However ATSs will also be faced with competition from exchanges who are rapidly developing alliances with one another to provide multiple-market access to their investors and who are also expanding into non-traditional areas. For example, **ASX's enterprise market, Hong Kong's Growth Enterprise Market** and the **Deutsche Borse's Neuer Market** which cater for emerging high-risk and high-growth segments. The **ASX** also recently introduced a secondary trading platform for corporate debt securities in November 1999, an area which the NYSE is also considering expanding into. Exchanges are also developing or adopting ATSs facilities to attract order flow. For instance, **NYSE's Institutional Xpress** and **NASDAQ'S Primex**, which will be formally introduced in late 2000. The ultimate game will turn on costs and market depth and will be the catalyst for the global redefinition of the market's identity.

Currently, **NASDAQ** is leading the race in globalisation. In 1999, NASDAQ established an alliance with the **ASX** and the **SEHK** to provide dual-listing to major companies, whose securities will be accessible to investors in both markets, and announced intentions to develop a 24-hour market system with the launch of **NASDAQ-Europe** and **NASDAQ-Japan** which will be accessible through a single entry point via the Internet. Such measures may see **NASDAQ** become the **core of the future global exchange**. More recently (June 2000) however, the **NYSE** has announced that it is participating in multilateral discussions to explore the feasibility of a Global Equity Market (**GEM**) with the **ASX, Euronext** (Amsterdam, Brussels, Paris), **SEHK**, the Mexican Stock Exchange, the Boalsa de Valores de Sao Paulo, the Tokyo Stock Exchange, and the Toronto Stock Exchange. Such rapid developments call for Australian regulators to rethink their position on the suggested merger of the **ASX** and the **Sydney Futures Exchange.**

In the meantime, trade barriers to global e-commerce will warrant room for more than a handful of exchanges and ATSs in the globalised market. These include the inevitable factors of geographically bound laws and the convenience of physical proximity, and the infrastructure difficulties associated with competing platforms, tax complications, varied forms of electronic payment and lack of integration in the banking sector. Cost and integrity implications will also encourage a trend towards STP in the trading process amongst international exchanges and emerging ATSs, as the current financial system cannot sustain trading activity at the projected volume. STP can have positive implications for the **broker-client relationship**, and in turn, market confidence in terms of the regulation of client-precedence, front-running, disclosure of principal trading, conflict of interest and best-execution.

Finally, as the progressive evolution of Internet trading alters and blurs the respective roles of exchanges and broker-dealers, regulatory reform in financial markets will play an important role in balancing the interests of market competition and market confidence in the growth context of ATSs. Compared to the Australian, US and UK regimes which accommodate the flexible development of ATSs and ECNs, Asian-Pacific regimes, such as **Hong Kong, Taiwan**, and **Malaysia**, currently have stringent regulations prohibiting competing ECNs.

The global exchange however does not stop here. Given the technological possibility of open-interface and STP, online trading will be the chief catalyst of the convergence of all online financial market services.

1 "Co-listing to initially favour Top 50," *The Age*, 30 November 1999, p 6; see also "The coming revolution in financial markets" *ASX Perspective*, 1st Quarter, 2000, p 4.
2 "ECNs, ATSs and Other Electronic Markets: An Insider's Guide" *Securities Industry News*, 13 January 2000.
3 L Semaan, "Online Markets in Asia-Pacific: Economic and Regulatory Implications" *ASX Perspective*, 3rd Quarter, p 63.
4 "Nasdaq System OK'd" *Securities Industry News*, 24 January 2000, p 1. For further discussion see section 6 of the report.
5 See websites: **www.instinet.com** and **www.bloomberg.com** under 'services.'

Precontractual Negotiations for Computer Hardware & Software Contracts

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1. INTRODUCTION

Three of the most important elements in any successful negotiation are understanding your business needs, understanding the needs of the other party and preparation. This is particularly the case for the negotiation of software and hardware contracts which increasingly form the backbone to a business' key operations. Understanding business needs and preparation for negotiations involves thinking about present needs as well as assessing the possible future requirements and obstacles.

This paper does not discuss the negotiation of various software and hardware contracts on a clause by clause basis. Instead, it outlines some specific issues that parties preparing

and negotiating software and hardware contracts should address in their negotiations in order to minimise or avoid future losses.

These issues are:

- Representations and statements made in the course of precontractual negotiations;
- Warranties;
- Limitation of liability;
- Privacy; and
- Tender documentation.

2. REPRESENTATIONS AND STATEMENTS

Pre-contractual negotiations may take place over a period of time and include a number of representations and statements, as well as conduct and sometimes documentation. IT contractors need to be aware that these activities may have legal consequences. Preparation for pre-contractual negotiations is the key to avoiding statements and conduct that could attract legal liability.

2.1 *Misleading and Deceptive Conduct*

Section 52(1) of the *Trade Practices Act* 1974 (Cth) (**the Act**) provides that, "a corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive". Section 52 has particular application to pre-contractual negotiations, as there is a wide range of statements and conduct that may fall under the Act, depending upon the circumstances. A claim based on contravention of section 52 may arise where one party is induced to enter into an agreement by reason of a misrepresentation by the other party.

Conduct is misleading if it has a tendency to lead the other party into error. Conduct may include exaggerated statements about property and services, statements of law, opinions and promises and even silence. The courts have decided however, that where exaggerated statements are made in the course of negotiations between business people of experience, this conduct will not be readily characterised as misleading, especially if the parties have had legal and accounting advice. In addition, it will be difficult for a claimant to establish that it relied on the misrepresentation where the claimant has obtained legal, commercial or technical advice in relation to the circumstances giving rise to a potential claim.

A person claiming damages for contravention of section 52 will need to show that they relied on the conduct - to the extent that they were induced or influenced by the conduct to do or not to do something—and as a result, suffered damage. If a claim of misleading or deceptive conduct is established, a range of remedies may be available. These include injunctions, damages and orders that a contract is void or to be varied.

The various state and territory Fair Trading Acts also contain similar provisions on misleading and deceptive conduct which should be considered.

2.2 *Estoppel*

Estoppel may take a variety of forms, although it will usually be based on an express or implied representation or promise. Assuming that a sufficiently clear representation or promise is established, and relied on to the detriment of the party setting up the estoppel, relief may be available. The relief that is appropriate will depend not only on the content of the representation or promise but also on the circumstances. Although there is no rule that a person who is estopped from denying that it made a promise must in all cases make the promise good, relief analogous to normal contractual relief is sometimes awarded. In practice, it will be more difficult to establish estoppel arising in pre-contractual negotiations involving two equal commercial entities, particularly where parties obtain professional advice in the pre-contractual stage of negotiations.

3. WARRANTIES

When negotiating a software or hardware contract, it is necessary for a party to consider how risks under the contract are to be allocated between the parties. One method of controlling that risk is by the inclusion of appropriate warranties in the contract. Warranties are one form of protection that a supplier or purchaser can use to ensure that the contract will meet their needs. A warranty may take the form of an undertaking that a fact is true (or false). Alternatively, it may simply be a contractual promise. The warranty allocates where risk will lie in the event that the fact is false (or true), or the promise is not fulfilled. Common warranties for IT contracts are performance warranties, system warranties and intellectual property rights warranties.

3.1 *Preparation of Warranties*

As IT contracts are usually specialised and customised for a particular environment, it will rarely be possible to follow a general precedent when negotiating warranties for a contract. There will inevitably be negotiation about the warranties that each party will seek from the other, although this may not be possible in some cases, for example, "shrink wrap" licences.

The purchaser will usually seek to obtain a warranty that certain standards of performance will be met. Of course, the supplier's position might be to make the performance warranty conditional on the technology being used according to the supplier's specifications and in a specified manner. Types of warranties that might be included are that:

- a particular type of software performs in accordance with defined specifications or requirements;
- the components of the system will actually work together;
- all services provided by the supplier will be provided with due care and skill; and
- the supplier has the right to grant the licence of the particular software.

The exact form of warranties that are required will depend on the nature of the technology, the degree of customisation required and the business needs of each party. Whether the technology is newly developed "state of the art" technology, developmental, legacy or well established systems will also influence the extent and form of the warranties.

From a customer's perspective, consideration should be given to the customer's expectations for performance of the information technology being supplied. Any particular requirements of the customer, or any representations of the supplier regarding performance of the relevant information technology, should be included as warranties.

The customer should also carefully review any documentation provided by the supplier, which operates as the specification or performance benchmark for the information technology, to ensure that document contains all relevant business, functional and technical criteria. As part of the negotiation process, both parties should consider the extent to which these warranties should be unconditional and whether there will be excluded events that excuse non-performance.

3.2 *Third parties*

In negotiating IT contracts, relevant considerations in the allocation of risks under the contract are:

- the extent to which performance of the supplier's obligations is dependent on third party input; and
- whether such performance is for the benefit of third parties (in addition to the customer).

The provision of warranties in the contract may create difficulties where third parties are involved. Third parties will be important in two cases.

First, where the purchaser seeks to obtain the benefit of a warranty for itself and for a third party. A clause that provides for the warranties to benefit third parties will be valid. However, if it becomes necessary to enforce this clause, a number of issues will arise:

- whether the third party is able to enforce the warranty against the vendor, given that contract law only entitles the purchaser to bring proceedings in relation to the warranty's application to the third party;
- where the purchaser does bring proceedings, it is only entitled to recover in respect of it's loss and this may be of no benefit to the third party.

Second, the warranties provided to the purchaser may be intended to include third party warranties given to the vendor. In this case, an assignment of the third party warranties to the purchaser may not be sufficient to provide the purchaser with the ability to enforce the warranties under the contract. In addition, there may be little practical value to the recipient of such third party warranties if the third party does not actually have the funds to meet any liability that arises from breach of warranty.

3.3 *Breach of warranty*

Negotiation of the scope of the warranties to be included in the IT contract should also take into account the parties' obligations on breach of a warranty. This will depend again on the business requirements of the purchaser and also on the service levels the supplier is prepared to agree to perform. In my experience, purchasers prefer to have the service levels for rectification of defects available under a maintenance arrangement also to apply to defects in the warranty period.

4. LIABILITY ISSUES AND LIMITATIONS

4.1 *Bargaining Power*

Warranties are one example of a serious liability risk area in software/hardware contracts. But it is not the only one that parties will need to deal with early in negotiations. You will need to know upfront what legal protection the other party is prepared to offer you so that you can structure your demands commercially; that is, assess tradeoffs and determine early on whether the deal is too much of a risk and should not be pursued.

Whether a party can negotiate trade offs largely depends on its bargaining power. For example, smaller customers may not be able to negotiate for tradeoffs if the vendor is a large organisation because such an organisation can generally afford to make demands on a 'take it or leave it' basis. Sometimes the opposite is true.

4.2 *Risk allocation devices*

In negotiating an IT contract, each party needs to consider the risks involved. A party may have to 'wear' liability arising from a certain event happening. Alternatively, a party may be required to compensate the other party if the other party incurs liability from the occurrence of a certain event. It may be difficult to quantify those risks. In many cases the potential liability will exceed the profits anticipated from the contract. The risk of damages can be regulated by clauses which seek to control liability. The usual approach is to use clauses which exclude or limit liability—collectively referred to as exclusion clauses. It is important to remember in your negotiations, however, that because contracts are concerned with the allocation of risk, virtually every provision in a contract will have some impact on the scope of the parties' responsibilities and the risk which a party bears under the contract.

4.3 *Indemnities*

Indemnities are common risk allocation devices. Two common types of indemnities in IT contracts are:

- third party indemnities; and
- party-party indemnities.

A third party indemnity may be a clause in a contract stating that one party will hold the other harmless against any loss or damage arising

from a claim by a third party, whether connected with a breach of the contract or not. For example, where a licensor of intellectual property indemnifies the licensee against any actions from third parties claiming that the use of the license infringes their intellectual property.

Party-party indemnities are a method of defining the extent of liability for breach. For example, a contract between a supplier and a distributor may include a provision that the breaching party will indemnify the innocent party for any loss or damage suffered by the innocent party that arises from the breach.

4.4 Exclusion clauses

Exclusion clauses seek to control a party's liability for certain actions or events.

An exclusion clause may exclude or limit any form of liability unless the exclusion is prohibited by public policy or statute. You should note that, generally, an exclusion clause is ineffective to avoid liability for breach of section 52 of the Act (misleading and deceptive conduct). This is not because there is anything in the Act which expressly prohibits the use of exclusions but because the courts have generally interpreted public policy as requiring the duty which section 52 creates to take precedence over contract.

Some examples of exclusion clauses are clauses that:

- exclude all liability for breach of the contract;
- limit a party's liability in the event of a particular breach to the taking of corrective action;
- exclude liability for indirect or consequential losses;
- exclude liability for particular types of losses (for example, loss of profits);
- limit liability to a maximum dollar figure (capping).

Although historically, the courts have shown hostility towards exclusion clauses, more recently they have adopted a more commercial approach, particularly where the parties have negotiated the contract and not merely used a standard form.

The most common form of exclusion clause is one which applies to "loss or damage" caused by a breach of the contract. This loss or damage may be pecuniary (eg: economic loss) or non-pecuniary (eg: mental distress). Examples of some issues to think about when negotiating clauses which seek to control liability for loss or damage are:

- is liability to be limited to direct loss or damage or does it include liability for consequential losses or loss of profit?
- is all liability to be excluded or is it to be limited for example, to the taking of one or more types of corrective action?
- are there limits on the type of action or inaction which causes the loss or damage, for example negligence or wilful breach of the contract?
- is liability to be excluded for any breach of the contract or only for particular breaches of the contract? For example a supplier failing to supply goods or services in accordance with the agreement.
- is liability to be capped?

4.5 Caps on liability

Negotiating for a cap on liability is largely a commercial issue. The purpose is to specify a maximum amount which a party will be liable for in the event of a successful claim against it.

In particular, all vendors of software and hardware products, service providers and recipients of IT outsourcing services should consider negotiating caps on their liability under the contract, limiting their liability to direct loss and excluding consequential loss or loss of profits.

Listed companies in particular should bear in mind that potential investors may be deterred if there is an unlimited liability or liability for consequential damages on the balance sheet.

Agreeing to a cap is not necessarily a drawback if the amount of the cap is carefully measured against risk of potential damage or loss occurring under the contract. Negotiating caps on liability may even bring other benefits to the customer. For example, if a vendor insists on capping its liability for breaches of the contract or wishes to limit its liability in other ways then the customer may be able to negotiate a better price or other added benefits to compensate for agreeing to a cap.

4.6 Limits on liability under the Trade Practice Act

This section of the paper deals with limiting liability for breaches of warranties and conditions implied by the Act. Similar provisions may also apply under state legislation (for example, the *Goods Act* (Vic)) but will not be discussed in this paper.

Parties negotiating software/ hardware contracts should always consider whether the Act applies as a threshold issue. This will determine a framework in which to negotiate in this context and will indicate to each party what to bargain for.

Division 2 of Part 5 of the Actimplies specific non excludable conditions and warranties into contracts for the supply of goods and services to consumers.

If that division of the Act applies, a customer may or may not be able to negotiate conditions and warranties that give greater protection than the Act offers. If the Act does not apply, the customer may or may not be able to negotiate up to the level of protection given in the Act or a higher standard. How successful a customer will be again depends on the relative bargaining strengths of the parties and the relationship between the parties.

Broadly speaking, in relation to the supply of goods by a corporation, the Act implies warranties relating to title and quiet enjoyment of the goods.

The Act may also imply conditions that the goods correspond with their description, are fit for their intended purpose (as communicated), are of merchantable quality and that they comply with any previously supplied sample.

In relation to the supply of services by a corporation, the Act implies a warranty that services will be rendered with due care and skill. The Act also implies warranties relating to fitness for purpose.

A clause which excludes liability for express conditions and warranties and for breach of duty of care in negligence will be enforceable. However, any term of a contract that tries to exclude, restrict or modify these implied warranties and conditions is void (sec 68).

The Act permits a contract to limit the remedies for breaches of these conditions and warranties in these ways:

- supply of goods *other than goods ordinarily acquired for personal, domestic or household use or consumption* = replacement, repair or cost of acquiring equivalent goods (sec 68A); and
- supply of services *other than services ordinarily acquired for personal, domestic or household use or consumption* = resupply of services or cost of resupply (sec 68A).

To determine whether the Act applies the parties should ask themselves:

- is the customer a "consumer"?
- is the supplier a "corporation"?
- is the software or hardware "goods" under the Act?
- are there "services" for the purposes of the Act?
- is the software/hardware ordinarily acquired for personal, domestic or household use?

4.7 Definitions of "consumer" and "goods" under the Trade Practices Act

A detailed discussion of the requirements of all the relevant definitions under the Act is beyond the scope of this paper and therefore it will address instead only two key definitions: "consumer" and "goods".

The threshold criterion for Division 2 protection is whether the customer is a "consumer".

In broad terms, if the goods/services supplied are:

- worth $40,000 or less; or
- worth above $40,000 but are ordinarily supplied for domestic/household use or consumption, then the customer is a "consumer". This will be the case for goods, provided that they were not acquired for the purpose of re-supply or for the purpose of using them up or transforming them, in trade or commerce (sec 4B).

Sometimes it may not be clear whether the definitions apply to the subject of a contract being negotiated. The definition of "goods" under the Act is not exhaustive or exclusive. It is expressed to "include" items but does not exclude items. So, parties may be unsure whether the items to be provided would be included in the definition of "goods" unless those items are specifically mentioned in the definition. For example, it has not been decided definitively in Australia whether computer program are "goods" for the purposes of the Act.

This means that parties negotiating software and hardware contracts, and customers in particular, should insist on including in their contracts, as a minimum, the type of warranties included in the Act.

5. PRIVACY ISSUES

How will the Federal Government's *Privacy Amendment (Private Sector) Bill* be relevant to current precontractual negotiations of software and hardware contracts?

Parties who are already part of the scheme or who will become subject to the National Principles (as set out in the legislation) or self-regulatory code may require the inclusion of provisions in their contracts to address compliance with the applicable privacy principles.

For example, one of the National Principles is a "use limitation principle" which applies to all uses of personal information. Personal information means information relating to any individual from which the individual is capable of being identified. This principle requires that an organisation only uses or discloses a person's personal information in ways consistent with that person's expectations of how the information will be used.

This will not be relevant in all contexts, such as basic software or software/hardware licences and supply contracts. But it may be very relevant for businesses that wish, for example, to outsource the management of their customer database or other databases that contain a third party's personal information. It could also be a relevant consideration for database maintenance contracts, contracts for the development of customised software and systems integration contracts. This is because the personal information may be disclosed to parties other than the party to whom it was originally disclosed or entrusted and for purposes not originally contemplated. In the outsourcing context it is particularly important to consider in your negotiations where liability lies if there is a breach of the applicable privacy principles.

Of course, the main purpose of the privacy scheme is to protect the personal information of an individual. So, standard contractual confidentiality provisions that generally deal with the use by each party of the other party's confidential information may not be adequate where the privacy principle prohibits unauthorised disclosure of another person's personal information.

The extent to which parties negotiating such contracts should focus on this issue will depend on the answers to these questions:

- Are the parties already subject to or are they likely to become subject to the National Principles (as set out in any legislation) or industry specific code of practice under proposed legislation?
- Do any of the National Principles (as modified) apply to the contract being negotiated?
- Have any of the parties voluntarily embraced privacy practices which could affect the handling of personal information?

These issues should be canvassed during the contract negotiations so that a party is not contractually committed to performing an obligation which would breach the privacy principles.

Negotiating parties should identify the point at which the business acquires personal information. This will help identify the privacy issues which may arise in pre-contractual negotiations.

In many cases, it may not be possible to contract around or out of applicable privacy principles so negotiating parties should also think about whether alternative deal structures or means of operating are feasible. For example:

- arranging secondments into your business of software development specialists for a period of time to avoid technical disclosure to third parties;
- if feasible, seeking the consent of the data subjects to the proposed uses and disclosures of their personal information; and
- testing systems using dummy or masked, rather than actual, personal data.

The full text of the *National Principles for the Fair Handling of Information* is available from the Australian Privacy Commissioner's website (www.privacy.gov.au).

The Federal Government has released key provisions of the proposed privacy scheme for the private sector. Those key provisions are accessible at www.law.gov.au/privacy.

6. TENDER DOCUMENTATION

There are many different types of tendering processes and rules that may apply to them. In particular, different considerations will apply to Government tenders than to private tenders. Government departments' tendering processes are often regulated by internal policies of which suppliers should be aware. Also, a range of administrative remedies may be available where there has been some irregularity in the Government tendering process. Those administrative law remedies will not be available in purely private sector tendering. Further, as a general principle, parties to all types of tenders should bear in mind possible liability under section 52 of the Act for misleading and deceptive conduct during the tendering process.

The following paragraphs focus on how the preparation of "Requests for Proposals" (RFPs) and responses to RFPs in some circumstances will be vital for the negotiation and implementation of software and hardware contracts.

6.1 Knowing your business—defining your needs

The starting point in the tendering process should be making sure that you understand your own business. The parties should ensure that they know their own businesses in sufficient depth to be able to obtain or offer the right products. The tender documentation should define needs and the value of the product to be provided (goods or services).

The importance of this process can be illustrated particularly in a context of a software development contract.

Often a tender for software development or the customisation of software will require the supplier or developer to submit proposals for the development of a product but the product will not be defined in any technical detail. This is because the software developer will often be required to create functional specifications from scratch. So, initially, there will be no objective standard or benchmark with which the supplier must comply. In the past this has led to litigation after a product has been developed which the customer is unhappy with. The customer's original expectations in such circumstances may be unascertainable because they were never documented. This situation has also led to claims of misrepresentation against the developer.

To achieve the best possible protection the customer should formulate a RFP that clearly demarcates the responsibilities of the customer and supplier and requires the developer to tender on these issues. The RFP should also extract as much detail as possible about how the ultimate product will perform, how it will be developed and how suitable it will be for the customer's purposes. All levels of an organisation should be involved in the preparation of such RFPs so that the RFP represents an accurate picture of the organisation's business needs.

Clearly defined expectations which are expressed in tender documentation will facilitate the negotiation of the contract terms because the parties expectations have already been communicated to each other.

6.2 Formulating an implementation plan

Tender documentation is not contractually binding unless it is included as part of the contract. So, particularly in the case of negotiating software development contracts, parties should remember the RFP and

consider developing the RFP into a suitable contract document together. This may take the form of an implementation plan that sets out the expectations of the parties as to the eventual product they expect to receive or deliver, as the case may be, and that also contains a timetable setting out target dates for the development, installation and testing of the system.

Without such a document, the parties may only have a contract to deliver a product which is not adequately defined in the contract even though it has been in the tender documentation. There may not be any immediate contractual remedy available to a customer in circumstances where a product is delivered but it is not what the customer expected and there is no contractual documentation that demonstrates that the customer was entitled to expect otherwise. This is because the customer will not be able to demonstrate a breach of contract. The customer could attempt to imply conditions into the contract but this is very difficult. Basically, the customer would have to prove that the contract was unworkable without that condition. Otherwise the injured party is left to other avenues of relief which may be just as difficult to establish. For example, misleading and deceptive conduct under the Act.

If the parties do incorporate an implementation plan in contracts such as software development contracts, the parties are more likely to achieve a win/win situation. From a customer's point of view, the supplier/developer will be contractually obliged to deliver a product that complies with the customer's documented expectations even if the full functional specifications have not been developed at the negotiation stage. The supplier's comfort is that the supplier has defined what it is confident it can provide rather than being contractually committed to provide an undefined product. This reduces the chance of a customer claiming that it expected something more or different at some point further down the track. This procedure also reduces the risk of future section 52 claims.

I have recently been involved in negotiations of a system development contract in the nature of a research and development project. I found that the procedure of developing tender documentation into a delivery framework helps to develop the relationship between the parties because they must work together before the contract is signed. The procedure also facilitated the negotiation of the contract conditions because the parties were forced to think more carefully about what they really wanted and to learn more about the practical business needs of the other party. Obviously, laying the foundations of a solid working relationship at a precontractual stage can prove especially useful if the contract will be for a long period of time.

6.3 *Acceptance testing procedures*

Another illustration of how important tender documentation can be for precontractual negotiation is acceptance testing procedures. Acceptance testing procedures will ultimately measure whether the delivered product is the product contracted for. If an RFP does not deal with this issue, the customer may find out, at contract negotiation stage, that it has chosen the wrong vendor. In the case of software development contracts, the tender documentation may have dealt with this issue but the tender documentation has not been included in the contract. This means that, as a practical matter, the customer will find it very difficult to establish that it has not received what it has bargained for. By the same token, the supplier may find it difficult to establish that the customer has received exactly what it bargained for.

So, the customer and supplier need to work out, as early as tender stage, who will be controlling and formulating the testing procedures. It is prudent for RFPs to require responses to address this issue in sufficient detail to allow the organisation issuing the tender to make an informed decision about how it will judge whether the product is ultimately acceptable to the organisation and that it has received what it has bargained for.

The RFP should seek information to answer the following questions:

- Will we get exactly what we want?
- Will we be able to prove that we have not received what we bargained for?

6.4 *Knowing the market and pricing*

No discussion of the preparation of tender documentation is complete without dealing with pricing issues. Organisations should research the market before they issue RFPs to get some idea of the likely variations in the responses they will receive and to help them to analyse those responses. The more research that is put into price volatility within the market, the more scope will exist for calling for tenders on different pricing structures. For example, will a tenderer's price be more competitive if it is a lump sum, a cost plus base or a mixed pricing structure? For long terms contracts, it may be worthwhile establishing benchmark pricing to test the market and provide for adjustment to prices which are above market rates.

If a RFP seeks responses on alternative pricing structures, the customer is better placed to assess the risk associated with each alternative. For example, it may be more risky to accept a cost plus pricing structure if the cost of materials is likely to skyrocket in the near future. A lump sum may be safer.

6.5 *Conclusion*

The saying "know thine enemy" is often advice given to parties negotiating any sort of contract. And it is good advice. Before you start to negotiate a contract or issue a tender, however, make sure you know your needs, your weaknesses, your budget, your expectations and your market. In other words, know yourself best before you know your enemy.