



NEW ZEALAND COUNCIL OF TRADE UNIONS
Te Kauae Kaimahi

**Submission of the
New Zealand Council of Trade Unions
Te Kauae Kaimahi**

to

**Procurement New Zealand, Ministry of Business,
Innovation and Employment
on the**

Government Procurement Rules (4th Ed.)

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1. Summary of Recommendations

1. The CTU supports the inclusion of broader outcomes in the rules for government procurement, including to support improvement in employment outcomes for New Zealanders.
2. We propose changes to the draft rules, detailed in this submission, to strengthen aspects of the Rules.

2. Introduction

- 2.1. This submission is made on behalf of the 27 unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU). With 320,000 members, the CTU is one of the largest democratic organisations in New Zealand.
- 2.2. The CTU acknowledges Te Tiriti o Waitangi as the founding document of Aotearoa New Zealand and formally acknowledges this through Te Rūnanga o Ngā Kaimahi Māori o Aotearoa (Te Rūnanga), the Māori arm of Te Kauae Kaimahi (CTU) which represents approximately 60,000 Māori workers.
- 2.3. The CTU welcomes the opportunity to comment on this draft of the Government Procurement Rules: 4th Edition.
- 2.4. Government procurement is an important and under-utilised lever to achieve public value and contributions to the strategic objectives of government, including improvement in living standards and employment outcomes for New Zealanders.
- 2.5. The proposed rules on broader outcomes, including employment standards, need to be strengthened to set substantive standards that are above existing legal minimum requirements.
- 2.6. In general, more thought and specificity should be given to ensuring the Rules are drafted to apply equally to international suppliers and the use of international suppliers by direct contractors to the government. This will encourage a more level playing field. The Rules should reference compliance not only with applicable laws but also international human (including labour) rights conventions to which New Zealand is a Party. This would be consistent with Directive 3 of the Draft Procurement Charter (p.15). This should apply both to international contractors and to international suppliers to contractors. Those holding government contracts for procurement should have a responsibility to do everything reasonably practicable to ensure compliance with the Rules in their supply chain.

3. Section One: Getting Started

- 3.1. The CTU supports the analysis of public value contained in the section titled “What is good procurement”.
- 3.2. However, we suggest that the sentence ‘Agencies are also encouraged to seek additional outcomes voluntarily’ be removed and replaced with a statement clarifying that agencies must consider all four of the broader outcomes set out in Rules 17-20, whether or not the relevant outcome has been designated as a priority by Cabinet.
- 3.3. We suggest that the guidelines for ‘managing risks’ related to ‘Health and Safety’ and ‘Labour’ should be strengthened in line with our proposed changes to Rule 19 below, to clarify that government procurement should support substantive standards that are set above the legal minimum.
- 3.4. The concept of ‘economic development’ used in the document should be broadened. In Section one: Getting Started ‘economic development’ is defined solely in terms of exporting. We also have an interest in strengthening productivity and good jobs among firms producing for the local market. Public Value on page 11 should include the benefits to the economy beyond the supplier and the purpose of the procurement: for example they could increase good upstream jobs, and help increase or maintain the skill base, industry capability, technology or knowhow. The Draft Government Procurement Charter could include supporting the development of new products and technology in New Zealand (such as by providing sufficient orders to allow local suppliers to scale up).
- 3.5. There should also be an explicit requirement, in both the Principles of Government Procurement and in Rule 15: Planning, to consider the implications of length of contracts for ongoing supplier viability and for the workers of suppliers. Where ongoing services are repeatedly outsourced on short term contracts, suppliers may have little incentive to invest in ongoing staff development and training, nor in new equipment, processes and technology because of uncertainty as to the ongoing sustainability of the work. Staff may feel demoralised or have little commitment,

and see little point in upskilling. In the context of social services, this was identified as a significant problem by the Productivity Commission's inquiry into Social Services, but it is true of other procurement too. Remedies include bringing the provision back in-house, longer term contracts, pricing ongoing staff training and development into contracts, and guarantees of transfer of staff from one supplier to another on the same conditions.

4. Rule 16: Broader Outcomes

- 4.1. The CTU supports the intent of Rule 16, to establish a process for the formal consideration and incorporation of broader outcomes for government procurement, set out in Rules 17-20.
- 4.2. Rule 16 establishes two tiers of obligation to apply Rules 17-20:
 - For contracts in general, the contracting agency 'must consider and incorporate where appropriate' each of the broader outcomes.
 - In addition, where a contract is designated against one of the four outcomes, the agency 'must include requirements relating to that outcome in the procurement'
- 4.3. The CTU supports the principle of this approach.
- 4.4. Clause 1 of Rule 16 should be strengthened and clarified by replacing the words 'where appropriate' with the words 'to the greatest extent practicable in the circumstances'.
- 4.5. Clause 3 of Rule 16 should be strengthened and clarified by adding after the word 'requirements' the words 'as weighted evaluation criteria'.
- 4.6. Given that Rule 16 already establishes two tiers of obligation, it is not necessary for Rules 17-20 to distinguish further between obligations for designated and non-designated contracts. Doing so in the rules as currently drafted introduces ambiguity and weakens the effect of the rules. This point is addressed below in relation to the specific rules.

5. Rule 17: Increase Access for New Zealand Business

- 5.1. The CTU supports the intent of this Rule, although we suggest that it could be strengthened to better capture the broader benefits to New Zealanders of strengthening the capacity of our national industries and workforces.
- 5.2. After the words 'opportunities for New Zealand businesses', we suggest adding ', promote good employment, and strengthen the capacity of New Zealand industry.'
- 5.3. The whole of Rule 17 should apply to all contracts for procurement, while being given particular priority for designated contracts through the process set out in Rule 16. We therefore suggest removing reference to designated contracts in this section by deleting the words 'For designated contracts' in clause 1 and deleting the word 'designated' in clause 3.

6. Rule 18: Construction Skills and Training

- 6.1. The CTU supports the intent of this Rule, to leverage Government procurement to build capacity in the New Zealand construction industry and workforce. However, we are concerned that the Rule as currently drafted will not achieve this outcome.
- 6.2. Rule 18 could be simplified and clarified by adding reference to other Rules in the Broader Outcomes section. This could be done by adding the following clauses to Rule 18:
 - Any contract for construction with a value of \$10m or more shall be treated as designated against Rule 18
 - Any contract designated against Rule 18 shall be treated as also designated against Rules 17, 19, and 20
- 6.3. In combination with the changes we suggest to Rules 16, this would allow the two tiers of obligation to apply consistently as they do to the other outcomes, while retaining the \$10m threshold. In combination with the changes we suggest to Rules 17, 19, and 20, this would apply consistent requirements to designated construction projects to require that they build the capacity of New Zealand industry and

workforce, improve employment conditions including health and safety requirements, and reduce waste and emissions.

6.4. Rule 18 should include further specific requirements to give effect to these broader outcomes in the context of the construction industry. We suggest this should include the following clause:

- Each agency must require suppliers of construction to demonstrate commitment to improving the ongoing capacity of the New Zealand construction industry and workforce, including by:
 - Showing significant investment, appropriate to the scale of the business, in plant and equipment that will enhance the capacity of the construction industry to operate at higher scale and pace, including the development of prefabricated construction processes where practicable.
 - Showing significant and ongoing commitment to recruitment, training, and secure employment of New Zealand-resident workers in the construction trades, including commitments to apprenticeship programmes.

6.5. We note that in Rule 18 as currently drafted, Clause 1 implies that there is no requirement to consider skills development and training practices for contracts under \$10m, even if the contract were designated against this outcome by Cabinet decision.

7. Rule 19: Improving Conditions for New Zealand Workers

7.1. The CTU supports the intent of this Rule, to leverage Government procurement to improve conditions for New Zealand workers. However, we are concerned that the Rule as currently drafted will not achieve this outcome.

7.2. As currently drafted, Rule 19 only requires compliance with 'employment standards and health and safety practices' for designated contracts. It is unclear exactly what

standards are referred to. This also sets a very low bar by only requiring compliance with legal minimum standards.

7.3. The general requirement for non-designated contracts is even weaker, requiring only that agencies 'have regard to guidance' on compliance with minimum standards.

7.4. We suggest that, to meet the stated objective of improving conditions for New Zealand workers, the Rule should be redrafted to set substantive requirements that are above existing legal minimum standards.

7.5. We suggest replacing clauses 1 and 2 with the following clause:

"Each agency must require suppliers to:

- Demonstrate compliance with all applicable statutory and regulatory instruments related to employment, including the Employment Relations Act and any applicable Code of Good Faith, Minimum Wage Act, Wages Protection Act, and Holidays Act.
- Establish terms and conditions of employment meaningfully above the industry standard, including rates of pay above industry-standard and, at a minimum, above the current Living Wage.
- Demonstrate commitment to best practice in Health and Safety, including compliance with all applicable statutory and regulatory instruments, codes of practice and guidelines. In assessing commitment to best practice, each agency shall refer to the SafePlus performance requirements established by Worksafe and shall require suppliers to submit the results of an independent assessment by the Onsite Assessment and Advisory Service completed within the previous two years or, for businesses with fewer than 20 employees, the results of a self-assessment prepared using the SafePlus online self-assessment tool.
- Demonstrate commitment to workforce training and skills development.

- Demonstrate commitment to equity and diversity in employment.
- Demonstrate respect for workers’ rights to freedom of association and collective bargaining.
- Ensure, to the greatest extent practicable in the circumstances, that the above requirements are also followed in the supply chain (as defined in Rule 19 Guidance).

7.6. A further clause should be added to protect continuity of employment, including terms and conditions, in any changes to procurement and in any restructuring of the supplier’s business or subcontracting arrangements.

7.7. The whole of Rule 19 should apply to all contracts for procurement, while being given particular priority for designated contracts through the process set out in Rule 16. We therefore suggest removing reference to designated contracts in this section by deleting the words ‘For designated contracts’ in clause 1 and deleting the word ‘designated’ in clause 3.

8. Rule 20: Supporting the Transition to a low emissions economy and designing waste out of the system

8.1. The CTU supports the intent of this Rule, to leverage Government procurement in support of the just transition to a zero net emissions, low-waste economy.

8.2. Rule 20 should be revised to give greater specificity to the desired outcome ‘to significantly reduce climate and waste impacts’. We propose specific changes below.

8.3. The Rule should include reference to existing international commitments, including New Zealand’s commitments under the Paris Agreement to contribute to global efforts to limit temperature increases to 1.5 degrees Celsius, and to reduce greenhouse gas emissions to 30 percent below 2005 levels by 2030.¹

¹ <http://www.mfe.govt.nz/sites/default/files/media/Legislation/Cabinet%20paper/cabinet-paper-public-consultation-zero-carbon-bill.pdf>, page 2

8.4. The Rule should also include reference to other government commitments to reduce carbon emissions. Currently, this includes ‘a target for a 50% reduction in New Zealand greenhouse gas emissions from 1990 levels by 2050.’² The government has announced a target of net zero emissions by 2050, though this has not been formally gazetted. This target will likely be confirmed by the Zero Carbon Bill to be introduced to Parliament in 2019.

8.5. The Rule should include a clause referencing government commitments to a Just Transition to a low-emissions economy. We propose:

‘Agencies must support a Just Transition to a Zero- or Low-Emissions Economy, including by ensuring that Rule 20 is applied in a manner consistent with Rule 19.’

8.6. The whole of Rule 20 should apply to all contracts for procurement, while being given particular priority for designated contracts through the process set out in Rule 16. We therefore suggest removing reference to designated contracts in this section by deleting the words ‘For designated contracts’ in clause 1 and deleting the word ‘designated’ in clause 3.

9. Rule 25: Subcontracting

9.1. This Rule is important in preventing contractors from escaping their responsibilities under the Broader Outcomes by subcontracting out. However this requirement should be stronger. There should be no contracting out unless the requirements on the contractor under Rules 16-20 are passed on to subcontractors by the contractor. The Agency should require a right to inspect subcontracting terms and to monitoring subcontractors in the same way it monitors the contract. Contractors should not be able to gain an advantage by subcontracting nor by devolving sections of its own operations or staff to those subcontractors.

² The Climate Change Response (2050 Emissions Target) Notice 2011. New Zealand Gazette 41: p987. 31 March 2011. <https://gazette.govt.nz/notice/id/2011-go2067>

10. Rule 28: Pre-conditions and Rule 44: Reasons to exclude a supplier

10.1. A further pre-condition, and reason to exclude a supplier if it is not true, should be that it has not breached any employment, health and safety or environmental law within the last seven years.

11. Conclusion

11.1. The CTU supports the inclusion of broader outcomes, including employment outcomes, in the rules for government procurement.

11.2. We have proposed changes to the draft, to strengthen aspects of the Rules.