

New Zealand Government Marketplace

Agency Participation Marketplace Terms

Terms

1. Agreement to terms

1.1 Welcome to the New Zealand Government Marketplace (the **Marketplace**) operated by the Department of Internal Affairs on behalf of the New Zealand Government (**DIA, we, our, us**). These Agency Participation Marketplace Terms (the **Agency Participation Terms**) apply to any Eligible Agency that registers to participate in 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 22 below. Notes in blue boxes are for your convenience but are not part of these Agency Participation Terms.

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

1.2 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.

1.3 When you click to accept these terms you are forming an agreement with DIA.

2. Effect of agreement

2.1 As between DIA and any other public service or non-public service department:

(a) 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); and

(b) clauses 16.4 and 16.8 do not apply.

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

2.2 As between DIA and any other Eligible Agency, these Agency Participation Terms form a legally enforceable agreement.

3. Eligibility

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

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

4. Access and login security

4.1 To access and subscribe to Services available via the Marketplace, your authorised staff need to log in with their own username and password. An Agency Administrator is responsible for determining

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

which staff members can subscribe to Services via the Marketplace.

- 4.2 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.
- 4.3 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 or a member of staff breaches the general website terms of use that apply to every individual and organisation that accesses the Marketplace.

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

5. Procurement process

- 5.1 If you are an agency that needs to comply with the Government Rules of Sourcing, you acknowledge that:
- (a) Services available via the Marketplace have been made available pursuant to the terms of the Common Capability Marketplace Agreement between DIA and each Service Provider (available on marketplace.govt.nz); and, therefore
 - (b) because that Agreement has common capability status, under rules 15(9)(i) and 54(3) of the Government Rules of Sourcing you do not need to openly advertise individual contract opportunities for these Services; you may, instead, purchase directly from the Marketplace using a secondary procurement process appropriate for the service being procured (the design of the Marketplace facilitates side-by-side comparison of relevant competing service offerings for secondary procurement purposes).
- 5.2 You acknowledge that the position described in clause 5.1 applies to *all* Services available via the Marketplace, including Services listed on the Marketplace that are available and procured under a Pre-existing Agreement (as to which, see clause 8 below).

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

6. Agency Purchase Agreements

- 6.1 The Marketplace provides separate channels for different kinds of capabilities, such as software as a service or **SaaS** (each a **Channel**). Part 2 of the Common Capability Marketplace Agreement contains sets of Supplementary Terms that apply to the different Channels. Each set of Supplementary Terms prescribes or describes the form of agreement that applies to your consumption of Services in the Channel to which the Supplementary Terms apply.
- 6.2 You acknowledge and accept that the agreement that applies between you and a Service Provider for your consumption of Services shall be the agreement prescribed by or described in the Supplementary Terms that apply to the relevant Channel. For example, for SaaS services for which there is no Pre-existing

The approach to agreements you'll have with a Service Provider is standardised. You'll enter into an agreement that is either prescribed by the Marketplace or, if the services are available under a Pre-existing Agreement, that is prescribed by that Agreement.

Agreement, this agreement comprises the Service Provider's standard terms as modified by some core government terms set out in the Supplementary Terms for Software as a Service. For services available under a Pre-existing Agreement that are listed in the Marketplace, see clause 8 below. You can find out more by reviewing the Common Capability Marketplace Agreement and guidance material on marketplace.govt.nz.

7. Amendments to Agency Purchase Agreements

7.1 You may only amend an Agency Purchase Agreement that you form with a Service Provider:

- (a) if you and the Service Provider agree to the amendments outside of the applicable Marketplace Ordering Process; and
- (b) the amendment is not of a kind prohibited by the Common Capability Marketplace Agreement.

7.2 This clause 7 does not apply to amendments to any Agency Agreement that you may enter into when you procure Services under a Pre-existing Agreement (as to which, see clause 8 below).

8. Pre-existing Agreements

8.1 If a Service Provider has entered into a pre-existing software framework agreement, cloud framework agreement, common capability agreement or other collaborative agreement with the New Zealand Government (each a **Pre-existing Agreement**) that covers Services listed in the Marketplace to which you would like to subscribe:

- (a) the Pre-existing Agreement has common capability status in relation to the Services listed in the Marketplace Catalogue (see, for example, clause 11.2(d) of the Common Capability Marketplace Agreement's Supplementary Terms for Software as a Service); and
- (b) you will need to procure the Service on the terms of the Agency Agreement that the Pre-existing Agreement specifies.

8.2 The Agency Agreement referred to in clause 8.1(b) can only be amended in accordance with its terms.

9. Payment for Services listed in the Marketplace

9.1 How you pay for a Service procured through or via the Marketplace depends on the kind of Service it is and whether it is the subject of a Pre-existing Agreement. For example, SaaS services that are not the subject of a Pre-existing Agreement are paid for through Marketplace payment processes described in more detail on marketplace.govt.nz. By contrast, services covered by a Pre-existing Agreement are paid for in accordance with the processes prescribed by that Agreement.

You cannot amend the Agency Purchase Agreement terms through the Marketplace. This is only possible outside of the marketplace processes (and should seldom be required).

If a Service Provider has a collaborative agreement with the Government for particular Services listed in the Marketplace, that agreement will have common capability status and you'll contract under the terms that it specifies. DIA determines which services from existing collaborative agreements may be listed in the Marketplace.

You'll usually pay for Services through the Marketplace and a small admin fee (that is paid to us) will be added to the charges you pay the Service Provider.

9.2 Except where clause 8 applies, you will be required to pay to us, periodically, an Administration Fee that will be calculated by reference to the Service Provider's charges for the Services you procure, as described in more detail on marketplace.govt.nz. (Where clause 8 applies, the payment of any administration fee is addressed by the separate arrangements that apply to your signing up to the relevant service.)

10. Participating Party – Service Provider disputes

10.1 If you have an invoicing, performance or any other dispute with a Service Provider, you will need to resolve it with the Service Provider directly, where applicable in accordance with relevant terms in your Agency Purchase Agreement or, where clause 8 applies, the agreement you will have formed with the Service Provider as specified in the Pre-existing Agreement. You acknowledge that, unless permitted by the applicable agreement, you will not be entitled to withhold payment to a Service Provider merely due to the existence of a dispute between you and the Service Provider.

10.2 If a Service 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 Service Provider, we will refer the matter to you and it will be your responsibility to resolve it with the Service Provider.

10.3 You accept that we are not responsible for:

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

10.4 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 Service Provider, please contact us as soon as possible.

11. Confidentiality

11.1 Subject to clause 11.2, 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 by:

- (c) the proper exercise of its contractual rights and obligations under these Agency Participation Terms or the relevant Agency Purchase Agreement or, where clause 8 applies, the agreement you will have formed with the Service Provider as specified in the Pre-existing Agreement; or

We don't get involved in disputes you may have with a Service Provider, unless the Marketplace itself is at fault or a Pre-existing Agreement says otherwise.

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

- (d) law, court order or an obligation to Parliament (including Parliamentary question), a Select Committee or a Minister of the Crown, or by procedures in relation to the appropriation of public money.

11.2 Each party may and will only disclose Confidential Information to relevant Personnel on a need-to-know basis, provided that you must not disclose a Service Provider's commercially sensitive information to any other service provider without our written consent.

11.3 Without limitation to clause 11.2, the parties agree that they should be able to share with one another information relating to the Services, Participating Parties' Agency Purchase Agreements (or other agreements where a Pre-existing Agreement applies) and these Agency Participation Terms. Nothing in this clause 11 will prevent or restrict the free exchange of information between and among DIA and Participating Parties concerning these matters. To avoid doubt, this does not limit the parties' obligations under Pre-existing Agreements, Agency Purchase Agreements or, where clause 8 applies, the agreement you will have formed with the Service Provider as specified in the Pre-existing Agreement.

11.4 You acknowledge that we will obtain statistical information from the Marketplace itself relating to Participating Parties' use of it and their consumption of Services through it. Nothing in this clause 11 will prevent us from using and publishing this information as we consider appropriate.

12. Security

12.1 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 Party'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,

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 Party, provide us with such information to assist with investigation of the incident as we reasonably request; and

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

- (g) take all reasonable steps to stop such unauthorised access or incident and prevent its reoccurrence.

13. Intellectual property

- 13.1 We or our licensors own the Intellectual Property Rights in content on the Marketplace. 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 11 (Confidentiality) and 12 (Security). We are confident we have all the rights we require to permit you to do these things.
- 13.2 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 11 (Confidentiality) and 12 (Security).
- 13.3 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 (for example, the number of and/or spend on orders for Services, whether aggregated across all Participating Parties and/or broken down on a per Participating Party basis).

14. Your contributions to the Marketplace

- 14.1 If you add any comments about or reviews or ratings of Service Providers 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
 - (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 14.1(a); and
 - (c) you permit us to use the Contributions for Marketplace purposes.

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.

15. Liability, warranties and disclaimers

15.1 Subject to clause 15.2:

- (a) no party's liability arising under or in connection with these Agency Participation Terms or their formation will exceed \$100,000; and
- (b) neither 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 income, profit or savings.

15.2 Clause 15.1(a) does not apply to:

- (a) breach of clauses 11 (Confidentiality) and 12 (Security); and
- (b) non-payment by any Participating Party of any Administration Fee.

15.3 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.

15.4 You agree that we are not responsible for:

- (a) the quality, appropriateness for your purposes or availability of the Services to which you subscribe;
- (b) any representations made by any Service Provider, whether on the Marketplace or in materials to which the Marketplace links; or
- (c) any comments about or reviews or ratings of any Service made by any other Participating Party.

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.

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

16. Disputes

16.1 Each party shall, in relation to any dispute that arises under or in connection with these Agency Participation Terms or their formation (**Dispute**), use all reasonable efforts in good faith to:

- (a) ensure that where the Dispute is reasonably foreseeable, it is dealt with at a sufficiently early stage to ensure that there is minimum impact on the ability of either party to perform its obligations under these Agency Participation Terms; and

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 Service Providers' performance.

Disputes need to be dealt with sensibly and there's a tiered approach to help facilitate this.

(b) resolve the Dispute as expeditiously as possible.

- 16.2 Subject to clauses 11.1, 11.2 and 16.3, and except where a Dispute is litigated in open court, the Dispute shall be confidential between the parties to the Dispute and their respective legal and other advisers.
- 16.3 We reserve the right to disclose the nature and outcome of the Dispute to other Participating Parties if we decide, acting reasonably, that the outcome has a bearing on other Participating Parties or their interpretation of these Agency Participation Terms.
- 16.4 Neither party may commence or maintain any action or proceeding in any court, tribunal or other forum regarding a Dispute unless that party has complied with clauses 16.5-16.9, except where it is seeking urgent interlocutory relief.
- 16.5 A party must, as soon as reasonably practicable, give the other party written notice of any Dispute.
- 16.6 The parties will endeavour to resolve the Dispute through good faith negotiations.
- 16.7 If a Dispute cannot be resolved through good faith negotiations between DIA's Marketplace Manager and the Participating Party Representative within 10 Business Days of written notification under clause 16.5, DIA's Chief Executive or his or her nominated delegate and the Participating Party's Chief Executive or his or her nominated delegate will endeavour to resolve the Dispute through good faith negotiations.
- 16.8 If a Dispute cannot be resolved through such good faith negotiations within 20 Business Days of escalation under clause 16.7, the parties may refer the Dispute to mediation. The mediation shall in all respects be conducted in terms of the Resolution Institute's standard Mediation Agreement (NZ version). The mediation shall be conducted by a mediator and at a fee agreed by the parties. Failing agreement between the parties, the mediator shall be selected, and the mediator's fee shall be determined, by the chairperson for the time being of the Resolution Institute or his or her nominee.
- 16.9 Unless the parties otherwise agree, any good faith negotiations and mediation required by this clause 16 are to take place in Wellington.
- 16.10 Except where the Dispute renders it impossible to do so, the parties will continue performing their respective obligations under these Agency Participation Terms while the Dispute is being resolved, unless and until such obligations are terminated or expire in accordance with these Agency Participation Terms.

17. Certification and accreditation

- 17.1 Where relevant to the kind of Service being procured, we will make available to Participating Parties security-related assurance documentation for the Services. For SaaS services, for example, the

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

nature and volume of this documentation for each Service:

- (a) depends on the security-related assurance tier that each Service Provider selects when applying to have its SaaS services listed in the Marketplace; and
- (b) may include third party information and reports.

Our provision of the documentation referred to in this clause 17.1 is intended to centralise the availability of assurance-related documentation and make it easier for Participating Parties to certify and accredit certain kinds of Services, such as SaaS services, for their particular uses. Despite clause 17.1, you retain your own responsibility (where applicable) for:

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

in accordance with the New Zealand Information Security Manual.

18. Governance and contacts

- 18.1 We will appoint, and maintain during the term of these Agency Participation Terms, an experienced person to lead the day-to-day relationship between DIA and all Participating Parties (**Marketplace Manager**).
- 18.2 You will appoint, and maintain while you are participating in the Marketplace, an experienced person for your relationship with us (**Participating Party Representative**). Your Participating Party Representative 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 Party's obligations under these Agency Participation Terms.
- 18.3 The identity and contact details of our Marketplace Manager can be found on marketplace.govt.nz.
- 18.4 You will be required to enter identity and contact details for your Participating Party Representative when on-boarding to the Marketplace.
- 18.5 If we change our Marketplace Manager, we will update marketplace.govt.nz accordingly.
- 18.6 If you wish to replace your Participating Party Representative, please email the details of your new Participating Party Representative (name, email address and phone number) to our Marketplace Manager.

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

19. Term and termination

- 19.1 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 Party.
- 19.2 You may withdraw from the Marketplace as a Participating Party by giving us one month's notice of your withdrawal.
- 19.3 If you withdraw from the Marketplace, Agency Purchase Agreements that you have entered into with Service Providers will remain in force in accordance with their terms but you will need to transition to separate payment arrangements directly with the Service Providers.

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

20. Privacy policy

- 20.1 The Marketplace Privacy Statement applies to the personal information that we store in connection with your use of the Marketplace. By registering with 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.

21. Amendments

- 21.1 We may amend these Agency Participation Terms and our Privacy Statement unilaterally at any time. Unless an urgent change is required, 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, provided that we will not vary our Administration Fee without advising you of the proposed variation.
- 21.2 There is a link in the footer of this website called "Log of changes". You can click on that link at any time to review a summary of the changes we have made to these Agency Participation Terms and our Privacy Statement. Your continued use of 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 but we won't change our admin fee without advising you.

22. Defined terms and interpretation

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

Administration Fee means the fee charged by DIA to Purchasing Agencies to contribute to the running costs of the Marketplace, calculated as 1% of the amount that a Service Provider charges a Purchasing Agency for the provision of its Services;

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 Service Provider arising within a Channel of the Marketplace

The terms defined here have special meaning.

as described in the applicable Supplementary Terms for that Channel 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 a Pre-existing Agreement;

Agency Participation Terms means these Agency Participation Marketplace Terms;

Channel means a channel for the sale of Services provided within the Marketplace, as described in clause 6.1;

Common Capability Marketplace Agreement means the common capability agreement that Service Providers must enter into before being able to list their Services in the Marketplace Catalogue, as amended from time to time in accordance with its terms and available on marketplace.govt.nz;

Confidential Information means:

- (a) in relation to a party, all non-public information of any kind, whether written, electronic or otherwise, and whether marked or identified as being confidential, relating to that party or its business operations;
- (b) Service Providers' commercially sensitive information made available to Participating Parties 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.

Eligibly 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 New Zealand Security Intelligence Service, 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;

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 or any successor URL;

Marketplace Catalogue means the catalogue of Services available for consumption by Eligible Agencies once they become Participating Parties;

Marketplace Manager has the meaning in clause 18.1;

MBIE means the Ministry of Business, Innovation & Employment;

Order means a request for Services;

Ordering Process means the process described on the Marketplace through which Participating Parties submit Orders for Services;

Participating Party means an Eligible Agency that has registered for the Marketplace and accepted these Agency Participation Terms;

Participating Party Representative has the meaning in clause 18.2;

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

Pre-existing Agreement has the meaning in clause 8.1;

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

Services means the services (or goods) listed in the Marketplace Catalogue; and

Service Provider means a service provider that lists services (or goods) in the Marketplace Catalogue.

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

- (a) references to the singular include the plural and vice versa;
- (b) where a word or phrase is defined, its other grammatical forms have a corresponding meaning;
- (c) references to a person include an individual, firm, company, agency, government, corporation or unincorporated body of persons;
- (d) references to any statute include any amendment to, or replacement of, that statute and any subordinate legislation made under it;
- (e) 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
- (f) references to “in writing” include by electronic means.

These rules apply to the interpretation of the agreement.