



Collaborative Marketplace Agreement

Part 2 – Channel Terms for Software as a Service (SaaS Terms) (Standard)

Channel Terms

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1. Introduction

- 1.1 These Channel Terms apply to the Software as a Service Channel (**SaaS Channel**). This Channel is part of the New Zealand Government Marketplace as described in, and is subject to, the terms of the Collaborative Marketplace Agreement (the **Marketplace Agreement**).
- 1.2 These particular terms apply in relation to Services for which there is *no* Eligible Pre-existing Agreement that governs the terms on which Eligible Agencies are to procure Services in this Channel.
- 1.3 When we use the terms **you** and **your**, we are referring to any provider that applies to be a Member of and list services in this Channel.

These are the channel terms for software as a service.

2. Definitions

- 2.1 These Channel Terms incorporate all definitions included in the General Terms in Part 1 of the Marketplace Agreement. In addition, for the purposes of these Channel Terms:

The terms defined here have special meaning.

Eligible Pre-existing Agreement means 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;

Order means a request for Services;

Order Form means an ordering form on the Marketplace that Participating Agencies may need to complete to submit an Order for Services;

Ordering Date means the date on which a Purchasing Agency submits an Order;

Pre-existing Agreement has the meaning in clause 24 of the General Terms;

Software as a Service (or SaaS Services) means the software or software-related services (including cloud licensing or other related services) in relation to which you have sought and obtained consent for Services Listings in the Marketplace pursuant to the On-boarding Process for this Channel;

Subscription Agreement means an Agency Purchase Agreement formed in accordance with these Channel Terms; and

Tier 1 Security Assurance and Risk Rating means the highest level of security assurance that a provider can obtain for a Services Listing in the Marketplace.

- 2.2 References in these Channel Terms to **software or software-related services** include, where relevant, licences for the deployment of software in cloud computing environments and professional services relating to the use of SaaS services, as long as they are capable of being listed in a subscription that a Participating Agency can procure through the Marketplace.
- 2.3 In a minority of cases we may consider that the nature, risk profile or value of some or all of your services warrants more detailed contractual terms than the terms in these Channel Terms and, for a Purchasing Agency, the applicable Subscription Agreement. In such cases we may elect, after discussion with you, to require you to enter into a different form of agreement (an **Alternative Common Capability Marketplace Agreement**) for the relevant services or licensing. In that event, you will not be able to list and provide the relevant services or licensing through the Marketplace until you have entered into an Alternative Common Capability Marketplace Agreement with us (entry into such an agreement remains your choice).

In a minority of cases we may need to ask you to enter into a more detailed agreement with us as a pre-requisite to your being able to list your services in the Marketplace.

3. Ordering SaaS Services

- 3.1 If an Eligible Agency decides to purchase SaaS Services, it will select the relevant service(s) and provider(s) and, where relevant, choose between them and submit an Order in accordance with the Ordering Process for SaaS Services (which is described on marketplace.govt.nz).

4. Agreements with Purchasing Agencies for SaaS Services

- 4.1 The contract that applies between you and a Purchasing Agency for the Purchasing Agency's consumption of your SaaS Services shall be an agreement that comprises:

- (a) your Standard Terms applying on the Ordering Date; but
- (b) subject to and as modified by the terms specified in clause 5 below (the **Government Terms**).

We call this agreement a **Subscription Agreement**. If there is any inconsistency between the Government Terms and your Standard Terms, the Government Terms prevail.

- 4.2 The Subscription Agreement is formed upon the Purchasing Agency's submission of an Order Form to you for the relevant SaaS Services (and the Purchasing Agency will be aware of the terms of the Subscription Agreement).

- 4.3 This clause 4 is intended to confer a benefit on and to be enforceable by all Purchasing Agencies that submit an Order Form for SaaS Services (for which there is no Eligible Pre-existing Agreement).

5. Government Terms

- 5.1 Despite any provision to the contrary in your Standard Terms, you agree in relation to every Subscription Agreement that:

- (a) **indemnities:** no Purchasing Agency shall be under any obligation to indemnify or grant any guarantee to you or any other person or entity (and for this purpose "indemnify" includes any obligation in the nature of an indemnity);
- (b) **entire agreement:** a Purchasing Agency's Subscription Agreement constitutes the entire agreement between the Purchasing Agency and you;

If an Eligible Agency wishes to procure SaaS Services, it does so through an Ordering Process that creates a Subscription Agreement between you and the relevant Eligible Agency. When that Subscription Agreement is formed, the Eligible Agency becomes a Purchasing Agency.

These Government Terms modify the application of your Standard Terms.

- (c) **control of claims:** any reference in your Standard Terms to your having any form of control over the defence or settlement of any third party claim against the Purchasing Agency (in relation to which you have an obligation such as an indemnity vis-a-vis the Purchasing Agency) is subject to any applicable directions provided to the Purchasing Agency pursuant to the New Zealand Government's "[Cabinet Directions for the Conduct of Crown Legal Business 2016](#)" or their successor;
- (d) **unilateral changes:** except as required by law, if you make a unilateral change to your Standard Terms from the Ordering Date that is prejudicial to a Purchasing Agency's or its Users' rights or interests, that change shall be unenforceable against the Purchasing Agency and its Users (this clause does not prevent you from amending your Standard Terms for all of your customers or adapting and evolving your Services as you see fit and it doesn't require you to issue bespoke communications to Purchasing Agencies and their Users if you amend your Standard Terms for all of your customers; it only limits the enforceability of unilateral changes that are prejudicial to a Purchasing Agency's or its Users' rights or interests). This clause is intended to benefit Users and be enforceable by them under the Contract and Commercial Law Act 2017 and you agree not to assert in any communications or proceedings, whether in New Zealand or elsewhere, that Users are bound by such unilateral changes;
- (e) **governing law and jurisdiction:**
- (i) New Zealand law governs all matters relating to the Government Terms of each Subscription Agreement and the formation of each Subscription Agreement, including interpretation of the Government Terms and any disputes relating to them;
 - (ii) you agree to submit to the non-exclusive jurisdiction of the New Zealand courts in relation to any dispute regarding the Government Terms of each Subscription Agreement or the formation of the Subscription Agreement and you agree that the New Zealand courts are an appropriate forum for such disputes and that you will not seek to argue to the contrary;
 - (iii) you and any Purchasing Agency will be entitled to seek interim relief in any relevant jurisdiction; and
 - (iv) except as stated in this clause 5.1, the governing law and jurisdiction clauses in your Standard Terms continue to apply.

The Cabinet Directions for the Conduct of Crown Legal Business apply to Ministers and government departments. Under the directions, the Attorney-General and Solicitor-General have specific roles and powers vis-à-vis departments in relation to litigation involving the Crown.

- 5.2 You also agree that, despite any provisions to the contrary in your Standard Terms, the following clauses apply in relation to each Subscription Agreement:
- (a) 3.4 of the General Terms (no exclusivity or minimum purchasing requirement);
 - (b) 3.11 of the General Terms (withdrawal, suspension or termination does not affect existing Agency Purchase Agreements);
 - (c) 4.8 of the General Terms (removal of Services Listing does not affect existing Agency Purchase Agreements);
 - (d) 10 of the General Terms (Warranties);
 - (e) 13 of the General Terms (Pricing and Administration Fee) and clause 7 of these Channel Terms (Additional pricing terms);
 - (f) 15 of the General Terms (Confidentiality);
 - (g) 17 of the General Terms (Purchasing Agency Data);
 - (h) 18 of the General Terms (Personal information);
 - (i) 21 of the General Terms (Amendments); and
 - (j) 24 of the General Terms (Defined terms and interpretation).

5.3 You must:

- (a) name your Standard Terms and your published privacy statements or policies and provide URL(s) to them in the applicable Marketplace Catalogue and upload them to that Marketplace Catalogue; and
- (b) update these names, URLs and uploads in that Marketplace Catalogue if you amend your Standard Terms or your published privacy statements or policies.

You need to add details of your Standard Terms and privacy policies to the Marketplace and keep them up to date.

5.4 You may only amend the terms of the Subscription Agreement for a *particular* Purchasing Agency:

- (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
- (b) the amendment is not a Prohibited Amendment (defined below).

You and a particular Purchasing Agency may agree to amend the default terms of a Subscription Agreement in certain respects.

This clause 5.4 does not limit clause 5.1(d) of these SaaS Terms.

5.5 For the purposes of clause 5.4, amendments that seek to:

- (a) increase the Price for your SaaS Services for a particular Purchasing Agency (unless you are doing so for all or the majority of your customers either worldwide or within a particular country pursuant to a right in your Standard Terms); or
- (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,

are **Prohibited Amendments** unless you obtain DIA's prior written consent.

6. Additional provisions relating to service changes

6.1 When you are proposing to make changes to a SaaS Service, you need to consider whether the changes will adversely affect:

- (a) the security or other controls;
- (b) your compliance with any standards (e.g., coding standards); and/or
- (c) the ongoing validity of any certifications you have for the SaaS Service,

that you notified to DIA when applying for inclusion of the SaaS Service in the Marketplace and obtaining the level of assurance for which the SaaS Service is listed in the applicable Marketplace Catalogue. If there will be an adverse effect:

- (d) you must inform DIA of the adverse effect with sufficient information to enable DIA to understand the potential risk and impact; and
- (e) you must follow DIA's reasonable directions to address the adverse impact; if you do not, we may elect to downgrade the assurance level for the affected SaaS Service (if greater than the base level) or require you to withdraw the SaaS Service from the Marketplace.

7. Additional pricing terms

7.1 The initial Prices for your SaaS Services and the currency in which they are charged will be the pricing and currency notified to us during the On-boarding Process for this Channel or otherwise agreed with us during that On-boarding Process. These initial Prices (and any Prices increased pursuant to clause 7.2) must be either:

- (a) the prices you usually apply to equivalent New Zealand customers (or tiers of customers) for those SaaS Services, taking into account where relevant the nature of the Services, terms of supply, recoverability of your expenditure

If you're changing a SaaS Service, you need to think about some security and related matters.

or investment, committed spend volumes and contractual periods; or

(b) reduced prices for Eligible Agencies.

7.2 Subject to clause 7.1, you may alter the Prices for your SaaS Services at any time and, if you do, you must update your Services Listings promptly to show the altered Prices.

You can alter your pricing at any time.

7.3 If you propose to increase the Price for a SaaS Service, you must give DIA and Purchasing Agencies at least 30 days' prior notice of the increase.

7.4 Pricing for a Purchasing Agency's consumption of your SaaS Services must be based on the Prices stated in the relevant Services Listings at the time the Purchasing Agency executes an Order Form for the SaaS Services. If you alter your pricing in accordance with clause 7.2, the altered pricing will apply to each Purchasing Agency's consumption of the relevant SaaS Services from the next applicable billing cycle.

Services Listing Pricing applies to a Purchasing Agency's consumption of your SaaS Services.

7.5 Your charges for your SaaS Services will be processed through the Marketplace, as described in more detail on marketplace.govt.nz.

8. **Obligation to keep us informed**

8.1 You may meet your obligation in clause 9 of the General Terms in Part 1 of the Marketplace Agreement (Obligation to keep us informed) either directly or, if you customarily issue information of a kind referred to in that clause to customers in the form of service status updates on your website or other platform, through such updates.

You can meet your obligation to keep us informed through online service status updates.

9. **Tier 1 Security Assurance and Risk Rating**

9.1 If you wish to apply for a Tier 1 Security Assurance and Risk Rating for a Service for which you already have a Services Listing or for which you are seeking a Services Listing, you will be required, as part of the application process, to agree to our Tier 1 Security Assurance Terms.

If you apply for a Tier 1 Security Assurance and Risk Rating or we require you to do so, you will be required to agree to our Tier 1 Security Assurance Terms.

9.2 We reserve the right to make your membership of this Channel, or your ability to add or maintain a Services Listing for a particular Service in this Channel, subject to your:

(a) first applying for and obtaining a Tier 1 Security Assurance and Risk Rating; or

(b) applying for and obtaining a Tier 1 Security Assurance and Risk Rating within a specified period after your Services Listing is added to the Marketplace with a lower rating.

We may exercise this right if, given the nature or risk profile of one or more of your Services, we consider it necessary or desirable to do

so. If we do, you will be required, as part of the application process, to agree to our Tier 1 Security Assurance Terms.

Published version history

Version number	Date	Comment (if any)
2	6 November 2020	New clause 9 (Tier 1 Security Assurance and Risk Rating) and associated definition of Tier 1 Security Assurance and Risk Rating