



Limiting Liability in ICT Contracts Guideline

February 2024



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This guideline outlines a recommended approach for establishing appropriate limits on the liability of suppliers, for use by State agencies (agency) engaged in the procurement of Information and Communications Technology (ICT). A limit or 'cap' on a supplier's liability refers to an arrangement within a contract where a supplier's liability for damage or loss incurred by the agency is limited to a finite amount.

This guideline should be read in conjunction with the procurement guidelines available on wa.gov.au, in particular the [Risk Management in the Procurement Context](#) and [Procurement Insurance Requirements](#) guidelines. The [WA Government Cyber Security Policy](#) may also be relevant when considering the risk of the ICT procurement.

Advice from the Insurance Commission of Western Australia (ICWA) must be sought prior to proposing, or accepting, a limit on liability.

Terms which may be useful when reading this guideline include:

- Risk - the chance of something happening that will have an impact on objectives, e.g. an event such as late delivery.
- Liability - a person's legal obligation to pay or compensate another person for loss or damage caused.
- Liability limit or cap - an arrangement where an entity agrees to a limit on the liability of another party (e.g. a supplier). If the entity subsequently suffers a loss because of an act or omission of the supplier in relation to the performance of the contract, the entity has agreed it will not seek to recover from the supplier more than the amount of an agreed cap.
- Indemnity - a legally binding promise whereby one party undertakes to accept the risk of loss or damage another party may suffer.
- Maximum possible loss - the financial estimate of any costs / damages that could be incurred if a risk eventuates *without* controls or treatments in place.
- Maximum probable loss - the financial estimate of any costs / damages that could be incurred if a risk eventuates and there are controls and treatments in place to mitigate the effects of the loss.

1. Liability limits

A limit or 'cap' on a supplier's liability refers to an arrangement within a contract where a supplier's liability for damage or loss incurred by the agency is limited to a finite amount. A liability cap only applies to the parties to the particular contract and does not include:

- the supplier's liability to compensate a third party; or
- damage suffered directly by the supplier.

Limiting a supplier's liability under a contract means that an agency may be unable to recover any gap between losses it suffers and the limit that has been agreed with the supplier. Where a loss is greater than the liability contracted for, the customer must bear this liability.

Before deciding to limit liability, there are two key aspects that require consideration:

- assessing maximum probable loss (see section 3); and
- determining what has been included in the limited liability (see section 4.2).

2. Drivers for limiting liability

Suppliers contend that in some circumstances unlimited liability either exposes them to a risk that they cannot obtain insurance for, or that the insurance cover would be unacceptably expensive. If a claim is made against a supplier that exceeds its insurance cover, they may need to use their own funds to make up any shortfall which may impact their ability to continue as a business.

In consideration of a supplier's potential insurance concerns, a Request that specifies a requirement for unlimited liability may result in the receipt of very expensive offers, no offers, or offers suggesting limited solutions which mitigate the risks to the supplier.

Although limiting supplier liability could expose the agency to additional risks, it may provide benefits including lower prices and promoting small to medium enterprise engagement in the procurement process. This makes the procurement planning stage the most appropriate point at which to consider limiting liability.

3. Determining limits and assessing maximum probable loss

If limits are to be included in a contract, a comprehensive risk assessment must be completed to determine the estimated maximum probable loss. When determining appropriate limits, please note:

- It is important not to conflate risk with contract value. Just because the price payable for the ICT goods or services is low does not mean that the customer's risk of loss or damage potentially suffered is also low. Similarly, not every high value contract is high risk.
- Whilst previous risk assessments and limits to liability that have been agreed under previous contracts are a good starting point, an updated risk assessment should be undertaken to ensure the current risk profile of a procurement is adequately reflected.

- Where liability is to be limited, it is preferable to specify a cap on the supplier's total aggregate liability. Limiting liability in relation to each 'occurrence' may create uncertainty, as it is often difficult to determine whether loss arose from a single or multiple 'occurrences'. An 'aggregate' cap limits the supplier's total liability under the contract regardless of the number of breaches. Any limits on liability should be expressed in the Request as a dollar figure, rather than a percentage of the contract value.
- Assessing maximum probable loss is the most accurate and sophisticated method of quantifying the liability associated with a project. Maximum probable loss is assessed using a model that combines the financial consequences of the identified risks with the likelihood of those risks eventuating, as well as any controls and treatments. A certain level of expertise is required to complete this assessment, and specialist assistance is recommended. If expertise is not available within the agency, agencies should consider engaging a risk management consultant from the [Audit and Financial Advisory Services CUA \(CUA AFA2018\)](#) – refer Category D 'Risk Advisory Services'.
- Agencies should also avoid agreeing to limiting liability at the amount of a supplier's insurance coverage. The level of insurance required to be held by the supplier does not necessarily equate to the limit on the supplier's liability under the contract.
- All decisions to propose or limit supplier liability must be approved by the agency's relevant Accountable Authority. The agency must document the rationale for all these decisions.

Advice from the Insurance Commission of Western Australia (ICWA) must be sought prior to proposing, or accepting, a limit on liability. Where ICWA does agree to extend insurance cover and provides a 'Certificate of Cover – Nominated Contract', this certificate must be provided to the agency officer responsible for insurances. If ICWA does not agree to extend insurance cover, approval from the agency's Accountable Authority must be sought before a limit is agreed to. Note that a decision from ICWA is only possible if there are no other continuing negotiations that may affect how the cap will operate.

4. Considerations during the procurement lifecycle

4.1 Planning

The WA Procurement Rules require agencies to establish processes to identify, analyse, allocate and manage risk commensurate with the scale, scope and risk of the procurement. It is best practice for an agency to undertake a risk assessment for all ICT procurements at the planning stage of the procurement.

The default position is to include unlimited liability in the Request. However, during the planning stages of a procurement process, agencies should consider, based on their experience and industry research, whether it may be appropriate to set a limit on supplier liability in the Request.

Any limit on supplier liability should be restricted to:

- liability for breach of contract; and
- liability for negligence (including professional liability).

Section 6 contains more detail on elements of liability which must not be limited.

Where it is considered appropriate to limit liability in the Request, the liability cap in the Request must not be less than maximum probable loss determined through a risk assessment.

Agencies must obtain ICWA advice if proposing to release a Request that includes a limit on liability (see section 5). All decisions to propose limited supplier liability must be approved by the relevant Accountable Authority, following ICWA engagement.

4.2 Contract Formation

A supplier may submit an Offer which proposes a lower limit on liability to that specified in the Request (either because the Request has no cap on liability or because the Request has specified a cap that is higher than the one proposed by the respondent).

In the value for money assessment, the evaluation panel must consider the respondent's proposed alternative conditions regarding the limitation of liability. In doing so, the evaluation panel should consider:

- How much risk would be transferred to the agency if the lower liability limit was accepted?
 - How much lower is the proposed cap compared to the maximum probable loss?
 - What categories of liability has the supplier proposed to limit? Keep in mind certain categories of liability must remain uncapped.
 - What effect would accepting the supplier's proposed limit have on the agency's contractual liability cover provided by ICWA.
- How much of a qualitative advantage does the solution, offered by the respondent who proposed the limits, present when compared to the alternatives?
- What is the price ranking of the respondent who has proposed limits?

All decisions to limit supplier liability must be approved by the relevant Accountable Authority, with advice from ICWA.

4.3 Contract Management

The contract's risk should be managed during the term of the contract. The contract's risk profile may change over its term, with some new risks having emerged and/or existing risks become more or less likely.

Contract managers should continue to assess the appropriateness of any liability cap, and determine whether further risk management strategies are required.

5. Role of Insurance Commission of Western Australia

The RiskCover fund is the Government of Western Australia's self-insurance scheme administered by the Insurance Commission of Western Australia (ICWA). ICWA provides agencies with financial protection through self-insurance and reinsurance cover. The cover is designed to protect agencies against risk, including but not limited to injuries to employees, damage to property and legal liability arising from the wide range of activities and services undertaken by agencies.

ICWA provides insurance coverage to agencies on the condition that it has the right to recover a loss from the supplier responsible for causing that loss – this is known as subrogation. ICWA's subrogation rights may be prejudiced where a claim is made on the supplier for a loss, which the supplier is legally liable for and ICWA is unable to recover the full amount of the loss from the supplier, due to a liability cap. ICWA may subsequently limit the agency's coverage to the amount that can be recovered from the supplier. The agency would then have to bear any loss above the liability cap. This could be a significant issue for the agency's budget and as a result the Accountable Authority must be kept informed of these potential risks.

ICWA's notification requirements are set out in detail in the RiskCover Fund Guidelines (available from ICWA on request). In summary, an agency is required to provide ICWA with:

- details of the procurement, such as a Procurement Plan or Request document;
- a copy of the completed risk register (available in the procurement [Risk Workbook](#));
- maximum probable loss calculations; and
- any negotiation logs.

ICWA will review the information provided and if complete, provide advice on suitable liabilities. Where necessary, ICWA will request additional information to inform the advice. If ICWA agrees to reinstate contractual liability cover in full or in part, ICWA will issue the agency with a certificate.

It is recommended that agencies contact ICWA as early in the procurement planning process as possible to discuss insurance requirements or liability capping. Where

further information is required about contractual liability cover, agencies should contact contracts@icwa.wa.gov.au or visit the website at: www.icwa.wa.gov.au.

6. ICT Request provisions

The General Conditions of Contract indemnity and liability clauses do not apply to ICT procurements. The [Request – ICT, CUA, Group Buy or Panel Arrangement](#) template includes alternative liability and indemnity clauses for use with ICT contracts.

The ICT Request contains several clauses related to indemnities, liability and releases. It is important to understand which clauses apply to which parties to a contract. Some clauses relate to third parties (i.e. not the supplier or customer [agency]) and some relate to party to party (i.e. the supplier to the customer, and customer to the supplier).

Any limit or exclusion from loss or liability must not apply to loss or liability for:

- third party claims including in respect of any exemplary or punitive damages awarded to a third party;
- personal injury, sickness and death;
- infringement of Intellectual Property Rights;
- breach of confidence or privacy by the supplier;
- a conflict of interest in respect of the supplier;
- matters that cannot be excluded at law;
- to the extent that a party is able to recover the loss from its insurer with no deduction made for a deductible or excess paid or payable to the insurer;
- an abandonment of the Contract by a party;
- reckless acts or omissions carried out with a wilful disregard for the consequences;
- wilful and intentional breach by a party;
- any statutory fines or penalties levied against a party;
- unlawful acts or omissions of the contractor's personnel.