



## Agency Participation Marketplace Terms

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## 1. Agreement to terms

- 1.1 Welcome to the New Zealand Government Marketplace (the **Marketplace**) operated by the Department of Internal Affairs (**DIA**) and the Ministry of Business, Innovation & Employment (**MBIE**) on behalf of the New Zealand Government (**we, our, us**). The Marketplace streamlines procurement of a wide range of goods and services, making it:
- (a) easier, faster and more cost-effective for Participating Agencies to procure goods and services while also complying with the Government Procurement Rules; and
  - (b) easier for providers to supply goods and services to government.
- 1.2 These Agency Participation Marketplace Terms (the **Agency Participation Terms**) apply to any Eligible Agency that registers to procure Services listed on the Marketplace. When we use the terms **you** and **your**, we are referring to any such Eligible Agency. Other terms with special meaning are defined in clause 24 below. Notes in blue boxes are for your convenience but are not part of these Agency Participation Terms.
- 1.3 A person making an application on behalf of an Eligible Agency represents to us that he or she is authorised to enter into these Agency Participation Terms on behalf of that Eligible Agency.
- 1.4 When you click to accept these terms you are forming an agreement with us and your Eligible Agency becomes a Participating Agency.

These “click to accept” terms apply between DIA/MBIE and each Eligible Agency that registers to procure Services listed on the Marketplace.

## 2. Effect of agreement

- 2.1 As between us and any other Public Service department or Non-Public Service department, these Agency Participation Terms have effect as a memorandum of understanding that does not give rise to legally enforceable obligations (the reason being that departments are constituent parts of a single and indivisible legal entity, the Crown). You acknowledge, however, that if this clause applies to you, you have agreed to abide by and follow these Agency Participation Terms.
- 2.2 As between us and any other Eligible Agency, these Agency Participation Terms form a legally enforceable agreement.
- 2.3 For the purpose of clause 2.1 above:
- (a) **Public Service department** means each Public Service department (and any departmental agencies that are part of those departments), as defined in section 27A of the State Sector Act 1988;
  - (b) **Non Public Service department** means the New Zealand Defence Force, the New Zealand Police, the Parliamentary

These terms are not legally binding as between us and another department but form a legally binding contract as between us and any other Eligible Agency.

Counsel Office, the Office of the Clerk of the House of Representatives and the Parliamentary Service.

### 3. Joining the Marketplace and procuring Services

3.1 If you are an Eligible Agency then, once you click to accept these terms and become a Participating Agency, you have joined the Marketplace and may procure all Services listed in the Marketplace.

Once you've signed up and clicked to accept these terms, you can procure Services through the Marketplace.

3.2 In relation to all Marketplace Catalogues that:

- (a) DIA administers, the Collaborative Marketplace Agreement between us and Providers is a "Common Capability Contract"; and
- (b) MBIE administers, the Collaborative Marketplace Agreement between us and Providers is an "All-of-Government-Contract",

You can procure through the Marketplace without having to worry about primary procurement processes because our contracts with the Providers are collaborative contracts.

as those terms are defined in the Government Procurement Rules (available at [www.procurement.govt.nz](http://www.procurement.govt.nz)).

3.3 The position described in clause 3.2 above applies to all Services available via the Marketplace, including Services listed on the Marketplace that are available and procured under an Eligible Pre-existing Agreement (as to which, see clause 9 below).

3.4 Participating Agencies that are mandated to comply with the Government Procurement Rules do not need to openly advertise individual contract opportunities for Services listed on the Marketplace on GETS; they may, instead, purchase directly from or via the Marketplace using a secondary procurement process appropriate for the Service being procured.

3.5 Schedule 1 to these Agency Participation Terms sets out certain circumstances in which, notwithstanding clauses 4 and 5 below, you may not be required to purchase from the Marketplace.

### 4. Mandated Participating Agencies

4.1 If you are a Participating Agency that is mandated to comply with the Government Procurement Rules, you acknowledge and agree that:

- (a) if you wish to purchase goods or services that are available in a Marketplace Catalogue that DIA administers (and which, therefore, has common capability status), you are expected by the Government Procurement Rules to purchase the goods or services from or via the Marketplace when they reasonably meet your needs;
- (b) if you wish to purchase goods or services that are available in a Marketplace Catalogue that MBIE administers (and which, therefore, has All-of-Government status) (**AoG Services**), you are required by the Government Procurement Rules to:

Participating Agencies that are required to comply with the Government Procurement Rules acknowledge the rules relating to uptake of common capability and All-of-Government contracts.

- (i) meet all your requirements for those goods and services by entering into Agency Purchase Agreements with Providers; and
- (ii) not procure goods or services that are the same as, or similar to, the AoG Services from any third party (i.e., a party other than a Provider),

unless paragraph 1 or 2 of Schedule 1 to these terms applies; and

(c) if you:

- (i) join the Marketplace and have a need to purchase goods or services the same as, or similar to, any AoG Services; or
- (ii) subsequently have a need to purchase goods or services the same as, or similar to, any AoG Services; and
- (iii) have existing arrangements with any provider (**Existing Provider**) for the supply of goods or services that are the same as, or similar to, those AOG Services (**Existing Agreements**),

you will:

- (iv) use your reasonable endeavours to bring those Existing Agreements to an end as quickly as possible but without paying any compensation or early termination fees, or otherwise directly or indirectly incurring any liability, to the Existing Providers;
- (v) not renew or extend those Existing Agreements, and to the extent that any renewal or extension requires your consent, you will not give that consent; and
- (vi) without limiting the foregoing or breaching the Existing Agreements, but subject to paragraph 2 of Schedule 1 to these terms, comply with clause 4.1(b)(i) to the fullest extent possible,

provided that this clause 4.1(c) does not require you to terminate an Existing Agreement if it adversely affects the provision of goods or services to you.

## 5. Non-mandated Participating Agencies

5.1 If you are a Participating Agency that is not mandated to apply the Government Procurement Rules, you acknowledge that you will meet all your requirements for the AoG Services by entering into Agency Purchase Agreements with Providers and you will not procure goods or services that are the same as or similar to the AoG Services from any third party, except to the extent that paragraph 1.2

Participating Agencies that are not required to comply with the Government Procurement Rules will purchase AOG Services via the Marketplace unless they opt-out under Schedule 1.

or 2 of Schedule 1 to these terms applies.

## 6. Access and login security

6.1 To access and procure Services via the Marketplace, your authorised staff need to log in with their own username and password. An Agency Administrator is responsible for determining which staff members can procure Services via the Marketplace.

You need a login to procure Services, your staff can't share their login credentials, and they need to look after them.

6.2 Each authorised staff member's username and password are personal to that staff member. You will take reasonable steps to ensure that your staff members do not share their usernames and passwords with others. Shared usernames and passwords are not permitted.

6.3 We may suspend or disable any staff member's username and password if we consider it necessary for security reasons or if you breach these Agency Participation Terms.

In extreme cases, we can suspend a staff member's login.

## 7. Agency Purchase Agreements

7.1 Before purchasing any Services, you must enter into an Agency Purchase Agreement for those Services with a relevant Provider.

The approach to agreements you'll have with Providers is standardised. You'll enter into a form of agreement that is prescribed by the applicable Channel Terms.

7.2 The Marketplace provides separate channels for different kinds of goods and services, such as Software as a Service, Consultancy and Professional Services, and Managed Services (each a **Channel**). Part 2 of the Collaborative Marketplace Agreement contains sets of Channel Terms that apply to the different Channels. Each set of Channel Terms prescribes or describes the form of Agency Purchase Agreement that applies to your consumption of Services in the Channel to which the Channel Terms apply. The overall contractual framework is illustrated on marketplace.govt.nz.

7.3 You acknowledge and accept that the agreement that applies between you and a Provider for your consumption of Services shall be the Agency Purchase Agreement prescribed by or described in the applicable set of Channel Terms. A summary of the components that make up each form of Agency Purchase Agreement, and links to them on the Marketplace, can be found in Schedule 2 to these Agency Participation Terms.

7.4 You and a Provider will each bear your own costs in respect of preparing, negotiating, agreeing and entering into any Agency Purchase Agreement.

## 8. Amendments to Agency Purchase Agreements

8.1 Except as stated in clause 8.4, the extent to which you can amend the default terms of an Agency Purchase Agreement and how you can do that are specified in the applicable set of Channel Terms. Relevant provisions of the Channel Terms are reproduced or summarised in Schedule 3 to these Agency Participation Terms.

You can agree with a Provider to amend the default terms that the applicable Channel Terms prescribe, subject to any limitations in those Channel Terms.

8.2 If, when we amend the Collaborative Marketplace Agreement, we change a term that applies to your Agency Purchase Agreements, you agree that it will apply automatically to those Agency Purchase Agreements as per clause 21.2 of the General Terms of the Collaborative Marketplace Agreement, unless an exception in clause 21.2 applies or unless the relevant Providers exercise their right to terminate their membership in the Marketplace under clause 21.4 of those General Terms. A copy of clause 21 of the General Terms can be found in Schedule 3 to these Agency Participation Terms.

8.3 We acknowledge that we do not have the authority to make any unilateral change to:

- (a) any Eligible Pre-existing Agreement or any Agency Purchase Agreement whose terms are prescribed by an Eligible Pre-existing Agreement; or
- (b) any Agency Purchase Agreement relating to Services for which we have expressly permitted the use of industry standard contracts.

8.4 If you are purchasing Services:

- (a) in accordance with an Eligible Pre-existing Agreement, that Agreement will specify the extent to which you can amend the form of Agency Purchase Agreement it prescribes; or
- (b) under industry standard contract templates that the applicable Channel Terms state are to be used, those templates will usually state how they can be amended.

## 9. Eligible Pre-existing Agreements

9.1 If a Provider has entered into a Pre-Existing Agreement that covers services that we allow to be listed in the Marketplace but on the basis that the terms of the Pre-Existing Agreement will apply to Participating Agencies' procurement of those services (each an **Eligible Pre-existing Agreement**):

- (a) the Eligible Pre-existing Agreement has common capability or All-of-Government status in relation to the Services listed in the Marketplace Catalogue (see the applicable Channel Terms for more information); and
- (b) if you wish to procure those Services, you will need to procure the Services on the terms of the Pre-existing Agreement or the Agency Agreement that the Pre-existing Agreement specifies (as applicable).

## 10. Payment for Services listed in the Marketplace

10.1 How you pay for a Service procured through or via the Marketplace depends on the kind of Service it is and the Channel the Service is in. For example, SaaS services that are not the subject of an Eligible Pre-existing Agreement are paid for through Marketplace payment

If a Provider already has a Pre-Existing Agreement with the Government for particular Services listed in the Marketplace and we have allowed that Pre-Existing Agreement to govern the purchase of those Services via the Marketplace, that Pre-Existing Agreement will have common capability or AOG status and you'll contract under the terms that it specifies.

How you pay for a service depends on the service you're procuring and the applicable payment terms. We also charge a small administration fee. Our method of collecting it depends on the terms that apply to the service you're procuring.

processes described in more detail on [marketplace.govt.nz](http://marketplace.govt.nz); consultancy and professional services, and managed services, are paid for in accordance with the payment terms of the applicable Agency Purchase Agreements.

- 10.2 Except where clause 9 applies and unless we decide otherwise, you will be required to pay to us, periodically, an Administration Fee associated with your procurement of Services via the Marketplace to contribute to the running costs of the Marketplace and the wider Government Procurement Reform Programme. How the Administration Fee is calculated for a given Service and how it is collected depends on the kind of Service and the Channel it is in. Details can be found on [marketplace.govt.nz](http://marketplace.govt.nz). (Where clause 9 applies, the payment of any administration fee is addressed by the separate arrangements that apply to your signing up to the relevant service.)

## 11. Participating Agency – Provider disputes

- 11.1 If you have an invoicing, performance or any other dispute with a Provider, you will need to resolve it with the Provider directly, where applicable in accordance with relevant terms in your Agency Purchase Agreement or, where clause 9 applies, the agreement you will have formed with the Provider as specified in the Eligible Pre-existing Agreement.

We don't get involved in disputes you may have with a Provider, unless the Marketplace itself is at fault or an applicable Eligible Pre-existing Agreement or applicable Channel Terms allow us to and we decide to get involved.

- 11.2 If a Provider raises with us an issue relating to the performance of your obligations under an Agency Purchase Agreement or Agency Agreement (as applicable) that you have with the Provider, we will refer the matter to you and it will be your responsibility to resolve it with the Provider. We will only get involved if:

- (a) an applicable Eligible Pre-existing Agreement or the applicable Channel Terms allow us to get involved; and
- (b) we decide to get involved.

This clause does not limit the rights we have vis-à-vis Providers under the Collaborative Marketplace Agreement.

- 11.3 You accept that we are not responsible for:

- (a) any Provider's performance; or
- (b) resolving any dispute you may have with a Provider.

- 11.4 If you have reason to believe that the Marketplace is at fault in relation to the nature or volume of charges for which you have been invoiced or charged by a Provider, please contact us as soon as possible.

## 12. Confidentiality

12.1 Each party must:

- (a) keep all Confidential Information confidential; and
- (b) not use or disclose to any other person, and take reasonable steps to ensure that its Personnel do not use or disclose to any other person, such Confidential Information,

except as required or permitted by:

- (c) the proper exercise of its contractual rights and obligations under these Agency Participation Terms; or
- (d) the relevant Agency Purchase Agreement; or
- (e) where clause 9 applies, the agreement you will have formed with the Provider as specified in the Eligible Pre-existing Agreement; or
- (f) law, court order or an obligation to Ministers of the Crown or Parliament (including any committee or office of Parliament).

12.2 If an Agency Purchase Agreement or an Agency Agreement prohibits a form of disclosure of a Provider's confidential information that clause 12.1(c) may otherwise appear to permit, the Agency Purchase Agreement or Agency Agreement will prevail.

12.3 You acknowledge that we will obtain data and statistical information from the Marketplace itself or via reporting from Participating Agencies and Providers relating to Participating Agencies' use of the Marketplace and their consumption of Services through it. Nothing in this clause 0 will prevent us from using and publishing this information as we consider appropriate. We acknowledge that, in the Collaborative Marketplace Agreement, we are under certain confidentiality obligations to Providers in relation to their confidential information.

## 13. Security

13.1 If either party becomes aware or suspects that:

- (a) there is a material vulnerability in the Marketplace;
- (b) any unauthorised person has obtained access to the Participating Agency's login credentials or Marketplace account;
- (c) any person has used any Confidential Information for purposes not authorised or permitted by these Agency Participation Terms; or
- (d) any other incident has occurred that threatens the security or integrity of the Marketplace,

We and you each need to keep Confidential Information confidential and not disclose it unless permitted by this clause.

We will obtain statistical information on use of the Marketplace and may publish some of it.

If either party becomes aware of a security risk, that party needs to take steps to mitigate it if it can.



the party will, as applicable:

- (e) notify the other party as soon as possible;
- (f) where the incident concerns unauthorised access, promptly take such steps as are reasonably available to it to identify the person or persons who have gained access and, in the case of the Participating Agency, provide us with such information to assist with investigation of the incident as we reasonably request; and
- (g) take all reasonable steps to stop such unauthorised access or incident and prevent its reoccurrence.

## 14. Intellectual property

14.1 We or our licensors own the Intellectual Property Rights in content on the Marketplace. Once you have become a Participating Agency, you may use and reproduce that content to the extent required for your participation in the Marketplace, your assessment and consumption of Services and your record-keeping requirements and obligations, subject to your obligations in clauses 0 (Confidentiality) and 12.3 (Security). We are confident we have the rights we require to permit you to do these things.

14.2 To the extent that you provide information to us in connection with your use of the Marketplace, you grant us a non-exclusive, perpetual, irrevocable, transferable and royalty-free licence to use, copy, amend and distribute that content for any purpose relating to the Marketplace and our recording-keeping requirements and obligations, subject to our obligations in clauses 0 (Confidentiality) and 13 (Security).

14.3 You acknowledge that, unless agreed otherwise in writing, we may use, share with Eligible Agencies and their Personnel and openly publish, analytics and reporting information that the Marketplace itself generates or that we obtain via reporting from Participating Agencies and Providers (for example, the number of and/or spend on orders for Services, whether aggregated across all Participating Agencies and/or broken down on a per Participating Agency basis).

## 15. Your contributions to the Marketplace

15.1 If you add comments about, or reviews and/or ratings of, Providers and/or Services (together, **Contributions**) to the Marketplace:

- (a) you will use all reasonable endeavours to ensure that your Contributions:
  - (i) are accurate and written with appropriate language;
  - (ii) do not infringe any third party rights;
  - (iii) are not motivated or otherwise affected by any conflict of interest; and

The Marketplace does not alter either party's or its licensors' ownership of Intellectual Property Rights. Each party allows the other to use their content and information for marketplace and record-keeping purposes.

You need to take care when contributing to the Marketplace. You allow us to use your contributions for Marketplace purposes and you accept that we may moderate them if they're inappropriate.

- (iv) are not otherwise offensive or inappropriate;
- (b) you accept that we may moderate those Contributions if we consider them to be contrary to clause 15.1(a); and
- (c) you permit us to use the Contributions for Marketplace purposes and share them with other Participating Agencies and Providers.

15.2 If we reasonably require you to add Contributions to the Marketplace, you will use reasonable endeavours to do so.

## 16. Reporting

16.1 You authorise each Provider to provide us with information relating to the amount you spend with that Provider.

16.2 You will complete and return any satisfaction surveys to us from time to time at our request.

16.3 If you are a Security Agency or an agency that is subject to statutory secrecy obligations and have any concerns about providing the information we request, please let us know and we will work through the issues with you.

## 17. Liability, warranties and disclaimers

17.1 Subject to clause 17.2:

- (a) no party's liability arising under or in connection with these Agency Participation Terms or their formation will exceed \$100,000; and
- (b) no party to these Agency Participation Terms will under any circumstances be liable to the other party for any Indirect or Consequential Loss or for any loss of profit, revenue or savings.

17.2 Clause 17.1(a) does not apply to:

- (a) breach of clauses 0 (Confidentiality) and 13 (Security); and
- (b) non-payment by any Participating Agency of any Administration Fee.

17.3 Whilst we take care in our provision of the Marketplace, we disclaim and exclude all warranties relating to it and our provision of it, to the maximum extent permitted by law.

17.4 You agree that we are not responsible for:

- (a) the quality, appropriateness for your purposes or availability of the Services you elect to purchase;
- (b) any representations made by any Provider, whether on the Marketplace or in materials to which the Marketplace links; or

With only a few exceptions, both parties' liability is limited, as to both quantum and the types of loss that can be claimed.

We are not responsible for Providers' performance.

- (c) any comments about or reviews or ratings of any Service made by any other Participating Agency.

You are responsible for determining whether a given Service is appropriate for your intended purposes and for assessing any such representations, comments, reviews and ratings.

- 17.5 You also agree that, except to the extent that the law stipulates otherwise, we are not responsible for the consequences of any Provider content on the Marketplace that breaches your or a third party's rights.

## 18. Certification and accreditation

- 18.1 Where relevant to the kind of Service being procured, we will make available to Participating Agencies security-related assurance documentation for the Services. Our provision of this documentation is intended to centralise the availability of assurance-related documentation and make it easier for Participating Agencies to certify and accredit certain kinds of Services, such as SaaS and other information communication technology services, for their particular uses.

Where relevant, we make it easier for you to certify and accredit the Services you use.

- 18.2 Despite clause 18.1, you retain your own responsibility (where applicable) for:

- (a) certifying each Service (e.g., a SaaS service) you use for your intended purpose(s), except where we do so centrally and you are willing to rely on our certification; and

- (b) accrediting the Service for your intended purpose(s),

in accordance with the New Zealand Information Security Manual.

## 19. Governance and contacts

- 19.1 We will appoint, and maintain during the term of these Agency Participation Terms, an experienced person to lead the day-to-day relationship between us and Participating Agencies in relation to their use of the Marketplace (**Marketplace Manager**). The identity and contact details of our Marketplace Manager can be found on marketplace.govt.nz. If we change our Marketplace Manager, we will update marketplace.govt.nz accordingly.

We and you will each appoint some contacts to ensure there is someone to talk to when needed.

- 19.2 We will advise you, either directly or on the Marketplace, of the relevant personnel within DIA and/or MBIE who are responsible for the relationship with Participating Agencies in relation to particular Marketplace Catalogues.

- 19.3 You will appoint, and maintain while you are participating in the Marketplace, an experienced person for your relationship with us (**Participating Agency Contact Person**). Your Participating Agency Contact Person will:

- (a) serve as the primary point of contact with us (usually our Marketplace Manager); and
- (b) have overall responsibility for managing and co-ordinating the performance of his or her Participating Agency's obligations under these Agency Participation Terms.

19.4 You will be required to enter identity and contact details for your Participating Agency Contact Person when registering to procure Services listed on the Marketplace. If you wish to replace your Participating Agency Contact Person, please amend the Participating Agency Contact Person record in the Marketplace with the new person's details (by logging in, locating the record, and amending it).

## **20. Term and termination**

20.1 These Agency Participation Terms will apply between us and you for as long as we continue to operate the Marketplace and you remain a Participating Agency.

20.2 If you wish to withdraw from the Marketplace as a Participating Agency:

- (a) you will give us written notice (signed by the person with delegated authority to commit you to entering into these Agency Participation Terms) of your request to withdraw from the Marketplace and your reason(s) for such request;
- (b) you will afford us a reasonable opportunity to provide feedback (orally and/or in writing) to you in respect of your reason(s) for withdrawal; and
- (c) provided you have complied with clauses 20.2(a) and 20.2(b), you will be deemed to withdraw from the Marketplace on the 20th Business Day following receipt of feedback from us (or your receipt of confirmation from us that we have no feedback), unless you give further notice to us within that timeframe that you no longer wish to withdraw from the Marketplace.

20.3 To avoid doubt, no withdrawal from the Marketplace limits your obligations under the Government Procurement Rules.

20.4 We may terminate your membership in the Marketplace as a Participating Agency on 30 days' written notice to you if you commit a material breach of these Agency Participation Terms and that breach is:

- (a) not capable of being remedied; or
- (b) capable of being remedied but is not remedied to our satisfaction within 30 days of the date of your receipt of our written notice of the breach.

These Agency Participation Terms need to remain in force for as long as you're participating in the Marketplace.

- 20.5 If you withdraw from the Marketplace or we terminate your membership:
- (a) Agency Purchase Agreements that you have entered into with Providers will remain in force in accordance with their terms but, if you are purchasing SaaS services through the Marketplace in a manner that utilises the Marketplace's billing engine, you will need to transition to separate payment arrangements directly with the Service Providers; and
  - (b) you shall not be permitted to enter into further Agency Purchase Agreements with Providers.

## 21. Privacy statement

- 21.1 The Marketplace Privacy Statement applies to the personal information that we store in connection with your use of the Marketplace. By registering to procure Services listed on the Marketplace and agreeing to these Agency Participation Terms, you will be taken to have read and agreed to the terms of that privacy statement.

Our privacy statement addresses our handling of personal information. Please read it.

## 22. Amendments

- 22.1 We may amend these Agency Participation Terms and our Privacy Statement unilaterally at any time and we may also alter our Administration Fees from time to time (provided in each case we act reasonably in doing so). Subject to clause 22.2, we will always endeavour to notify you of the changes by email or by posting a notice on this website summarising the changes at least one month before the changes take effect. If you wish to comment on notified changes during that notice period, please contact our Marketplace Manager and we will take your comment into account before the changes take effect.
- 22.2 If we need to make a change urgently (e.g., for security reasons) or if we make a change to correct a clear typographical or cross-referencing error or to update document URLs, we may make the change immediately, without advance notice.
- 22.3 Your continued use of the Marketplace (or procurement of Services listed on the Marketplace) after the effective date of changes we make indicates your acceptance of those changes.

As with any marketplace like this, we need the right to amend these Agency Participation Terms and our Privacy Statement when required.

## 23. General

- 23.1 New Zealand law governs all matters relating to these Agency Participation Terms, including their interpretation and any disputes in relation to them or their formation.
- 23.2 Nothing expressed or implied in these Agency Participation Terms will be deemed to constitute either party as the partner, agent or joint venturer of the other party.

23.3 Notices required by these Agency Participation Terms are to be sent electronically, as follows:

- (a) notices to DIA and MBIE are to be sent via the online 'Contact us' form(s) on the Marketplace; and
- (b) notices to you are to be sent to the contact email address we have on record for you, as provided when you registered to procure Services from the Marketplace and as you may update from time to time within the Marketplace itself.

23.4 Notices sent in accordance with clause 23.3 will be deemed to have been received upon the sender's receipt of either an automated receipt message from the receiver's email system that confirms receipt or other acknowledgement of receipt by the recipient. Each party must acknowledge receipt of an electronic communication when requested to do so by another party. If a party sends a notice by email and does not obtain an automated receipt message or acknowledgement of receipt, that party may notify the other by other written means and the notice will be deemed to have been received on actual receipt.

## 24. Defined terms and interpretation

24.1 In these Agency Participation Terms, unless the context requires otherwise:

**Administration Fee** means the fee we charge to Purchasing Agencies to contribute to the running costs of the Marketplace and the wider Government Procurement Reform Programme, as described on [marketplace.govt.nz](http://marketplace.govt.nz) and as may be updated from time to time;

**Agency Administrator** means the member of your staff that has administrative rights within the Marketplace to authorise other members of staff to procure Services on your behalf;

**Agency Purchase Agreement** means an agreement between you and a Provider formed in accordance with the applicable Channel Terms for a Channel of the Marketplace and, depending on the applicable Channel, may include (without limitation) a subscription agreement, participating agency agreement, services agreement or sale and purchase agreement, as the case may be;

**Agency Agreement** means the affiliate agreement, subscription agreement, participating agency agreement or other agreement, as applicable, that individual agencies enter into to consume services pursuant to the terms of an Eligible Pre-existing Agreement;

**Agency Participation Terms** means these Agency Participation Marketplace Terms;

**AoG Services** has the meaning given in clause 4.1(b);

The terms defined here have special meaning.

**Business Day** means any day of the year other than a Saturday, a Sunday or a public holiday (as defined in section 44 of the Holidays Act 2003) observed in Wellington, New Zealand;

**Channel** means a channel for the sale of Services provided within the Marketplace, as described in clause 7.2;

**Channel Terms** means the terms set out in Part 2 of the Collaborative Marketplace Agreement that apply to specific Channels (including, where relevant, any applicable Extra Terms);

**Collaborative Marketplace Agreement** means the agreement that Providers must enter into with DIA and MBIE before being able to list their Services in the Marketplace, as amended from time to time in accordance with its terms and available on marketplace.govt.nz;

**Commencement Date** means the date you become a Participating Agency;

**Confidential Information** means:

- (a) in relation to a party, all non-public information of any kind, whether written, electronic or otherwise, and whether or not marked or identified as being confidential, relating to that party or its business operations;
- (b) Providers' commercially sensitive information made available to Participating Agencies through the Marketplace;
- (c) non-public assurance-related documents relating to Services available through the Marketplace; and
- (d) security-related reports on Services made available through the Marketplace;

**Contract Quarter** means a period of three consecutive months commencing on 1 January, 1 April, 1 July or 1 October, except that:

- (a) the first Contract Quarter will begin on the Commencement Date and end on 31 December, 31 March, 30 June or 30 September, whichever date occurs first; and
- (b) the final Contract Quarter will end on the effective date of expiry or termination of these Agency Participation Terms;

**Contract Year** means a period of 12 consecutive months commencing on 1 June and ending on 31 May (inclusive, in each case), except that:

- (a) the first Contract Year will begin on the Commencement Date and end on 31 May; and
- (b) the final Contract Year will end on the effective date of expiry or termination of these Agency Participation Terms;

**DIA** means the Department of Internal Affairs;

**Eligible Agency** means:

- (a) each Public Service department and departmental agency, as defined in section 27A of the State Sector Act 1988;
- (b) the New Zealand Defence Force, the New Zealand Police, the Parliamentary Counsel Office, the Clerk of the House of Representatives and the Parliamentary Service;
- (c) each Crown Entity, as defined in section 7 of the Crown Entities Act 2004;
- (d) each organisation listed in the fourth schedule to the Public Finance Act 1989;
- (e) the Reserve Bank of New Zealand;
- (f) the Office of the Controller and Auditor-General, the Office of the Ombudsmen, and the Office of the Parliamentary Commissioner for the Environment;
- (g) each corporation listed in the first schedule to the State Owned Enterprises Act 1986;
- (h) each local authority, as defined in section 5 of the Local Government Act 2002; and
- (i) any other organisation, agency or collection of persons that does not fall within the above categories but which DIA and MBIE determine should be treated as an eligible agency;

**Eligible Pre-existing Agreement** has the meaning in clause 9.1;

**Extra Terms** means additional terms, set out or cross-referred to in a set of Channel Terms, that apply by default to certain categories of services within the Channel (usually when there is no Eligible Pre-existing Agreement for those services);

**GETS** means the Government Electronic Tenders Service;

**Indirect or Consequential Loss** means loss that does not arise as a direct, natural and/or probable result of the act or omission complained of;

**Intellectual Property Rights** means all industrial and intellectual property rights whether conferred by statute, at common law or in equity, including all copyright, rights in relation to inventions (including all patents and patent applications), trade secrets and know-how, rights in relation to designs, rights in relation to trade marks, business names and domain names;

**Marketplace** means the New Zealand Government Marketplace at [marketplace.govt.nz](http://marketplace.govt.nz) or any successor URL;



**Marketplace Catalogues** means the catalogues of Services available for consumption by Eligible Agencies once they become Participating Agencies;

**Marketplace Manager** has the meaning in clause 19.1;

**MBIE** means the Ministry of Business, Innovation & Employment;

**Order** means a request for Services;

**Participating Agency** means an Eligible Agency that has registered to procure Services listed on the Marketplace and accepted these Agency Participation Terms;

**Participating Agency Contact Person** has the meaning in clause 19.3;

**Personnel** means employees of or contractors to a party to these Agency Participation Terms;

**Pre-existing Agreement** means a current and separate software framework agreement, cloud framework agreement, common capability agreement, all-of-government agreement or other collaborative agreement that a Provider either has with the New Zealand Government or is required to enter into with the New Zealand Government if it wishes to join an existing open panel of providers to which such a collaborative agreement applies;

**Provider** means a provider that lists services (or goods) in the Marketplace;

**Purchasing Agency** means a Participating Agency that submits an Order to a Service Provider for Services;

**Security Agency** means each of the Government Communications Security Bureau, the New Zealand Security Intelligence Service, the Ministry of Defence, the New Zealand Defence Force and the New Zealand Police; and

**Services** means the services (or goods) listed in the Marketplace.

24.2 In these Agency Participation Terms, unless the context requires otherwise:

- (a) a reference to a party means a party to these Agency Participation Terms and, where the context permits, an agent or representative of that party;
- (b) references to the singular include the plural and vice versa;
- (c) where a word or phrase is defined, its other grammatical forms have a corresponding meaning;
- (d) headings to clauses and tables of contents are included for the purpose of ease of reference only and are not to have any effect on construction and interpretation;

These rules apply to the interpretation of the Agency Participation Terms.

- (e) references to a person include an individual, firm, company, agency, government, corporation or unincorporated body of persons;
- (f) references to any statute include any amendment to, or replacement of, that statute and any subordinate legislation made under it;
- (g) wherever the words “includes” or “including” or “such as” (or similar words) are used, they are deemed to be followed by the words “without limitation”; and
- (h) references to “in writing” include by electronic means.

## **Schedule 1 – Opting out of purchasing AoG Services available in Marketplace Catalogues and procuring outside of the Marketplace**

### **1. Opting out of purchasing AoG Services in an MBIE-administered Marketplace Catalogue**

- 1.1 If you are an Eligible Agency that is mandated to comply with the Government Procurement Rules and you wish to opt out of purchasing AoG Services that are available in a Marketplace Catalogue that MBIE administers (and which, therefore, has All-of-Government status), you must get approval from the Procurement Functional Leader under Rule 58 of the Government Procurement Rules. To seek such approval, please contact us at [marketplace@mbie.govt.nz](mailto:marketplace@mbie.govt.nz).
- 1.2 If you are an Eligible Agency that is not mandated to comply with the Government Procurement Rules and you wish to opt out of purchasing AoG Services that are available in a Marketplace Catalogue that MBIE administers, you must notify us at [marketplace@mbie.govt.nz](mailto:marketplace@mbie.govt.nz). If you opt out in reliance on this clause 1.2, paragraph 2 below will not apply to you in relation to the Marketplace Catalogue you have opted out of.

### **2. Procuring certain goods or services outside of Marketplace**

- 2.1 MBIE expects that you should be able to satisfy your requirements for AoG Services from the Marketplace.
- 2.2 Subject to these terms, you may procure goods or services the same as, or similar to, the AoG Services if you can demonstrate that you have a need that cannot be met by the Providers on the Marketplace to the satisfaction of your senior manager or officer responsible for the relevant goods or services arrangements.
- 2.3 If you procure goods or services (being of the same class of any of the AoG Services) from a third party outside the Marketplace, you must provide MBIE with a written notice detailing:
- (a) who is providing the goods or services;
  - (b) what goods or services are being provided;
  - (c) why the goods or services could not be provided within the Marketplace; and
  - (d) the approximate cost of the goods or services,
- at the end of each Contract Quarter.
- 2.4 At the end of each Contract Year, MBIE may request that you provide details of your expenditure on AoG Services purchased via the Marketplace, and on goods or services that are the same as or similar to those AoG Services purchased outside of the Marketplace, to establish:
- (a) the volume of your expenditure that is not on AoG Services available through the Marketplace;
  - (b) whether there are sufficient Providers to provide the AoG Services to satisfy your demand; and
  - (c) whether the scope of the AoG Services is sufficient to meet your demand,
- and, if requested, you will provide such information within 20 Business Days of our request.

**3. Procuring AoG Services without using the Marketplace digital platform**

3.1 MBIE, as Procurement Functional Leader, may, from time to time at its discretion, allow you to accept these Agency Participation Terms, and procure Services in Marketplace Catalogues that MBIE administers, outside of the Marketplace.

3.2 Where paragraph 3.1 applies, all references in these terms to activities that happen in, through or via the Marketplace shall be read as taking place outside the Marketplace to the extent possible.

## Schedule 2 – Agency Purchase Agreement components

### 1. Introduction

- 1.1 As stated in clause 7.3, the agreement that applies between you and a Provider for your consumption of Services shall be the Agency Purchase Agreement prescribed by or described in the applicable set of Channel Terms.
- 1.2 This Schedule summarises the components of these Agency Purchase Agreements for different Channels and Marketplace Catalogues within those Channels, describes how the Agreements are formed, and the status of their associated Marketplace Catalogues.

<b>SaaS Channel</b>			
<b>Marketplace Catalogues (MCs)</b>	<b>Kind of Agency Purchase Agreement</b>	<b>How Agreement formed</b>	<b>Status of MCs</b>
All Marketplace Catalogues in this Channel	Agency Purchase Agreement is a Subscription Agreement that comprises:  (1) the Provider's standard terms (specific to each SaaS Service and linked to from the Services Listings), but  (2) subject to and as modified by the Government Terms in clause 5 of the Channel Terms for Software as a Service (SaaS Terms) (Standard) <a href="#">[link to Channel Terms, PDF]</a>	Agreement is formed automatically when a Purchasing Agency submits an Order for SaaS Services. (If a Purchasing Agency requires amendments, it would need to negotiate them directly with the Provider, outside of the Marketplace, before submitting the Order for Services.)	DIA-administered common capability
<b>Consultancy and Professional Services Channel</b>			
<b>Marketplace Catalogues (MCs)</b>	<b>Kind of Agency Purchase Agreement</b>	<b>How Agreement formed</b>	<b>Status of MCs</b>
All Marketplace Catalogues, except Construction Consultancy Services	Agency Purchase Agreement is a Subscription Agreement that comprises:  (1) Subscription Form <a href="#">[document link, Word]</a>  (2) Core Services Terms <a href="#">[document link, PDF]</a>  (3) Statements of Work <a href="#">[document link, Word]</a>  (4) any Extra Terms that apply to a particular Marketplace Catalogue (none at present for this Channel)	Agreement is formed when the parties fill out and sign (physically or electronically) a copy of the Subscription Form template.	DIA-administered common capability
Construction Consultancy Services Marketplace	Agency Purchase Agreement is the Crown version of the Conditions of Contract for Consulting Services (CCCS) for the sale and purchase of	Agreement is formed when the parties complete and sign the CCCS (or other terms on which the parties agree).	MBIE-administered All-of-Government

Catalogue	Construction Consultancy Services <a href="#">[link to CCCS]</a> unless otherwise agreed between the Purchasing Agency and Provider.		
<b>Managed Services Channel</b>			
<b>Marketplace Catalogues (MCs)</b>	<b>Kind of Agency Purchase Agreement</b>	<b>How Agreement formed</b>	<b>Status of MCs</b>
All Marketplace Catalogues in this Channel	Agency Purchase Agreement is a Subscription Agreement that comprises: (1) Subscription Form <a href="#">[document link, Word]</a> (2) Core Services Terms <a href="#">[document link, PDF]</a> (3) Statements of Work <a href="#">[document link, Word]</a> (4) Extra Terms for Managed Services <a href="#">[link, PDF]</a>	Agreement is formed when the parties fill out and sign (physically or electronically) a copy of the Subscription Form template.	DIA-administered common capability

## Schedule 3 – Amending Agency Purchase Agreements

### 1. Introduction

#### 1.1 As stated in:

- (a) clause 8.1, the extent to which you can amend the default terms of an Agency Purchase Agreement and how you can do that are specified in the applicable set of Channel Terms (which are Part 2 of the Collaborative Marketplace Agreement between DIA/MBIE and relevant Providers); and
- (b) clause 8.2, if, when we amend the Collaborative Marketplace Agreement, we change a term that applies to your Agency Purchase Agreements, you agree that it will apply automatically to those Agency Purchase Agreements as per clause 21.2 of the General Terms of the Collaborative Marketplace Agreement, unless an exception in clause 21.2 applies or unless the relevant Providers exercise their right to terminate their membership in the Marketplace under clause 21.4 of those General Terms.

#### 1.2 To help you understand each of these matters without having to resort to other documents, this Schedule:

- (a) reproduces or summarises relevant provisions in each set of Channel Terms relating to how you can amend the default terms of an Agency Purchase Agreement; and
- (b) reproduces clause 21 of the General Terms (in Part 1 of the Collaborative Marketplace Agreement).

### 2. Provisions in Channel Terms relating to your amending the default terms of Agency Purchase Agreements

Channel	Marketplace Catalogue(s) in Channel	Name of Channel Terms	Provisions
Software as a Service Channel	All Marketplace Catalogues	Channel Terms for Software as a Service (SaaS Terms) (Standard)	<p>The relevant clauses are clauses 5.4-5.5 ("You" is referring to the Provider):</p> <p>5.4 You may only amend the terms of the Subscription Agreement for a particular Purchasing Agency:</p> <ul style="list-style-type: none"> <li>(a) if you and the particular Purchasing Agency agree to the amendments outside of the Marketplace Ordering Process (the Ordering Process for SaaS Services is standardised and does not accommodate ad hoc amendments); and</li> <li>(b) the amendment is not a Prohibited Amendment (defined below).</li> </ul> <p>This clause 5.4 does not limit clause 5.1(d) of these SaaS Terms.</p> <p>5.5 For the purposes of clause 5.4, amendments that seek to:</p> <ul style="list-style-type: none"> <li>(a) increase the Price for your SaaS Services for a particular Purchasing Agency (unless you are doing so for all</li> </ul>

Channel	Marketplace Catalogue(s) in Channel	Name of Channel Terms	Provisions
			<p>or the majority of your customers either worldwide or within a particular country pursuant to a right in your Standard Terms); or</p> <p>(b) make changes that are prejudicial to a Purchasing Agency's rights or interests or otherwise detract from the protections, safeguards or entitlements of the Government Terms,</p> <p>are Prohibited Amendments unless you obtain DIA's prior written consent.</p>
Consultancy and Professional Services Channel	All Marketplace Catalogues, except Construction Consultancy Services	Channel Terms for Consultancy and Professional Services and Managed Services (C&PS/MS Terms) (Standard)	<p>The relevant clause is clause 5.1 ("you" refers to the Provider):</p> <p>5.1 To avoid doubt, you and a Purchasing Agency may agree to amend or supplement the Core Services Terms in Annexure B and any applicable Extra Terms in Annexure C, in either your Subscription Form or a Statement of Work.</p> <p>See also clause 8 of the Subscription Form template.</p>
	Construction Consultancy Services	Channel Terms for Consultancy and Professional Services (C&PS Terms) (Construction Consultancy Services)	<p>The Crown version of the Conditions of Contract for Consulting Services (CCCS) for the sale and purchase of Construction Consultancy Services, or other form of agreement to which the parties agree, can be amended with the written agreement of the Provider and the Purchasing Agency.</p>
Managed Services Channel	All Marketplace Catalogues	Channel Terms for Consultancy and Professional Services and Managed Services (C&PS/MS Terms) (Standard)	<p>The relevant clause is clause 5.1 ("you" refers to the Provider):</p> <p>5.1 To avoid doubt, you and a Purchasing Agency may agree to amend or supplement the Core Services Terms in Annexure B and any applicable Extra Terms in Annexure C, in either your Subscription Form or a Statement of Work.</p> <p>See also clause 8 of the Subscription Form template.</p>



3. **Clause 21 of the General Terms (in Part 1 of the Collaborative Marketplace Agreement)**

3.1 Clause 21 of the General Terms is as follows:

**21. Amendments**

21.1 Subject to clause 21.5, we reserve the right to change this Marketplace Agreement (including its Channel Terms) at any time and, except as stated in this clause, will provide you with at least 30 days' notice of the change (or, if a security issue needs to be addressed quickly, a shorter period if we consider that appropriate) (the **Notice Period**), either by publishing it on the Marketplace or by email. If we make a change to correct a clear typographical or cross-referencing error, we may make the change immediately, without advance notice. You accept that a notice of change on the Marketplace will be deemed to be notice to you and that, subject to clause 21.4, the changes will be binding on you from the effective date stated in the notice.

We can change these terms without your consent but not in specified ways that could significantly affect your business.

21.2 Subject to clause 21.4, if we change a term that applies to Agency Purchase Agreements you have with Purchasing Agencies (for example, the change could amend or supplement a Government Term or a Core Services Term), you and each Purchasing Agency agree that it will apply automatically to the relevant Agency Purchase Agreements from the date that is 15 days after the effective date of the change stated in our notice (Purchasing Agencies' agreement is obtained through their Agency Participation Marketplace Terms with us and in some cases their Agency Purchase Agreements), unless:

Subject to some important exceptions, changes to terms that apply to Agency Purchase Agreements flow through to those Agreements automatically.

- (a) in the case of a specific Agency Purchase Agreement (including Statements of Work under such Agreement) the change is contrary to an amendment or supplement to the terms that you and the Purchasing Agency have already agreed; or
- (b) in the case of existing Statements of Work, the change increases your costs or risks, and you inform the Purchasing Agency of this reasonably promptly; or
- (c) you and the Purchasing Agency otherwise agree that the change will not apply.

21.3 If you do not like a change we propose to make to the terms of this Marketplace Agreement, you may discuss the matter with us during the Notice Period.

If you don't like a change we propose to make, you can talk to us about it. If it has a material adverse effect on your commercial position, you can terminate your membership and the change won't affect Agency Purchase Agreements.

21.4 If we:

- (a) change this Marketplace Agreement in accordance with clause 21.1; or
- (b) introduce an Additional Code of Conduct under clause 8.1(b); or
- (c) notify you of a new requirement in accordance with the Supplier Code of Conduct,

and you consider, acting reasonably, that the change or Additional Code of Conduct or new requirement (each a **Relevant Change**)

has a material adverse effect on your commercial position you may, within 15 days of the effective date of the Relevant Change, elect to terminate your membership in the Marketplace by giving us 30 days' notice of termination. If you make an election in accordance with this clause 21.4:

- (d) you must notify us in writing of your election and why you consider the Relevant Change has a material adverse effect on your commercial position;
- (e) the Relevant Change will be deemed not to have applied to you from the effective date stated in our notice;
- (f) if the Relevant Change would have applied to Agency Purchase Agreements, the Relevant Change will not apply to those Agency Purchase Agreements (which will remain in place on their existing terms in accordance with clause 3.11); and
- (g) once the 30 day notice period you have given us expires, your Services Listings will no longer be available to Participating Agencies.

21.5 Clause 21.1 does not authorise us to make any unilateral change to:

- (a) your Prices or Services Listings;
- (b) the application of your Standard Terms (where, under any Channel Terms, those Standard Terms apply);
- (c) ownership and licensing of your Intellectual Property Rights;
- (d) the limitations on your liability set out in this Marketplace Agreement;
- (e) where relevant, any Eligible Pre-existing Agreement or any Agency Purchase Agreement whose terms are prescribed by an Eligible Pre-existing Agreement; or
- (f) any Agency Purchase Agreement relating to Services for which we have expressly permitted the use of industry standard contracts.