

**Discussion Paper on Reforming Liability Regime
under the Government ICT Contracts**

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Under the existing liability regime of procurement policy, it is a usual practice of the Government ICT contracts that regardless of the nature or size of contracts, the liability to direct and indirect damages is unlimited.

The effect of such uncapped liability policy or “one size fits all” approach is that there is a trend of Multinational Companies (MNC) bidding less and less because these companies cannot afford to have their name and company future at risk of incurring a significant liability. For SMEs, they also could not run such risk and in the worst case, they may just abstain from bidding government projects.

The result of this is not only bad to the companies not bidding but also unhealthy to Hong Kong and the ICT industry as a whole, as there is less and less choice of technology and solution, and MNC are not willing to bring in state-of-the-art technology to Hong Kong. This clearly is in contradiction to Hong Kong's drive for innovation.

Other detrimental effects of uncapped liability policies include:

Reduced competition – If suppliers are required to take on high levels of risk in a project, particularly risk that they are not able to manage, some will not bid for the project. This means that Government are not exposed to the full range of potential vendors and technology/solutions.

Refusal to supply innovative solutions – Stringent liability requirements prevent a vendor from offering innovative solutions. This is because innovative solutions can involve increased risk to the customer, and thus the vendor, and if an acceptable limitation on liability cannot be agreed, it will be far too risky for the supplier to proceed with any innovative solutions as it may put the company at risk.

Cost of insurance – As uncapped liability can result in a significant potential liability for the vendor, capital may have to be provisioned against such contracts, resulting an increase in the vendor' s capital requirements or insurance costs. The obvious effect is that the Government may end up paying more for ICT products and services.

To encourage more industry players in the government contracts to drive competition and innovation, several countries, such as Canada, Germany, Switzerland and the United Kingdom have already reformed and specified in details in their procurement policy in respect of the types of claims and financial limits of liability for which a vendor may be held liable under the Government ICT contracts.

As the single largest ICT customer in Hong Kong, it is important for the Government to ensure that their ICT procurement policies are effective in

driving ICT industry growth and innovation whilst realizing government ICT procurement objectives.

To achieve the above goal, **I recommend the Government to review the existing procurement policies, moving away from a default position of “one size fits all” or uncapped liability to a flexible approach of limiting the liability of ICT vendors which can be tailored to the individual circumstances of each contract and which is not excessively bureaucratic or costly for the parties to implement and comply with.**