platform in different ways – and some may choose not to use the buy.nsw platform at all.

Accordingly, cloud services details can be recorded on buy.nsw – or they can be incorporated into the contract in other ways, eg: by referencing certain service details on the seller’s website or management console, or by incorporating more extensive service details into the Requirements document.

At this stage, the draft Cloud Agreement is designed to work in conjunction with buy.nsw – but we recognise that there are other options for recording the details of cloud services acquired. See below our request for feedback on this point.

How the Cloud Agreement is put together

The new Cloud Agreement is made up of:

a. **Cloud Core Terms:** standard legal terms for the procurement of cloud services.

b. **Requirements:** specific requirements for the cloud services and how they are delivered. These details will vary, depending on the nature of the cloud services and the buyer’s specific requirements.

c. **Attached Seller Terms (optional):** the Seller may wish to propose additional terms to address matters which are not covered by the Cloud Core Terms or the Requirements. Those additional terms will need to be reviewed by the buyer, and may require negotiation between the parties to ensure that they are satisfactory to the buyer. Where agreed, those additional terms may be attached to the Requirements – subject to tight restrictions which ensure that they can’t change the legal outcome under the Cloud Core Terms.
How the documents work together:

The hierarchy of the documents is as follows – with the Cloud Core Terms prevailing, followed by the Requirements and the Attached Seller Terms (if any):

- Cloud Core Terms
- Requirements
- Attached Seller Terms

The Cloud Core Terms and the Requirements are intended to be read together. For example:

- **Intellectual Property:**
  - The Cloud Core Terms set out the general legal terms relating to intellectual property – and for New Materials, they set out the default position (which can be amended in the Requirements) – see Clause 11 (**Intellectual Property**).
  - The Requirements enable the parties to make amendments to the intellectual property arrangements for “New Materials” – see Section 9 of the Requirements: **Intellectual property - options available under Cloud Core Terms**.

- **Buyer Data**
  - The Cloud Core Terms set out the general legal terms relating to Buyer Data. In relation to the licensing of Buyer Data to the Seller, they set out the default licensing position (with the ability to make amendments in the Requirements) - see clause 7 (**Buyer Data**) of the Cloud Core Terms.
  - The Cloud Core Terms specify that Australia is the default region for the location of Buyer Data (with the ability to make amendments in the Requirements). There are obligations around keeping the Buyer Data in the “**Selected Region**”, and
prohibiting access to the Buyer Data from outside the Selected Region – see Clause 9 (Selected Region for Buyer Data) of the Cloud Core Terms.

- The Requirements enable the parties to make amendments to the licensing arrangements and the Selected Location for Buyer Data – see Part B of the Requirements (Buyer Data and Selected Region).

- **Security:**
  - The Cloud Core Terms set out the general legal terms relating to security – with high level obligations only – see Clause 10 (Security) of the Cloud Core Terms.
  - Under the Requirements, the parties must comply with the detailed security requirements set out in Attachment 1 to the Requirements (Detailed Security Requirements).

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### How to create a Cloud Agreement

- The signing page is at the front of the Requirements document. The parties need to complete and sign the Requirements template to create a Cloud Agreement.

- Each Requirements template that is completed and signed creates a separate Cloud Agreement, incorporating the Cloud Core Terms (specifically, the version that is posted on the ProcurePoint site on the date of signing).

- It is not necessary to print the Cloud Core Terms and annex them at the time of signing – the relevant version of the Cloud Core Terms is incorporated by reference.

- After the date of signing a Cloud Agreement, any amendments that are made:
  - to the online version of the Cloud Core Terms; or
  - to the cloud service details that are made on buy.nsw

will not change the signed Cloud Agreement (unless the parties agree in writing to incorporate those amendments).
Ultimately, a buy.nsw may be able to offer an electronic ordering path. In the interim, the ordering process will involve paper-based requirements - or alternatively, some sellers may offer digital configuration of cloud resource allocations and service configurations via their website or management console:

- **Example 1:**
  - Seller sets out all cloud service details on buy.nsw
  - The goal is an electronic ordering path via buy.nsw
  - In the interim, use paper-based requirements - with minimal details set out in the Requirements document, and buy.nsw details incorporated by reference

- **Example 2:**
  - Seller has landing page on buy.nsw
  - Link to the seller’s portal for dynamic pricing / cloud service details
  - No need to document extensive details of cloud services in the Requirements. Limited details are set out in the Requirements document, and buyers configure their own cloud services and allocate cloud resources via the seller’s website or management console

- **Example 3:**
  - Seller sets out default details of cloud services on buy.nsw
  - “Bespoke” cloud services are customised on a case by case basis
  - Bespoke details are documented in the agreed Requirements document, and override the details on buy.nsw
  - Heavy reliance on detailed, paper-based Requirements document

We are keen to obtain your feedback on the draft Cloud Agreement, so that we can ensure that it is flexible and adaptable for different types of cloud services and risk scenarios.

**Please provide your feedback on:**
- the proposed structure for the Cloud Agreement
- preferred approaches to recording the details of the cloud services acquired
Looking inside the Cloud Agreement

1. Scope of the Cloud Agreement

This draft Cloud Agreement is only designed for the procurement of cloud services. At this stage, professional and consulting services are excluded from the scope – we'll get to that later.

Our objective is to ensure that the Cloud Agreement is flexible and adaptable for different types of cloud services and risk scenarios. We used the Core& Agreement (Low Risk) as a starting point, and we've modified and expanded it to address the broader range of scenarios for procuring cloud services (across both low and high risk scenarios).

The Cloud Agreement is available for all cloud services – except those identified as “Excluded Services” in Attachment 2 to the Requirements. Further details relating to scope are set out below in section 3 (Cloud Agreement – Requirements).

2. Cloud Agreement – Cloud Core Terms

The Cloud Core Terms (set out in Annexure A to this Discussion Paper) incorporate legal terms that are critical to NSW Government and apply to the procurement of cloud services, including in relation to:

- User material
- Subcontracting
- Confidential information
- Buyer data
- Privacy
- Selected Region for Buyer Data
- Security
- Intellectual property
- Indemnities
- Liability
- Suspension rights
- Termination for cause
- Early termination
- Consequences of termination or expiry
- General legal terms

We draw your attention to the following key areas where we require your feedback:

**Buyer Data**

Under the Cloud Core Terms the buyer owns or controls all “Buyer Data”, being data or information that is:

- provided by the buyer to the seller; or
- stored, processed, transmitted or generated (i) by the buyer in the course of using the cloud services, or (ii) by the seller on the buyer’s behalf, in the course of performing the agreement.

By exception, “Systems Metadata” and “Account Information” are excluded from the scope of Buyer Data.
Australia is the default region for the location of Buyer Data - with the ability to make amendments in the Requirements. Clause 9 (Selected Region for Buyer Data) of the Cloud Core Terms sets out obligations to keep the Buyer Data in the “Selected Region”, and prohibits access to the Buyer Data from outside the Selected Region.

Security of cloud services and Buyer Data

- The Cloud Core Terms set out the general legal terms relating to security - including the allocation of responsibilities between the parties in relation to security of the cloud services and Buyer Data.
- Detailed security requirements will be set out in Attachment 1 to the Requirements (Detailed Security Requirements).

Additional security materials: It’s not appropriate to take a “one size fits all” approach to security for cloud services. We’re preparing security checklists and guidelines to assist buyers in compiling their detailed security requirements for Attachment 1. Those additional materials will be made available for consultation as soon as they are available.

Please provide your feedback in relation to:
- the scope of Buyer Data;
- managing the “Selected Region”; and
- the allocation of responsibilities between the parties in relation to security of the cloud services and Buyer Data.

Indemnities

- The seller is required to provide an indemnity to the buyer in relation to third party intellectual property claims. The question arises as to whether an indemnity should be provided by the buyer to the seller in respect of third party intellectual property infringement claims concerning access to and use of Buyer Data. See clause 15 (Indemnities) of the Cloud Core Terms. Clause 16(b) also provides that indemnities are uncapped.
- This would be a significant policy change for NSW Government – recognising that current advice from the Procurement Board to government agencies is not to provide any indemnities to suppliers. This Procurement Board position is reflected in the Procure IT contract framework. Such a change would require consultation with the NSW Government Treasury Managed Fund (TMF).
- However, we are posing the question in relation to cloud services - recognising that government agencies are operating in the seller’s cloud environment (rather than in their own environment). A third party intellectual property indemnity provided by the buyer would relate to risks which the seller has no control over, and instead remain within the control of the buyer.

Please provide your feedback in relation to indemnities

Liability

Liability under the Cloud Agreement is subject to:
• **uncapped and unlimited liability**: where set out in clause 16(b) of the Cloud Core Terms;

• the **Security Breach Liability Cap**: where set out in clause 16(c) of the Cloud Core Terms; and

• the **General Liability Cap**: where set out in clause 16(d) of the Cloud Core Terms.

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**Clause 16(b) - Uncapped and unlimited liability**: applies to the following:

- personal injury (including death) or damage to property;
- a breach of a third party's intellectual property rights;
- any indemnities provided under the Cloud Agreement;
- a breach of confidentiality obligations under clause 6 (Confidentiality), or of Privacy Laws or any privacy obligations under clause 8 (Privacy);
- our payment obligations under the Cloud Agreement; and
- damages for gross negligence or willful misconduct.

There is no exclusion of indirect, incidental or consequential damages for this category.

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**Clause 16(c) - Security Breach Liability Cap**: applies to a breach of the Seller’s obligations under:

- clause 10 (**Security**) of the Cloud Core Terms; or
- section 14 of the Requirements (**Detailed Security Requirements**).

The Security Breach Liability Cap is two (2) times the amounts paid or payable by the Buyer during the prior 12 months - less any claims already paid by the Seller under the Security Breach Liability Cap during that prior 12 month period.

A minimum cap of A$2,000,000 applies for the first year following the Commencement Date.

Indirect, incidental and consequential damages are excluded for this category.

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**Clause 16(d) - General Liability Cap**: applies to the liability of either party in any other circumstances (ie: where clauses 16(b) and 16(c) don’t apply).

The General Liability Cap is one (1) times the amounts paid or payable by the Buyer under the Cloud Agreement during the prior 12 months - less any claims already paid by the relevant party under the General Liability Cap during that prior 12-month period.

A minimum cap of A$1,000,000 applies for the first year following the Commencement Date.

Indirect, incidental and consequential damages are excluded for this category.

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*Please provide your feedback in relation to the proposed approach to liability for cloud services*
**Making changes to the Cloud Core Terms**

The Cloud Core Terms address matters that are critical to NSW Government. It is intended that these Core Terms can only be amended via the process set out in the relevant Procurement Board Direction.

By exception, the Cloud Core Terms contemplate that alternative terms may apply where required:

- under applicable laws or regulations
- in relation to beta services or trial use
- or in limited circumstances where third party software is subject to third party “pass-through” terms.

**Please provide your feedback in relation to the process for making changes to the Cloud Core Terms**

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**3. Cloud Agreement - Requirements**

We recognise that no two cloud services are the same - and every cloud service provider has a different approach to commercial and technical arrangements. Also, agencies will have their own specific requirements about how cloud services are delivered.

The Requirements document (set out in Annexure 2 to this Discussion Paper) is designed to capture specific details of the arrangements agreed between the parties, including in relation to:

- Cloud Services description – with a link to details of the specific functional, technical, delivery and support arrangements set out on buy.nsw
- Scope of the Cloud Agreement
- Agreement Period
- Specific details of the fees and invoicing arrangements
- Details of any alternative arrangements required, where permitted under the Cloud Core Terms
- Selection Location details
- Detailed security requirements
- Service levels / service credits
- Details of the buyer’s policy requirements
- Arrangements for managing ongoing changes

We draw your attention to the following key areas where we require your feedback:

**Scope of the Cloud Agreement**

The Cloud Agreement is available for all cloud services – except those identified as “Excluded Services” in Attachment 2 to the Requirements. This enables the parties to expressly exclude a particular type of cloud service where:

- procurement of that type of cloud service is not authorised by the buyer; or
- it is not appropriate to procure that type of cloud service under the terms of the Cloud Agreement (and alternative arrangements need to be considered).
Please provide your feedback on the approach to Excluded Services – and identify any types of cloud services which you consider should be treated as Excluded Services.

**Agreement Period**

The parties may agree a fixed term for the Cloud Agreement – or alternatively, the Agreement Period may continue until either party terminates on 30 days’ notice. See section 5 of the Requirements.

Please provide your feedback on the approach to the Agreement Period (including notice periods for termination)

**Capturing detailed requirements for cloud services**

- The information requirements relating to cloud services can be minimised by leveraging (and incorporating by reference) the details set out on buy.nsw in relation to the particular cloud services procured.
- To enable this to work in practice, we recognise the need for ongoing curation of the cloud service details set out on buy.nsw to ensure that they are adequate and appropriate for contracting purposes.
- In addition to the information set out on buy.nsw, further details about the cloud services can be documented in the Requirements, or by reference to details on the seller’s website or management console. Customised order documentation may also need to be introduced in the future (paper-based or electronic).
- At this stage, the draft Cloud Agreement is designed to work in conjunction with buy.nsw – but we recognise that there are other options for recording the details of cloud services acquired. Regardless of how details about the cloud service are captured, we’re keen to obtain your feedback on the scope of information required.

Please provide your feedback on Annexure B: Requirements and the scope of information required in relation to cloud services

**Making changes to the cloud services**

- The seller is expected to make ongoing changes to the cloud services to keep pace with technological changes and improvements in methods of delivery. This includes updating the details posted on buy.nsw so that they remain current throughout the Agreement Period in accordance with section 3(c) of the Requirements (Updating buy.nsw details).
- All changes to the cloud services (including changes to the details posted on buy.nsw) are subject to the following conditions (see section 19 of the Requirements (Changes to the Cloud Services)):
  - where the seller wishes to make security changes, the seller must continue to provide at least the same level of security as required at the time of signing;
for any other changes to the security requirements, the seller must use all reasonable endeavours to provide least 90 days' notice;

where the seller wishes to make changes to service performance and/or service levels (including any associated service credits):
  – the seller must provide at least 180 days' notice where those changes will materially reduce the benefits offered to the buyer, as compared with those applying at the time of signing; and
  – for any other changes (except where specified below), the seller must use all reasonable endeavours to provide at least 90 days' notice.

the seller must not make any changes that would result in the cloud services being discontinued or unable to comply with the Cloud Agreement (including changes which would lead to a material adverse impact on the cloud services resulting in a loss of functionality, capability or Buyer Data, or alteration of Buyer Data or a cloud service) unless:
  – the seller makes those changes for all customers receiving the same cloud service; and
  – the seller provides the buyer with at least 12 months' notice, except where such changes are necessary to address an “Emergency” (as defined), in which case the seller must provide such notice as is reasonably practicable.

Please provide your feedback on the proposed approach to making changes to the cloud services

Making changes to the Requirements document

• The details contained in the Requirements document relate to the functional, technical and commercial arrangements for the cloud services, and how they are to be delivered.

• It is contemplated that the Requirements document can be amended with consent of the agency’s CIO – provided that those amendments do not conflict with, or attempt to change the legal outcome under, the Cloud Core Terms.

Please provide your feedback on the proposed approach to making changes to the Requirements document
4. Cloud Agreement - Attached Seller Terms

- We recognise that sellers may need to impose certain conditions or restrictions on the use of their cloud services. While the Cloud Core Terms contain minimum legal requirements for buyers, they don’t necessarily address all the seller’s requirements.
- The draft Cloud Agreement contemplates that a seller may attach additional terms, where and to the extent agreed by the buyer. Tight restrictions apply to ensure that those “Attached Seller Terms” don’t have the effect of changing the legal outcome under the Cloud Core Terms, or changing the agreed Requirements. This drafting is set out in clause 1 of the Cloud Core Terms.

Please provide your feedback on the arrangements for incorporating Attached Seller Terms into the Cloud Agreement

5. Capturing spend information in relation to cloud services

- Sellers are required to provide data about cloud services procurement to buy.nsw (including details of cloud services procured and associated spend). This is required to facilitate whole-of-government reporting and data analytics.
- Under the Requirements document, the buyer authorises the seller to provide such reporting information to buy.nsw. See section 17 of the Requirements (Performance monitoring and reporting).

Please provide your feedback on the proposed approach to capturing details of cloud services procured and associated spend

6. General approach

A key component of the ICT transformation program is to ensure that the contracting framework provides a clear, streamlined, user friendly approach to contracting that meets the needs of agencies.

Please provide your feedback on whether the draft Cloud Agreement meets this objective

7. Next steps

- Please provide your feedback on all other aspects of the Cloud Agreement.
- Once we receive your feedback, we’ll fine-tune the draft Cloud Agreement so that it’s flexible to address the various types of cloud services. We’ll also refine the end-to-end processes for the procurement of cloud services, leveraging the buy.nsw digital platform where it makes sense.
- In the meantime, we will continue to prepare security checklists and guidelines to assist buyers in compiling their detailed security requirements for Attachment 1.
Those additional materials will be made available for consultation as soon as they are available.

- Then we’ll broaden our focus into other contracting areas such as professional services, managed services and as-a-service.

Please provide your views on areas that you would like to see prioritised as we transform the contracting framework for ICT procurement

8. Get involved

- We’re keen to receive your feedback on the new contracting approach for cloud, including on the issues that we’ve flagged for discussion.
- Let us know what you think by emailing ICTServices@finance.nsw.gov.au. We’ll be accepting feedback until 31 October 2018.

IDG & Digital Government – ICT Procurement

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