



Government Model Contract submission

Overview

NZRise submitted feedback to the Ministry of Business, Innovation and Employment regarding the Government Model Contract Crown Services template on 11 and 12 October 2019.

<https://www.mbie.govt.nz/have-your-say/consultation-on-refreshed-government-model-contract-templates>

The information below forms our submission. Any questions or comments can be directed to the Community Manager in the first instance communitymanager@nzrise.org.nz

Our submission

Thank you for providing the “compare versions” of Schedule 2. It seems the Crown and non-Crown versions are the same, except for Definitions related to the Buyer. NZRise provides the following feedback:

1. Updating Guidance

Do you intend to update the 2011 Guidance? We suggest it would be helpful to do so.

2. Software as a Service

Supply of software via on-premis or cloud (SaaS). It seems clear that the Services template is intended to be used for software, rather than the Goods template, because IP is only referenced there and in the Guidance for the Services agreement. Despite that, Services’ Schedule1 seems to have a strong focus on personnel services; it’s almost as if Schedule1 no longer seems to contemplate the supply of software. So, should there be a separate GMC template for software and SaaS?

3. Approved Personnel

Clause 2.4.b – listing of Approved Personnel should be limited to those critical to a project under updated Guidance; it should be acknowledged Suppliers already have the commitment under 2.3.a and 2.3.b. The template should also recognise that medium sized businesses with a reasonable number of appropriately skilled staff, and need flexibility around who is committed, particularly to longer term projects. Once again, we point to the Supplier commitments under 2.3.a and 2.3.b. Otherwise, Crown contracts could restrain growth opportunities for NZ Tech businesses. At the very least, clause 2.4.b should incorporate the final sentence of clause 6.3.



4. NZBN

Clause 3.2.d – why have you added the requirement to include a NZBN into a Tax Invoice? This is not an IRD requirement. <https://www.ird.govt.nz/topics/income-tax/record-keeping/tax-invoices-for-gst>. So Govt seems to be adding a requirement that means Suppliers either need to have a separate process for invoicing Govt, or change their Tax Invoice template for all customers, potentially causing confusion amongst the latter. We should note that having a NZBN does not mean the Supplier is a NZ business under the MBIE-accepted definition.

5. SME cashflow and invoicing

Clause 3.3 – these payment terms seem somewhat in conflict with MP’s statements about recognising the importance of cashflow to NZ SMEs, and their encouraging Govt Agencies to pay sooner rather than later. It would be wonderful if 3.3.a extended the timeline to 5 Business Days, and 3.3.b stated the Buyer will pay as soon as conveniently possible, with 20th of the following calendar month being the latest date for payment.

6. Insurance

Clause 8.1.a – the change doesn’t seem to recognise that (hopefully in most instances) the supplier may already have the necessary insurance. The words “...must take out the insurance...” should therefore be amended to state, for example, “..must, if the insurance has not already been effected, take out...”

7. Balance in bargaining power

There should be more balance between clauses 11.2 and 11.3, to avoid suggestions Govt is exercising its greater bargaining power over SMEs.

8. Intellectual Property

Clause 12.1.b - IP rights. This seems very unreasonable, inappropriate and impractical for the supply of software products, especially on a SaaS basis. It also conflicts with SSC’s 2008 guidance around ICT IP rights. We do not accept the justification under the Copyright Act. If the “material developed” was an Open Source project, this completely conflicts with the Open Source Definition.

(The following paragraph was filed additionally on October 12 to this point):

In addition to what was stated earlier, we should explain that if the Crown seeks to retain the IP rights for any changes/additions to a proprietary software “package”, it would create an impractical joint ownership situation, with the proprietary owner owning the vast bulk of the (pre-existing) IP while the Crown owns the little piece associated with the changes/additions. It probably gets even more challenging with a SaaS cloud solution. Either way, the software owner needs to integrate the changes into its main version because single-version software products are demonstrably less desirable for many reasons, including being more expensive to maintain and the difficulties incorporating future supplier-initiated enhancements.



9. Proprietary software

For proprietary software, Clause 12.1.c needs to be modified to recognise the additional licence fees that would be payable. For Open Source software, the clause is probably unnecessary, because that's part of the Open Source Definition.

10. Warranty

Clauses 12.2.b and 12.3 need to recognise that the warranty can't extend to changes and enhancements requested by the Buyer (commissioned software). And it's not possible for Open Source developers to provide any warranty because of the collective nature of the code.

11. Consideration for an open society

Why have you "tightened up" clause 16.5; aren't you getting close to imposing unreasonable restrictions on your suppliers, given we operate in an open society? In addition, could you add the last sentence of clause 6.3 please?

12. Relationship with the Procurement Rules

We may have missed some things but can't see a lot of emphasis on incorporating the new Procurement Rules' requirements including Broader Outcomes. Could you please summarise the relationship between your changes and the Procurement Rules changes?

(The following paragraph was filed additionally on October 12 to this point):

We anticipate that revised Tender templates [ROI, RFI, RFQ, RFP, etc] will seek information about Broader Outcomes under Rules 16 and 17, to enable "the Buyer" to adequately consider and assess those aspects in relation to competing prospective Suppliers. NZRise supports all of the Broader Outcomes initiatives, having a particular focus on the recently-published Guidance "Increasing access for New Zealand businesses to ICT contract opportunities".

Amongst other things, we would suggest the GMC templates incorporate the commitments the Supplier has made in relation to the Broader Outcomes, with provisions for reporting on those commitments under an enforceable regime such as Statutory Declarations, random audits and/or other means to ensure compliance.

Ends.