

RFX Process, Terms and Conditions

Note to Suppliers and Respondents

- a. In managing this procurement the Buyer will endeavour to act fairly and reasonably in all of its dealings with interested suppliers and Respondents, and to follow due process which is open and transparent.
- b. This section contains the government's standard RFX Process, Terms and Conditions (shortened to RFX-Terms) which apply to this procurement. Any variation to the RFX-Terms will be recorded in Section 1, paragraph 2.6. Check to see if any changes have been made for this RFX.
- c. Words and phrases that have a special meaning are shown by the use of capitals e.g. Respondent, which means *'a person, organisation, business or other entity that submits a Proposal in response to the RFX. The term Respondent includes its officers, employees, contractors, consultants, agents and representatives. The term Respondent differs from a supplier, which is any other business in the market place that does not submit a Proposal.'* Definitions are at the end of this section.
- d. If you have any questions about the RFX-Terms please email our Point of Contact.

Standard RFX process

1 Preparing and submitting a proposal

1.1 Preparing a Proposal

- a. Respondents are to use the Response Form provided and include all information requested by the Buyer in relation to the RFX.
- b. By submitting a Proposal the Respondent accepts that it is bound by the RFX Process, Terms and Conditions (RFX-Terms) contained in this document (RFX-Terms) (as varied by Section 2, paragraph 2.6, if applicable).
- c. Each Respondent will:
 - i. examine the RFX and any documents referenced in the RFX and any other information provided by the Buyer
 - ii. consider all risks, contingencies and other circumstances relating to the delivery of the Requirements and include adequate provision in its Proposal to manage such risks and contingencies
 - iii. document in its Proposal all assumptions and qualifications made about the delivery of the Requirements, including any assumption that the Buyer or a third party will deliver any aspect of the Requirements or incur any cost related to the delivery of the Requirements
 - iv. ensure that pricing information is quoted in NZ\$ exclusive of GST
 - v. if appropriate, obtain independent advice before submitting a Proposal
 - vi. satisfy itself as to the correctness and sufficiency of its Proposal, including the proposed pricing and the sustainability of the pricing.

- d. There is no expectation or obligation for Respondents to submit Proposals in response to the RFX solely to remain on any prequalified or registered supplier list. Any Respondent on such a list will not be penalised for failure to submit a Proposal.

1.2 Offer Validity Period

- a. Proposals are to remain valid and open for acceptance by the Buyer for the Offer Validity Period.

1.3 Respondents' Deadline for Questions

- a. Each Respondent should satisfy itself as to the interpretation of the RFX. If there is any perceived ambiguity or uncertainty in the RFX document/s Respondents should seek clarification before the Deadline for Questions.
- b. All requests for clarification must be made by email to the Buyer's Point of Contact. The Buyer will endeavour to respond to requests in a timely manner, but not later than the deadline for the Buyer to answer Respondents' questions in Section 2, paragraph 2.2.a, if applicable.
- c. If the Buyer considers a request to be of sufficient importance to all Respondents it may provide details of the question and answer to other Respondents. In doing so the Buyer may summarise the Respondent's question and will not disclose the Respondent's identity. The question and answer may be posted on GETS and/or emailed to participating Respondents. A Respondent may withdraw a request at any time.
- d. In submitting a request for clarification a Respondent is to indicate, in its request, any information that is commercially sensitive. The Buyer will not publish such commercially sensitive information. However, the Buyer may modify a request to eliminate such commercially sensitive information, and publish this and the answer where the Buyer considers it of general significance to all Respondents. In this case, however, the Respondent will be given an opportunity to withdraw the request or remove the commercially sensitive information.

1.4 Submitting a Proposal

- a. Each Respondent is responsible for ensuring that its Proposal is received by the Buyer at the correct address on or before the Deadline for Proposals. The Buyer will acknowledge receipt of each Proposal.
- b. The Buyer intends to rely on the Respondent's Proposal and all information provided by the Respondent (e.g. correspondence and negotiations). In submitting a Proposal and communicating with the Buyer each Respondent should check that all information it provides to the Buyer is:
 - i. true, accurate and complete, and not misleading in any material respect
 - ii. does not contain Intellectual Property that will breach a third party's rights.
- c. Where the Buyer requires the Proposal to be delivered in hard and soft copies, the Respondent is responsible for ensuring that both the hard and soft copies are identical.
- d. Where the Buyer stipulates a two envelope RFX process the following applies:
 - i. each Respondent must ensure that all financial information and pricing components of its Proposal are provided separately from the remainder of its Proposal
 - ii. financial information and pricing must be contained either in a separate sealed envelope or as a separate soft copy file (whichever option has been requested by the Buyer)

- iii. the pricing information must be clearly marked 'Financial and Pricing Information.' This is to ensure that the pricing information cannot be viewed when the package containing the other elements of the Proposal is opened.

2 Assessing Proposals

2.1 Evaluation panel

- a. The Buyer will convene an evaluation panel comprising members chosen for their relevant expertise and experience. In addition, the Buyer may invite independent advisors to evaluate any Proposal, or any aspect of any Proposal.

2.2 Third party information

- a. Each Respondent authorises the Buyer to collect additional information, except commercially sensitive pricing information, from any relevant third party (such as a referee or a previous or existing client) and to use that information as part of its evaluation of the Respondent's Proposal.
- b. Each Respondent is to ensure that all referees listed in support of its Proposal agree to provide a reference.
- c. To facilitate discussions between the Buyer and third parties each Respondent waives any confidentiality obligations that would otherwise apply to information held by a third party, with the exception of commercially sensitive pricing information.

2.3 Buyer's clarification

- a. The Buyer may, at any time, request from any Respondent clarification of its Proposal as well as additional information about any aspect of its Proposal. The Buyer is not required to request the same clarification or information from each Respondent.
- b. The Respondent must provide the clarification or additional information in the format requested. Respondents will endeavour to respond to requests in a timely manner. The Buyer may take such clarification or additional information into account in evaluating the Proposal.
- c. Where a Respondent fails to respond adequately or within a reasonable time to a request for clarification or additional information, the Buyer may cease evaluating the Respondent's Proposal and may eliminate the Proposal from the RFX process.

2.4 Evaluation and shortlisting

- a. The Buyer will base its initial evaluation on the Proposals submitted in response to the RFX. The Buyer may adjust its evaluation of a Proposal following consideration of any clarification or additional information as described in paragraphs 2.2 and 2.3.
- b. In deciding which Respondent/s to shortlist the Buyer will take into account the results of the evaluations of each Proposal and the following additional information:
 - i. each Respondent's understanding of the Requirements, capability to fully deliver the Requirements and willingness to meet the terms and conditions of the Proposed Contract
 - ii. except where the price is the only criterion, the best value-for-money over the whole-of-life of the goods or services.

- c. In deciding which Respondent/s, to shortlist the Buyer may take into account any of the following additional information:
- i. the results from reference checks, site visits, product testing and any other due diligence
 - ii. the ease of contracting with a Respondent based on that Respondent's feedback on the Proposed Contract (where these do not form part of the weighted criteria)
 - iii. any matter that materially impacts on the Buyer's trust and confidence in the Respondent
 - iv. any other relevant information that the Buyer may have in its possession.
- d. The Buyer will advise Respondents if they have been shortlisted or not. Being shortlisted does not constitute acceptance by the Buyer of the Respondent's Proposal, or imply or create any obligation on the Buyer to enter into negotiations with, or award a Contract for delivery of the Requirements to any shortlisted Respondent/s. At this stage in the RFX process the Buyer will not make public the names of the shortlisted Respondents.

2.5 Negotiations

- a. The Buyer may invite a Respondent to enter into negotiations with a view to contract. Where the outcome is unsatisfactory the Buyer may discontinue negotiations with a Respondent and may then initiate negotiations with another Respondent.
- b. The Buyer may initiate concurrent negotiations with more than one Respondent. In concurrent negotiations the Buyer will treat each Respondent fairly, and:
- i. prepare a negotiation plan for each negotiation
 - ii. advise each Respondent, that it wishes to negotiate with, that concurrent negotiations will be carried out
 - iii. hold separate negotiation meetings with each Respondent.
- c. Each Respondent agrees that any legally binding contract entered into between the Successful Respondent and the Buyer will be essentially in the form set out in Section 5, the Proposed Contract.

2.6 Respondent's debrief

- a. At any time after shortlisting Respondents the Buyer will offer all Respondents who have not been shortlisted a debrief. Each Respondent will have 30 Business Days, from the date of offer, to request a debrief. When a Respondent requests a debrief, the Buyer will provide the debrief within 30 Business Days of the date of the request, or of the date the Contract is signed, whichever is later.
- b. The debrief may be provided by letter, email, phone or at a meeting. The debrief will:
- i. provide the reasons why the Proposal was or was not successful
 - ii. explain how the Proposal performed against the pre-conditions (if applicable) and the evaluation criteria
 - iii. indicate the Proposal's relative strengths and weaknesses
 - iv. explain, in general terms, the relative advantage/s of the successful Proposal
 - v. seek to address any concerns or questions from the Respondent
 - vi. seek feedback from the Respondent on the RFX and the RFX process.

2.7 Notification of outcome

- a. At any point after conclusion of negotiations, but no later than 30 Business Days after the date the Contract is signed, the Buyer will inform all unsuccessful Respondents of the name of the Successful Respondent, if any. The Buyer may make public the name of the Successful Respondent and any unsuccessful Respondent. Where applicable, the Buyer will publish a Contract Award Notice on GETS.

2.8 Issues and complaints

- a. A Respondent may, in good faith, raise with the Buyer any issue or complaint about the RFX, or the RFX process at any time.
- b. The Buyer will consider and respond promptly and impartially to the Respondent's issue or complaint.
- c. Both the Buyer and Respondent agree to act in good faith and use their best endeavours to resolve any issue or complaint that may arise in relation to the RFX.
- d. The fact that a Respondent has raised an issue or complaint is not to be used by the Buyer to unfairly prejudice the Respondent's ongoing participation in the RFX process or future contract opportunities.

3 Standard RFX conditions

3.1 Buyer's Point of Contact

- a. All enquiries regarding the RFX must be directed by email to the Buyer's Point of Contact. Respondents must not directly or indirectly approach any representative of the Buyer, or any other person, to solicit information concerning any aspect of the RFX.
- b. Only the Point of Contact, and any authorised person of the Buyer, are authorised to communicate with Respondents regarding any aspect of the RFX. The Buyer will not be bound by any statement made by any other person.
- c. The Buyer may change the Point of Contact at any time. The Buyer will notify Respondents of any such change. This notification may be posted on GETS or sent by email.
- d. Where a Respondent has an existing contract with the Buyer then business as usual communications, for the purpose of managing delivery of that contract, will continue using the usual contacts. Respondents must not use business as usual contacts to lobby the Buyer, solicit information or discuss aspects of the RFX.

3.2 Conflict of Interest

- a. Each Respondent must complete the Conflict of Interest declaration in the Response Form and must immediately inform the Buyer should a Conflict of Interest arise during the RFX process. A

material Conflict of Interest may result in the Respondent being disqualified from participating further in the RFX.

3.3 Ethics

- a. Respondents must not attempt to influence or provide any form of personal inducement, reward or benefit to any representative of the Buyer in relation to the RFX.
- b. A Respondent who attempts to do anything prohibited by paragraphs 3.1.a. and d. and 3.3.a. may be disqualified from participating further in the RFX process.
- c. The Buyer reserves the right to require additional declarations, or other evidence from a Respondent, or any other person, throughout the RFX process to ensure probity of the RFX process.

3.4 Anti-collusion and bid rigging

- a. Respondents must not engage in collusive, deceptive or improper conduct in the preparation of their Proposals or other submissions or in any discussions or negotiations with the Buyer. Such behaviour will result in the Respondent being disqualified from participating further in the RFX process. In submitting a Proposal the Respondent warrants that its Proposal has not been prepared in collusion with a Competitor.
- b. The Buyer reserves the right, at its discretion, to report suspected collusive or anti-competitive conduct by Respondents to the appropriate authority and to give that authority all relevant information including a Respondent's Proposal.

3.5 Confidential Information

- a. The Buyer and Respondent will each take reasonable steps to protect Confidential Information and, subject to paragraph 3.5.c. and without limiting any confidentiality undertaking agreed between them, will not disclose Confidential Information to a third party without the other's prior written consent.
- b. The Buyer and Respondent may each disclose Confidential Information to any person who is directly involved in the RFX process on its behalf, such as officers, employees, consultants, contractors, professional advisors, evaluation panel members, partners, principals or directors, but only for the purpose of participating in the RFX.
- c. Respondents acknowledge that the Buyer's obligations under paragraph 3.5.a. are subject to requirements imposed by the Official Information Act 1982 (OIA), the Privacy Act 1993, parliamentary and constitutional convention and any other obligations imposed by law. The Buyer will not be in breach of its obligations if Confidential Information is disclosed by the Buyer to the appropriate authority because of suspected collusive or anti-competitive tendering behaviour. Where the Buyer receives an OIA request that relates to a Respondent's Confidential Information the Buyer will consult with the Respondent and may ask the Respondent to explain why the information is considered by the Respondent to be confidential or commercially sensitive.

3.6 Confidentiality of RFX information

- a. For the duration of the RFX, to the date of the announcement of the Successful Respondent, or the end of the RFX process, the Respondent agrees to keep the RFX strictly confidential and not make

any public statement to any third party in relation to any aspect of the RFX, the RFX process or the award of any Contract without the Buyer's prior written consent.

- b. A Respondent may disclose RFX information to any person described in paragraph 3.5.b. but only for the purpose of participating in the RFX. The Respondent must take reasonable steps to ensure that such recipients do not disclose Confidential Information to any other person or use Confidential Information for any purpose other than responding to the RFX.

3.7 Costs of participating in the RFX process

- a. Each Respondent will meet its own costs associated with the preparation and presentation of its Proposal and any negotiations.

3.8 Ownership of documents

- a. The RFX and its contents remain the property of the Buyer. All Intellectual Property rights in the RFX remain the property of the Buyer or its licensors. The Buyer may request the immediate return or destruction of any or all RFX documents and any copies. Respondents must comply with any such request in a timely manner.
- b. All documents forming the Proposal will, when delivered to the Buyer, become the property of the Buyer. Proposals will not be returned to Respondents at the end of the RFX process.
- c. Ownership of Intellectual Property rights in the Proposal remain the property of the Respondent or its licensors. However, the Respondent grants to the Buyer a non-exclusive, non-transferable, perpetual licence to retain, use, copy and disclose information contained in the Proposal for any purpose related to the RFX process.

3.9 No binding legal relations

- a. Neither the RFX, nor the RFX process, creates a process contract or any legal relationship between the Buyer and any Respondent, except in respect of:
 - i. the Respondent's declaration in its Proposal
 - ii. the Offer Validity Period
 - iii. the Respondent's statements, representations and/or warranties in its Proposal and in its correspondence and negotiations with the Buyer
 - iv. the Evaluation Approach to be used by the Buyer to assess Proposals as set out in Section 4 and in the RFX-Terms (as varied by Section 2, paragraph 2.6, if applicable)
 - v. the standard RFX conditions set out in paragraphs 3.1 to 3.14
 - vi. any other matters expressly described as binding obligations in Section 2, paragraph 2.6.
- b. Each exception in paragraph 3.9.a. is subject only to the Buyer's reserved rights in paragraph 3.11.
- c. Except for the legal obligations set out in paragraph 3.9.a. no legal relationship is formed between the Buyer and any Respondent unless and until a Contract is entered into between those parties.

3.10 Elimination

- a. The Buyer may exclude a Respondent from participating in the RFX if the Buyer has evidence of any of the following, and is considered by the Buyer to be material to the RFX:
 - i. the Respondent has failed to provide all information requested, or in the correct format, or materially breached a term or condition of the RFX
 - ii. the Proposal contains a material error, omission or inaccuracy

- iii. the Respondent is in bankruptcy, receivership or liquidation
- iv. the Respondent has made a false declaration
- v. there is a serious performance issue in a historic or current contract delivered by the Respondent
- vi. the Respondent has been convicted of a serious crime or offence
- vii. there is professional misconduct or an act or omission on the part of the Respondent which adversely reflects on the integrity of the Respondent
- viii. the Respondent has failed to pay taxes, duties or other levies
- ix. the Respondent represents a threat to national security or the confidentiality of sensitive government information
- x. the Respondent is a person or organisation designated as a terrorist by New Zealand Police.

3.11 Buyer's additional rights

- a. Despite any other provision in the RFX the Buyer may, on giving due notice to Respondents:
 - i. amend, suspend, cancel and/or re-issue the RFX, or any part of the RFX
 - ii. make any material change to the RFX (including any change to the timeline, Requirements or Evaluation Approach) on the condition that Respondents are given a reasonable time within which to respond to the change.
- b. Despite any other provision in the RFX the Buyer may:
 - i. accept a late Proposal if it is the Buyer's fault that it is received late
 - ii. in exceptional circumstances, accept a late Proposal where it considers that there is no material prejudice to other Respondents. The Buyer will not accept a late Proposal if it considers that there is risk of collusion on the part of a Respondent, or the Respondent may have knowledge of the content of any other Proposal
 - iii. in exceptional circumstances, answer a question submitted after the Deadline for Questions, if applicable
 - iv. accept or reject any Proposal, or part of a Proposal
 - v. accept or reject any non-compliant, non-conforming or alternative Proposal
 - vi. decide not to accept the lowest priced conforming Proposal unless this is stated as the Evaluation Approach
 - vii. decide not to enter into a Contract with any Respondent
 - viii. liaise or negotiate with any Respondent without disclosing this to, or doing the same with, any other Respondent
 - ix. provide or withhold from any Respondent information in relation to any question arising in relation to the RFX. Information will usually only be withheld if it is deemed unnecessary, is commercially sensitive to a Respondent, is inappropriate to supply at the time of the request or cannot be released for legal reasons
 - x. amend the Proposed Contract at any time, including during negotiations with a shortlisted Respondent
 - xi. waive irregularities or requirements in or during the RFX process where it considers it appropriate and reasonable to do so.

- c. The Buyer may request that a Respondent/s agrees to the Buyer:
 - i. selecting any individual element/s of the Requirements that is offered in a Proposal and capable of being delivered separately, unless the Proposal specifically states that the Proposal, or elements of the Proposal, are to be taken collectively
 - ii. selecting two or more Respondents to deliver the Requirements as a joint venture or consortium.

3.12 New Zealand law

- a. The laws of New Zealand shall govern the RFX and each Respondent agrees to submit to the exclusive jurisdiction of the New Zealand courts in respect of any dispute concerning the RFX or the RFX process.

3.13 Disclaimer

- a. The Buyer will not be liable in contract, tort, equity, or in any other way whatsoever for any direct or indirect damage, loss or cost incurred by any Respondent or any other person in respect of the RFX process.
- b. Nothing contained or implied in the RFX, or RFX process, or any other communication by the Buyer to any Respondent shall be construed as legal, financial or other advice. The Buyer has endeavoured to ensure the integrity of such information. However, it has not been independently verified and may not be updated.
- c. To the extent that liability cannot be excluded, the maximum aggregate liability of the Buyer, its agents and advisors is \$1.

3.14 Precedence

- a. Any conflict or inconsistency in the RFX shall be resolved by giving precedence in the following descending order:
 - i. Section 2, paragraph 2.6
 - ii. This document (RFX-Terms)
 - iii. all other Sections of this RFX document
 - iv. any additional information or document provided by the Buyer to Respondents through the Buyer's Point of Contact or GETS.
- b. If there is any conflict or inconsistency between information or documents having the same level of precedence the later information or document will prevail.

Definitions

- a. In relation to the RFX the following words and expressions have the meanings described below.

Advance Notice	A notice published by the buyer on GETS in advance of publishing the RFX. An Advance Notice alerts the market to a contract opportunity. Where used, an Advance Notice forms part of the RFX.
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Business Day	Any week day in New Zealand, excluding Saturdays, Sundays, New Zealand (national) public holidays and all days from Boxing Day up to and including the day after New Year's Day.
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Buyer	The Buyer is the government agency that has issued the RFX with the intent of purchasing the goods or services described in the Requirements. The term Buyer includes its officers, employees, contractors, consultants, agents and representatives.
Competitors	Any other business that is in competition with a Respondent either in relation to the goods or services sought under the RFX or in general.
Confidential Information	Information that: <ul style="list-style-type: none"> a. is by its nature confidential b. is marked by either the Buyer or a Respondent as ‘confidential’, ‘commercially sensitive’, ‘sensitive’, ‘in confidence’, ‘top secret’, ‘secret’, classified’ and/or ‘restricted’ c. is provided by the Buyer, a Respondent, or a third party in confidence d. the Buyer or a Respondent knows, or ought to know, is confidential. Confidential information does not cover information that is in the public domain through no fault of either the Buyer or a Respondent.
Conflict of Interest	A Conflict of Interest arises if a Respondent’s personal or business interests or obligations do, could, or be perceived to, conflict with its obligations to the Buyer under the RFX or in the provision of the goods or services. It means that the Respondent’s independence, objectivity or impartiality can be called into question. A Conflict of Interest may be: <ul style="list-style-type: none"> a. actual: where the conflict currently exists b. potential: where the conflict is about to happen or could happen, or c. perceived: where other people may reasonably think that a person is compromised.
Contract	The written Contract/s entered into by the Buyer and Successful Respondent/s for the delivery of the Requirements.
Contract Award Notice	Government Rules of Sourcing, Rule 45 requires a Buyer to publish a Contract Award Notice on GETS when it has awarded a contract that is subject to the Rules.
Deadline for Proposals	The deadline that Proposals are to be delivered or submitted to the Buyer as stated in Section 2, paragraph 2.2.
Deadline for Questions	The deadline for suppliers to submit questions to the Buyer as stated in Section 2, paragraph 2.2, if applicable.
Evaluation Approach	The approach used by the Buyer to evaluate Proposals as described in Section 4 and in this document (RFX-Terms) (as varied by Section 2, paragraph 2.6, if applicable).
GETS	Government Electronic Tenders Service available at www.gets.govt.nz
GST	The goods and services tax payable in accordance with the New Zealand Goods and Services Tax Act 1985.
Intellectual Property	All intellectual property rights and interests, including copyright, trademarks, designs, patents and other proprietary rights, recognised or protected by law.
Offer Validity Period	The period of time when a Proposal (offer) is held open by the Respondent for acceptance by the Buyer as stated in Section 2, paragraph 2.6.

Point of Contact	The Buyer and each Respondent are required to appoint a Point of Contact. This is the channel to be used for all communications during the RFX process. The Buyer's Point of Contact is identified in Section 2, paragraph 2.3. The Respondent's Point of Contact is identified in its Proposal.
Price	The total amount, including all costs, fees, expenses and charges, to be charged by the Successful Respondent for the full delivery of the Requirements. Each Respondent's Proposal must include its Price.
Proposal	The response a Respondent submits in reply to the RFX. It comprises the Response Form, the Respondent's bid, financial and pricing information and all other information submitted by a Respondent.
Proposed Contract	The Contract terms and conditions proposed by the Buyer for the delivery of the Requirements as described in Section 3, paragraph 3.6.
RFX	Means the Request for Proposal.
Registration of Interest	A formal request by a Buyer asking potential suppliers to register their interest in a procurement. It is the first step in a multi-step tender process.
Request for Proposal (RFX)	The RFX comprises the Advance Notice (where used), the Registration of Interest (where used), this RFX document (including the RFX-Terms) and any other schedule, appendix or document attached to this RFX, and any subsequent information provided by the Buyer to Respondents through the Buyer's Point of Contact or GETS.
RFX-Terms	Means the Request for Proposal - Process, Terms and Conditions as described in this document (RFX-Terms).
RFX Process, Terms and Conditions (shortened to RFX-Terms)	The government's standard process, terms and conditions that apply to RFXs as described in this document (RFX-Terms). These may be varied at the time of the release of the RFX by the Buyer in Section 2, paragraph 2.6. These may be varied subsequent to the release of the RFX by the Buyer on giving notice to Respondents.
Requirements	The goods and/or services described in Section 3 which the Buyer intends to purchase.
Respondent	A person, organisation, business or other entity that submits a Proposal in response to the RFX. The term Respondent includes its officers, employees, contractors, consultants, agents and representatives. The term Respondent differs from a supplier, which is any other business in the market place that does not submit a Proposal.
Response Form	The form and declaration prescribed by the Buyer and used by a Respondent to respond to the RFX, duly completed and submitted by a Respondent as part of the Proposal.
Successful Respondent	Following the evaluation of Proposals and successful negotiations, the Respondent/s who is awarded a Contract/s to deliver all or part of the Requirements.