

eSourcing User Agreement

USER AGREEMENT

1. Introduction

1.1. This User Agreement between the System Operator and the Supplier governs the access and use of the eSourcing System (the System) by the Supplier to respond to an invitation from the Buyer to participate in a procurement exercise.

1.2. A procurement exercise may include a Request for Information (RFI), a Request for Proposal (RFP), a Request for Quotation (RFQ), an electronic Auction or an electronic Contract.

1.3. The System is provided by the System Operator and BravoSolution UK Ltd and operated by the System Operator. This User Agreement applies to the Supplier's and its Supplier Users' access to and use of the System. The Supplier acknowledges that by a Supplier User accessing the System using the user ID and password provided by, or on behalf of the System Operator, the Supplier agrees to be bound by this User Agreement.

1.4. The Supplier shall only use the System to respond to an invitation to participate in a procurement exercise in accordance with this User Agreement and any further rules expressed and presented in the System. In the event that there is any conflict between this User Agreement and any such further rules, then the provisions of such further rules shall take precedence over this User Agreement.

2. Access

2.1. The System Operator grants to the Supplier, free of charge, access to the System by Supplier Users for the purpose of responding to any invitation to participate in a procurement exercise, subject to this User Agreement.

2.2. The System Operator may immediately deny access to the System by the Supplier and/or one or more Supplier Users by giving notice in writing to the Supplier if any of the following events occur:

2.2.1. The Supplier commits a material breach of any of its obligations under this User Agreement; and

2.2.2. The Supplier fails to remedy, or persists in, any breach of any of its obligations under this User Agreement after having been notified in writing to remedy or desist such breach within a period of ten (10) Working Days.

2.3. Without prejudice to any of the System Operator 's other rights, the System Operator reserves the right to suspend access to the System without notice for technical or legal reasons.

3. Registration

3.1. To be granted access to the System, the Supplier must register each person which the Supplier wishes to be a Supplier User by providing the required registration data and specifying a user ID and password.

3.2. User ID and password are strictly personal to the Supplier User and non-transferable. The Supplier shall ensure that its Supplier Users do not divulge or disclose their user ID or password to third parties. In the event that the Supplier or a Supplier User becomes aware that a user ID and / or password may have been divulged, disclosed or discovered by any third party, they shall immediately notify the Helpdesk.

3.3. The Supplier shall designate an individual Supplier User to manage access to the System by other Supplier Users.

3.4. The Supplier must immediately inform the Helpdesk in the event that a Supplier User leaves its employment or no longer requires access to the System. The System Operator retains the right to deactivate a Supplier User user id and password if there has been no access for a period of sixty (60) days.

4. Invitation to Participate

4.1. The Buyer shall send, through the System, an invitation to participate in a specific procurement exercise to appropriate Suppliers that have registered and been activated on the System as described in the User Agreement. Data and information relating to a specific procurement exercise shall be made available to invited Suppliers.

4.2. The Buyer shall configure the System as appropriate for each procurement exercise. The selected configuration settings for a procurement exercise shall be displayed on the System for invited Suppliers to view. The Supplier acknowledges that by one of its Supplier Users participating in a procurement exercise on the System, the Supplier agrees to be bound by these configuration settings.

4.3. All material issued through the System in connection with this procurement shall remain the property of the Buyer and shall be used only for the purpose of this procurement.

5. Supplier's Obligations

5.1. The Supplier shall ensure that all its Supplier Users comply with this User Agreement.

5.2. The Supplier shall use all reasonable care and skill in performing its obligations under this User Agreement.

5.3. The Supplier shall provide its Supplier Users with the equipment and software needed to access and use the System.

5.4. The Supplier shall provide software to ensure the security of the System and use best endeavours to protect the System from viruses when being accessed and used by its Supplier Users.

5.5. The Supplier shall use the System for lawful and proper purposes only and shall, in any event, comply with all relevant laws, regulations and Codes of Practice within New Zealand or other jurisdiction from which Supplier Users access the System.

5.6. In particular, the Supplier agrees that it will not:

5.6.1. manipulate any information supplied on the System in a manner that would lead to inaccurate, misleading or discriminating presentation of information being displayed;

5.6.2. post, transmit or disseminate any information on or via the System which is or may be harmful, obscene, defamatory or otherwise illegal;

5.6.3. use the System in a manner which causes or may cause an infringement of the rights of any other; and

5.6.4. use any software, routine or device to interfere or attempt to interfere electronically or manually with the operation or functionality of the System, including uploading or making available files containing corrupt data or viruses via whatever means.

5.7. The Supplier agrees that its Supplier Users shall act as authorised agents for and on behalf of the Supplier in submitting any response to any invitation to participate in a procurement exercise on the System.

5.8. The Supplier shall be liable for any unauthorised, false or fraudulent response to any invitation to participate in a procurement that is submitted using one of its Supplier Users' user id and password.

5.9. The Supplier represents and warrants that:

5.9.1. all information it provides will be accurate and complete and shall accurately represent the Supplier's capabilities;

5.9.2. it shall have the right, through actual ownership or otherwise, to provide any product or service that is the subject of any response made by it to any invitation to participate in a procurement;

5.9.3. it has the ability to sell the product/service/works at the prices offered in any response made by it to any invitation to participate in a procurement and according to the relevant criteria specified by the Buyer in the relevant invitation to participate in a procurement.

6. General Provisions for the Submission of Responses

6.1. Suppliers are expected to examine all of the file attachments published in the System, which indicate what information must be provided. Suppliers must provide all of the items of information requested in the procurement exercise. Incomplete submission of the information requested including the submission of information in file attachments containing viruses that have been advised by the System shall entitle the Buyer to invalidate or reject the response to the procurement exercise.

6.2. All responses to any invitation to participate in a procurement exercise must be submitted through the System by the closing date and time as specified on the System.

6.3. Responses may be submitted through the System at any time up to the closing date and time as specified on the System.

6.4. Suppliers shall be entitled to submit one or more responses prior to the closing date and time. It is understood that the last response submitted prior to the closing date and time shall be the response that is considered by the Buyer in the evaluation and award process.

6.5. The Supplier agrees to keep any responses valid for a period of ninety (90) days from the closing date and time for the submission of responses, unless any other period is specified in the terms and conditions of the procurement exercise.

6.6. In the case of discrepancies, the last response (in accordance with the provisions of paragraph 6.4) submitted through the System shall prevail over the contents of a file, attachments and other documents made available by the Supplier during the procurement.

6.7. Responses will be opened by the Buyer in accordance with the opening procedures specified on the System for each procurement exercise.

7. Specific Provisions for Auctions

7.1. In the event of an Auction being conducted the Supplier acknowledges and accepts that the responses received in earlier stages of the procurement exercise may represent, upon the Buyer's decision and following a notification to Suppliers, the initial bid by each Supplier in the Auction.

7.2. The Buyer shall be entitled to set an opening price and a reserve price for an Auction.

7.3. The configuration settings for the Auction as defined by the Buyer shall determine the closing time for each Auction. The selected configuration settings for an Auction will be displayed on the System for Suppliers to view prior to the Auction.

7.4. All bids entered during an Auction are irrevocable except to the limited extent provided for in this Clause. Bids may be revoked by the Supplier only if the Supplier notifies the Buyer immediately after the bid has been entered and then only if the bid revocation is accepted by the Buyer. If the Buyer does not agree to the bid revocation in such case, the bid will become binding in accordance with these Participation Rules.

7.5. The Buyer is not obliged to accept the lowest bid or any bid made during an Auction. If the Buyer decides to accept a bid, in accordance with the published evaluation criteria, the Buyer shall notify the Supplier that its bid has been accepted. Such notice shall be in writing and shall constitute the unqualified acceptance by the Buyer of the Supplier's offer on the Buyer's terms and conditions of contract as specified in the procurement exercise.

8. Amendments to a procurement exercise

8.1. The Supplier acknowledges that:

8.1.1 the Buyer reserves the right to:

8.1.1.1 suspend and re-open or cancel a procurement exercise or extend the closing date and time; and/or

8.1.1.2 vary or amend the details of a procurement exercise,

at any time prior to the closing date and time for receipt of response by publication of a notification through the System and without incurring any liability whatsoever; and

8.1.2 in the event of a suspension and subsequent re-opening of a procurement exercise, the procurement exercise will resume on the basis of the last response recorded by the Supplier through the System.

9. Notification of Award

9.1. Written Notification of Contract Award or otherwise will be made by the Buyer to the Supplier subsequent to the closing date and time and following evaluation of the Supplier's response to the procurement exercise. Such Written Notification of Contract Award will be in accordance with Clause 17. No other notification of contract award or otherwise sent by the System shall in any way represent any obligation towards the Supplier on the part of the Buyer.

10. Intellectual Property Rights

10.1. All Intellectual Property Rights in the System are owned by, or are under licence to, the System Operator.

10.2. The Supplier and its Supplier Users shall have no Intellectual Property Rights in the System, nor shall it have any rights to copy, adapt, modify or interfere with the System.

10.3. The System may include the Buyer's logo and/or trade mark. The Supplier acknowledges that it may not copy, use, or mask the Buyer's logo and/or trade marks which appear on the System without the prior consent of the Buyer.

11. Data Protection

11.1. In its use and access of the System, the Supplier shall comply with the Privacy Act 1993 and all relevant regulations together with any codes of conduct and guidance issued by the Privacy Commissioner and it shall not do or cause or permit to be done anything which may cause or otherwise result in a breach by the Buyer of the same.

11.2. GSB Supplycorp and BravoSolution UK Ltd, on behalf of the Buyer, will collect, hold and use personal data obtained from and about the Supplier Users pursuant to paragraph 3.1. The Supplier agrees to such data being collected, held and used in accordance with this User Agreement and its obligations under the Privacy Act 1993.

12. Limitation of Liability

12.1. To the extent allowed by law, the System Operator and Buyer will not be liable (in contract or in tort, including negligence) to the Supplier or any other person for any physical, direct or indirect damage, loss or cost due to any breach, act, omission or negligence of any client in relation to any procurement exercise.

12.2. In no event shall the System Operator or Buyer be liable to the Supplier for any direct loss, indirect loss or damages incurred by the Supplier arising from the use of the System caused by:

12.2.1. An event of Force Majeure that affects the availability and/or performance of the System;

12.2.2. Incorrect use by Supplier Users of the System;

12.2.3. Connectivity failures in respect of the equipment used by the Supplier Users;

12.2.4. Breakdown of the System for a period of time not exceeding 30 Working Days.

12.3. The Supplier acknowledges and accepts that:

12.3.1. The System Operator reserves the right to interrupt and/or suspend the availability of the System and/or revoke access at any time by notice to the Supplier without incurring any liability;

12.3.2. The System Operator provides the System on an 'as is' basis and 'as available' basis without any warranty of any kind;

12.3.3. The Buyer does not accept any liability for any information or links on the System that may refer Supplier Users to external sources outside of the Buyer's reasonable control.

13. Confidentiality

13.1. Each party shall:-

13.1.1. treat all Confidential Information as Confidential and safeguard it accordingly;

13.1.2. not disclose any Confidential Information to any third party without the prior written consent of the other party, except to such persons and to such extent as may be necessary for the performance of this User Agreement: and

13.1.3. not use any Confidential Information otherwise than for the purposes of this User Agreement.

13.2. The Supplier shall take all necessary precautions to ensure that all Confidential Information obtained from the Buyer under or in connection with this User Agreement:-

13.2.1. is given only to such employee, consultant, sub-contractor, professional advisor or agent engaged to advise it in connection with this User Agreement as is strictly necessary for the performance of this User Agreement and then only to the extent necessary for each employee, consultant, sub-contractor, professional advisor or agent activities in the performance of this User Agreement;

13.2.2. is treated as confidential and not disclosed (without prior written approval) or used by any employee, consultant, sub-contractor, professional advisor or agent otherwise than for the purposes of this User Agreement;

13.3. Where it is considered necessary in the opinion of the Buyer, the Supplier shall ensure that any employee, consultant, sub-contractor, professional advisor or agent of the supplier sign a confidentiality undertaking before commencing work in connection with this User Agreement.

13.4. The provisions of this Clause 13 shall not apply to any information:-

13.4.1. which is or becomes public knowledge (otherwise than by breach of the obligations of confidentiality under this User Agreement);

13.4.2. which is in the possession of the party concerned, without restriction as to its disclosure, before receiving it from the disclosing party;

13.4.3. which is received from a third party who lawfully acquired it and who is under no obligation restricting its disclosure; or

13.4.4. is independently developed without access to the Confidential Information.

13.5. Nothing in this User Agreement shall prevent the Buyer from:-

13.5.1. disclosing any Confidential Information which is required to be disclosed by an order of court or other tribunal or required to be disclosed in accordance with any law, statute, proclamation, by-law, directive, decision, regulation, rule, order, notice, rule of court, delegated or subordinate legislation parliamentary obligation; or

13.5.2. disclosing any information for the purpose of:-

13.5.2.1. the examination and certification of the Buyer's accounts; or

13.5.2.2. any examination pursuant to Section 16(1) of the Public Audit Act 2001 of the economy, efficiency and effectiveness with which the Buyer has used its resources; or

13.5.3. disclosing any information obtained from the Supplier:-

13.5.3.1. to any other department, office or agency of the Crown; or

13.5.3.2. to any person engaged in providing any services to the Buyer for any purpose relating to or ancillary to this User Agreement,

provided that in disclosing information under this sub-paragraph (13.5.3) the Buyer discloses only the information which is necessary for the purpose concerned and requires that the information is treated in confidence and that a confidentiality undertaking is given where appropriate.

13.6. Nothing in this User Agreement shall prevent either party from using any techniques, ideas or know-how gained during the performance of this User Agreement in the course of its normal business, to the extent that this does not result in a disclosure of Confidential Information or an infringement of Intellectual Property Rights.

13.7. In the event that the Supplier fails to comply with this Clause 13, the Buyer reserves the right to terminate this User Agreement by notice in writing with immediate effect.

13.8. The Supplier acknowledges that the Buyer is subject to the requirements of the Privacy Act 1993, the Official Information Act 1982 and the Environment Act 1986 and shall assist and cooperate with the Buyer in meeting its obligations there under. The Supplier shall use all reasonable endeavours to ensure the observance of the provisions of this Clause 13 by its sub-contractors.

13.9. The obligations of this Clause 13 shall survive the expiry of this User Agreement indefinitely.

14. Rights of Third Parties

14.1. This User Agreement shall not create any rights that shall be enforceable by anyone other than the Buyer and the Supplier, except that the rights specified in Clause 11.2 may be enforced by GSB Supplycorp and BravoSolution UK Ltd.

15. Amendments to User Agreement

15.1. Subject to Clauses 15.2 and 15.3, the Supplier acknowledges that the Buyer reserves the right to vary or amend this User Agreement by publication of a notification or message on the System or through an email or letter to the Supplier, using the email address or postal address referred to in Clauses 17.1.1, 17.1.2. and 17.1.3 respectively.

15.2. The amendments shall be deemed to have been accepted by the Supplier unless the Helpdesk receives, within 15 days of the date of the notice under Clause 15.1, a written communication from the Supplier expressing refusal of the amendments. In any case, the Supplier's continued use of the System shall represent its unconditional acceptance of the amendments in its entirety.

15.3. The Supplier shall be entitled to terminate this User Agreement with immediate effect in the event that notice is given pursuant to Clause 15.1.

16. General

16.1. The waiver by either party of any breach of this User Agreement shall not prevent the subsequent enforcement of that provision and shall not be deemed to be a waiver of any subsequent breach of that or any other provision.

16.2. If at any time any part of this User Agreement is held to be or becomes void or otherwise unenforceable for any reason under any applicable law, the same shall be deemed omitted from this User Agreement and the validity and/or enforceability of the remaining provisions of this User Agreement shall not in any way be affected or impaired as a result of that omission.

16.3. Nothing contained either inside or outside this User Agreement shall be taken as constituting:

16.3.1. a contract, including any collateral contract, or any contractual term between the Buyer and any other party as to the procurement of any goods, services or works, including any potential service provider; or

16.3.2. any representation by or on behalf of the Buyer.

16.4. The Buyer shall not be committed to any course of action as a result of:

16.4.1. issuing any invitation to participate in a procurement exercise;

16.4.2. an invitation to submit any proposal in respect of a procurement exercise;

16.4.3. communicating with a Supplier in respect of this procurement exercise; or

16.4.4. any other communication between the Buyer and any other party.

16.5. The Supplier accepts and acknowledges that:

16.5.1. whilst every care has been taken to ensure that the data and information contained within an invitation to participate in a procurement exercise is valid, the Buyer shall not accept liability for the accuracy, adequacy or completeness of such information and data; and

16.5.2. that by issuing an invitation to participate in a procurement exercise the Buyer shall not be bound to accept any response and it reserves the right to award a contract for some but not all of the requirements specified or not to award any contract at all;

16.5.3. the Buyer shall not accept any liability for any costs or expenses incurred by a Supplier responding to any invitation to participate in a procurement exercise.

16.6. The Buyer and the Supplier acknowledge that, for the entire duration of the procurement exercise, any dates and times shall be those displayed on the System and any other Helpdesk

recording and telecommunications equipment, and such recordings shall represent a full account of the actual facts and circumstances.

16.7. The Supplier acknowledges that the system will not allow it to view the identity of the other Suppliers during a procurement exercise.

16.8. The waiver by either party of any breach of this User Agreement shall not prevent the subsequent enforcement of that provision and shall not be deemed to be a waiver of any subsequent breach of that or any other provision.

16.9. The terms and expressions set out in clause 20 shall have the meanings ascribed therein.

17. Notices

17.1. All communications given under this User Agreement shall be in writing and shall be:

17.1.1. served to the Supplier, via e-mail, to the e-mail address the Supplier has given upon registration or through the messaging facility available on the System; or

17.1.2. served to the Buyer, via e-mail to ask@gsb.co.nz or through the messaging facility available on the System; and

17.1.3. deemed to be received by the addressee on the same day as the addressor sending such e-mail, subject to the:

17.1.3.1 addressor using the addressee's correct e-mail address; and

17.1.3.2 addressee, on receipt of such an e-mail, e-mailing an acknowledgement of receipt to the addressor as soon as is practicable and in any event not later than 17:00 of the following Working Day after the addressee received such e-mail. If the addressor fails to receive such acknowledgement by 17:00 of the next Working Day after the addressee received the e-mail, the addressor may also serve the communication by first class registered post to:

17.1.3.2.1 the Supplier, to the postal address the Supplier has given upon registration; or

17.1.3.2.2 the Buyer, to the postal address that the Buyer has given in the procurement exercise,

and shall be deemed to be received by the addressee two working days after posting..

17.2 Either party to this User Agreement may change its postal address for notification purposes by giving the other reasonable prior written notice of the new information and its effective date pursuant to this Clause 17.

18. Law and Jurisdiction

18.1. This User Agreement and any dispute or claim arising out of or in connection with them shall be governed by, and construed in accordance with, the laws of New Zealand and shall be subject to the nonexclusive jurisdiction of the Courts of New Zealand to which the parties irrevocably submit.

19. Interpretations

19.1. The headings to clauses are inserted for convenience only and shall not affect the interpretation or construction of this User Agreement.

19.2. Words imparting the singular shall include the plural and vice versa. Words imparting a gender include every gender and references to persons include an individual, company, corporation, firm or partnership.

19.3. The words and phrases "other", "including" and "in particular" shall not limit the generality of any preceding words or be construed as being limited to the same class as any preceding words where a wider construction is possible.

19.4. References to any statute or statutory provision shall include (i) any subordinate legislation made under it, (ii) any provision which it has modified or re-enacted (whether with or without modification), and (iii) any provision which subsequently supersedes it or re-enacts it (whether with or without modification).

19.5. All references in this User Agreement to Clauses are to the clauses to this User Agreement and references to Sections are to sections of this User Agreement unless otherwise stated.

20. Definitions

"Auction" means a type of procurement exercise conducted on the System where supplier submit bid simultaneously.

"Buyer" means either:

- i. GSB Supplycorp acting in its own right, or
- ii. GSB Supplycorp acting on behalf of an entity which has appointed GSB Supplycorp to run a procurement exercise, or
- iii. any other entity licenced by GSB Supplycorp to run a procurement exercise on the System.

"Confidential Information" means secret, confidential, commercial, financial, marketing, technical or other information, know-how, trade secrets and other information in any form or medium whether disclosed orally or in writing before or after the date of this User Agreement, together with any reproductions of such information in any form or medium or any parties of this information.

"Confidential" means that the information, either in its entirety or in the precise configuration or assembly of its components, is not publicly available.

“Force Majeure” means any cause affecting the performance by either the Buyer, System Operator or BravoSolution UK Ltd of its obligations arising from acts, events, omissions, happenings or non-happenings beyond its reasonable control including (but without limiting the generality thereof) governmental regulations, fire, flood, or any disaster or an industrial dispute affecting a third party for which a substitute third party is not reasonably available. Any act, event, omission, happening or non-happening will only be considered Force Majeure if it is not attributable to the wilful act, neglect or failure to take reasonable precautions of the affected party, its agents or employees or the failure of either the Buyer, System Operator or BravoSolution UK Ltd to perform its obligations under this User Agreement.

“Helpdesk” means the facility provided by System Operator to handle support queries and issues raised by Supplier Users.

“Intellectual Property” means any patent, copyright, database right, moral right, design right (whether registered or unregistered), trade mark, service mark, domain name, know-how, utility model, unregistered design or, where relevant, any application for any such right, or other industrial or intellectual property right.

“Supplier” means an organisation that has indicated its acceptance to be bound by this User Agreement.

“Supplier User” means an individual representing the Supplier that has registered and been provided with access to the System.

“System” means the eSourcing System provided for Suppliers to participate in procurement exercises.

“System Operator” means GSB Supplycorp.

“Working Days” means 09:00-17:00 Monday to Friday in New Zealand and excludes all Public Holidays.

“Written Notification of Contract Award” means the Buyer’s standard "Contract Award Process" identified for each procurement exercise that shall be expressly initiated by the Buyer and may entail a preliminary e-mail advising the Supplier of the formal contract award process.