

## Legal update - Government procurement update

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### Rules of sourcing to become mandatory for Crown entities

The number of government agencies required to comply with the Rules of Sourcing (Rules) will expand significantly on 1 February 2015 to include all Crown entities (except school boards of trustees and tertiary education institutions) and companies listed in Schedule 4A of the Public Finance Act. Compliance with the Rules has been mandatory for public service departments, the New Zealand Police, and the Defence Force since October 2013.

The application of the Rules to Crown entities is a significant change to New Zealand's procurement landscape as it means that the Rules will now apply to over 100 additional agencies, including (among others) Accident Compensation Corporation, the Civil Aviation Authority, the Commerce Commission, DHBs and other health sector entities, Housing New Zealand Corporation, Maritime New Zealand, NZ Transport Agency, Sport New Zealand, and WorkSafe New Zealand.

Agencies will already be preparing for this change, which will impact on internal procurement policies, existing market engagement practices and the legal terms and conditions that govern the relationship between agencies and tender respondents. For example, the Rules require agencies to:

- Have policies in place that incorporate the five principles of government procurement
- Openly advertise on the Government Electronic Tenders Service (GETS) for procurements over certain thresholds
- Report regularly to the Ministry of Business, Innovation & Employment (MBIE) about procurement activities and seek MBIE approval for syndicated procurements and procurements with a total value of greater than NZ\$5 million
- Include and follow evaluation criteria in notices of procurement
- Award contracts based on the value over whole of contract life (ie not always take the lowest-priced response).

### New RFX suite

MBIE has been preparing a range of guidance and template documents to help agencies move to the new Rules and apply them in practice. These are available [here](#). The latest release - a 'trial version' Request for Proposal - is part of the 'RFX' suite, which will form a comprehensive set of template *Request for...* documents for agencies to use when engaging with the market. MBIE has also been developing government model contracts for agencies to use when entering into contracts at the conclusion of a procurement activity.

The trial version RFP will be deployed in certain procurements over the next year and then finalised for agency use from 2016. It is a comprehensive document and provides:

- A six-section structure with mandatory section headings
- Scope for agencies to develop their own sub-headings and context-based descriptions that reflect the subject of the procurement
- Detailed instructions to agencies about how and in what circumstances departures from the template are permissible
- A set of standard RFP process terms and conditions (more on these below).

Once finalised, the RFP template will become an 'approved government model template' under rule 59 of the Rules. Agencies must adopt approved templates in their procurement activities and may only use an alternative template if there is a good business or legal reason to do so, such as where there is an industry standard document (eg construction forms) or a bespoke template for complex procurements (eg large, complex ICT projects or PPPs).

Adopting standard RFP terms has two major benefits for suppliers:

- Greater consistency of documents and processes makes it easier to prepare responses
- Agencies will play by the same general rules when assessing those responses.

Of particular note is that the RFP terms depart from recent practice by *expressly* binding the agency to the stated evaluation approach. Although the terms retain broad discretion for agencies to amend the procurement process, agencies will need to draft very carefully - and then follow - the evaluation approach, including criteria and weightings. This increases the scope of an agency's potential exposure and emphasises the need to manage legal risks during procurement activities. Any departure from the stated approach could result in legal challenges.

If you would like to know more about the Rules or the upcoming changes to procurement generally, please get in touch with one of our public law and procurement experts.

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