

Guide to e-commerce

Electronic transactions under Government Model Contracts

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Introduction

What does this guide cover?

This Guide is for both government agencies and suppliers. It explains how using email can sometimes make it easier to do business when using Government Model Contracts (GMCs).

Background

The internet and email have changed the way that we interact with others not only socially, but also how we do business. To give some certainty in e-commerce New Zealand passed the Electronic Transactions Act in 2002.

The focus of the Act is to facilitate the use of electronic technology in business. This is in line with other countries – United States, European Union, Australia, Canada, Singapore and Japan.

Electronic Transactions Act 2002

- If there is a 'legal requirement' that information must be recorded in writing, this requirement will be met if recorded in an electronic format.
- There is a rider - the information must remain readily accessible in future.

Government Model Contracts

As part of the New Zealand Government Procurement Reform, Government Model Contracts have been developed for low-value, low-risk common goods and services.

The aim is to standardise documentation and make it easier to do business with government when making routine purchases.

Government Model Contracts options

There is no legal requirement that routine government contracts must be recorded in writing. However, this is the preferred approach as it provides evidence of what has been agreed and certainty for each party. It reflects prudent business practice.

To support greater use of e-commerce the following guidance is provided on how to conduct some business electronically using the GMCs templates. In particular:

1. Contract formation – very low-value one page contracts

To allow for very low-value contracts to be formed through an exchange of emails using the GMCs Minor Purchase (one page) templates.

2. Contract Variations

To allow for Contract Variations to be agreed through an exchange of emails.

3. Contract Notices

To allow for Contract Notices to be delivered and received by email.

Does this guide provide legal advice?

No, this guide does not provide legal advice. It explains how business can be conducted electronically when using GMCs. It aims to support a better understanding of e-commerce. It is not an alternative to obtaining independent legal advice.

How does it work?

The default position

The GMCs default position is as follows:

- in signing a GMC the agency and the supplier each consent to allow Contract Variations to be agreed by email and Contract Notices to be communicated by email
- a Contract Variation is legally effective if there is an exchange of emails between the agency and the supplier - one offering and the other accepting the Variation, and
- a Contract Notice is legally effective if sent by email by one party to the email address for Notices (as stated in the Contract) of the other party.

Can I opt out?

Yes. If you do not want to conduct business electronically you can opt out. This must be done before signing the Contract. When the Contract is being prepared insert the following statement in Schedule 1 at 'Changes to Schedule 2':

“Despite any other clause in this Contract, both Parties agree to opt out of using electronic transactions. Contract Variations and Contract Notices cannot be legally effected by email communication.”

This means that Contract Variations and Notices cannot be legally communicated by email and both the agency and the supplier must use another method. Other methods are described in the Contract and include by post, courier or fax.

Good practice

The law in relation to electronic transactions is currently a little unsettled. To help agencies and suppliers achieve greater certainty the following practices are recommended.

Email Contract using GMCs Minor Purchase templates

To establish a very low-value contract using the GMCs Minor Purchase templates by email, carry out the following steps:

- Develop the contract using the GMCs Minor Purchase email template.
- Email the completed contract to the supplier. The contract can form the text of the email, or be attached as a separate pdf.
- The person sending the email must be the person who is authorised to sign the contract. When sending the email it is prudent to request a delivery receipt.
- Where the supplier agrees to the terms and conditions of contract the supplier generates a return email confirming acceptance. The person sending this email must be the person who is authorised to sign the contract on behalf of the supplier.
- The email offer and the email acceptance form the legal contract. The acceptance must, however, be unconditional. If the supplier makes a conditional acceptance e.g. I agree, but can only deliver in August not July this amounts to a counter-offer.
- Both parties should keep copies of the email offering the contract and the email accepting the contract.

SIGNING IN COUNTERPARTS

Normally both parties sign a single original copy of a contract. However, where parties are in distant locations or there is need to have a contract formed quickly they can opt to sign in counterparts. This is different from the process described above.

The GMCs standard templates (i.e. not the Minor Purchase templates) allow for GMCs to be signed in counterparts (Schedule 2 clause 16.7 *Signing the Contract*).

For example:

- *An agency based in Wellington agrees to contract with a supplier based in Dunedin.*
- *In order to form the contract the agency signs the contract in Wellington. It retains the signed original copy and sends a pdf copy of the signed original, by email, to the supplier.*
- *The supplier prints and signs the pdf copy. It scans its signed copy and returns this to the buyer as an attachment to an email.*
- *Taken together the original copy (signed by the buyer) and the scanned pdf copy (signed by the supplier) form the contract.*

Email Variation

To establish a Contract Variation by email carry out the following steps:

- Develop the variation using the GMCs variation template.
- Email the completed variation to the supplier. The variation can form the text of the email, or be attached as a separate pdf.
- The person sending the email must be the person who is authorised to approve the variation. When sending the email it is prudent to request a delivery receipt.
- Where the supplier agrees to the Contract Variation the supplier generates a return email confirming acceptance. The person sending this email must be the person who is authorised to approve the variation on behalf of the supplier.
- The email offer and the email acceptance form the legal variation. The acceptance must, however, be unconditional. If the supplier makes a conditional acceptance e.g. I agree, but can only deliver in August not July this amounts to a counter-offer.
- Both parties should keep copies of the email offering the variation and the email accepting the variation.

Email Notice

To send a Contract Notice by email carry out the following steps:

- The email must be addressed to the person stated in Schedule 1 under 'Address for Notices'.
- The Notice can form the text of the email, or be attached as a separate pdf.
- The person sending the email must be the person who is authorised to approve the Contract Notice.
- The sender must request a delivery receipt and retain a copy of the receipt as proof.
- The GMCs state (at Schedule 2, clause 14.3 f) that a Notice by email will be considered to have been received:

“at the time the email enters the recipient’s information system as evidenced by a delivery receipt requested by the sender and it is not returned undelivered or as an error.”
- Where the nature of the notice is critical it is prudent to send a copy Notice by another means, for example registered post.

Conventions

For the purpose of GMCs electronic transactions the following conventions are suggested to provide clarity and certainty for both the agencies and the suppliers.

- The time of dispatch (the time the email is sent) is the same as the time of receipt (the time the email is accepted into the other party's information system). To provide evidence of this the sender must select the option to 'request a delivery receipt' before hitting the 'send' button. The return email notification of the delivery receipt shows the time of receipt and must be retained by the sender as evidence that the email was both dispatched and received.
- The place of dispatch is deemed to be the place of business of the sender. The place of receipt is deemed to be the place of business of the receiver. If there is no place of business, the person's ordinary place of residence is used.
- An email is signed if it includes an electronic signature.
- The agency and the supplier signal their intent to be legally bound by the email transaction by including a statement to that effect in their electronic signatures.



Good practice tips

To be able to verify an email business transaction each party must keep evidence of what happened and when.

Delivery receipt – a 'delivery receipt' generates an automatic return email notification that your email has been received into the recipient's information system. It is sufficient evidence of receipt.

Read receipt – you can also select the 'read receipt' option in addition to the 'delivery receipt'. This gives you reassurance that the recipient has opened your email. However, it is not necessary for legal purposes.

Electronic signatures

What is an e-signature?

An e-signature is the equivalent of a written signature – it is as good as an ink autograph on paper. The legal requirements for a signature are met if the electronic signature:

- identifies the person signing
- indicates that person's approval to the transaction, and
- is as reliable as is appropriate - given the nature of the transaction.

Is an e-signature the same as a digital signature?

No. Although they sound similar e-signatures and digital signatures are completely different. An e-signature is a legal concept. It is created by legal rules.

A digital signature is a form of encryption technology. It is created and verified by code. A digital signature is obtained by purchasing a digital certificate or 'keys' from a commercial certification authority such as VeriSign. An electronic signature may incorporate a digital signature to provide a very high level of security and certify the integrity and authenticity of the message.

How do I create an e-signature?

Key Features of e-signature

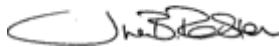
- A scanned copy of your handwritten signature.
- Text of your name, position & organisation.
- A statement that signals your intention to be legally bound.

There are many ways to create an e-signature depending on the type of software you use. In Microsoft Outlook this can be fairly straightforward. See instructions on page 11.

You can develop an e-signature that contains text identifying you. Another option is to include a scanned copy of your handwritten signature.

Once created you can save the e-signature, in addition to your normal email signature, and use it only for e-commerce emails.

Example of e-signature:



JAMIE BRANSON | Chief Procurement Officer
 Ministry of Entertainment | 66 Bowen Street | PO Box 1543 | Wellington | New Zealand
 t: 04 474 3000 | m: 027 466 1000 | f: 04 474 3001

For the purpose of Government Model Contracts the above is an e-signature. This signals my intention on behalf of the Ministry of Entertainment to agree to, and be legally bound by, the business transaction to which this email message relates.

The legal requirements

How reliable is an e-signature?

An e-signature is presumed to be reliable if it meets the following tests.

Test	Requirement	Comment
Creation	The ability to create the e-signature is <u>linked</u> to the user and no-one else.	E-signatures can meet this requirement if the user has to perform an action unique to them in order to create, use or alter the e-signature.
Control	The ability to create the e-signature is under the <u>control</u> of the user and no-one else.	E.g. where the user must enter a private password to access the system where they create, use or alter the e-signature. A password that is only known to the user increases the reliability that the signature is from that person. An e-signature can be verifiable as coming from that person's email address via their email account.
Alteration	An alteration to the e-signature, made after the time of signing, must be <u>detectable</u> .	By retaining a copy of the original email the sender can detect if there has been an alteration after signing.

Regardless of the above, you can still prove, on other grounds, that the e-signature is as reliable as is appropriate for the nature of the transaction. The circumstances of the communication and the actions of the parties can contribute to establishing an intention to be bound by the communication.

The most technologically secure signature is a digital signature. However, the cost of obtaining and maintaining a digital signature can be high and it may not be a viable option for low-value, low-risk contract transactions.

Keeping records

What records do I need to keep?

As part of contract management you must keep records of all important communications in relation to the Contract and any changes to the Contract. This includes email transactions such as a Contract Variation or Contract Notice. You have options in how to store your e-transactions. You can keep hard copies, electronic copies or both.

You should check your agency's or business's records management policy to see if there are specific requirements about contracts and emails and the length of time you are required to maintain the records.

If you save your emails in an electronic format there are two requirements:

- The electronic system you use must be reliable to safely retain the email and maintain the integrity of the information in the email.
- You must be able to easily retrieve the email for future reference.

Good Practice Tips

- Most contract managers keep key contract documents in hard copy e.g. the original of the signed contract.
- If this is your practice you should print hard copies of all electronic contract transactions for your file.
- However, if you have a secure electronic document retention system you may not need to do this. Check with your public records advisor.

What should I print out?

You need to print the trail of emails that record the transaction – from start to finish:

For email Contracts print:	For Contract Variations print:	For Contract Notices print:
<ul style="list-style-type: none"> • original email offering the Contract • delivery receipt • responding email accepting the Contract. 	<ul style="list-style-type: none"> • original email offering the Contract Variation • delivery receipt • responding email accepting the Contract Variation. 	<ul style="list-style-type: none"> • original email containing the Contract Notice • delivery receipt.


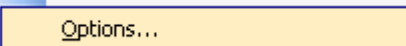

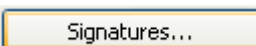
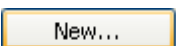
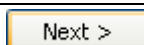

Create an e-signature in Microsoft Office Outlook

The instructions below detail how you can create, save and use your own personal e-signature. The instructions are based on Microsoft Office Outlook 2003. They also cover how to make an electronic copy of your handwritten signature and include this in your e-signature.

1. Scan your signature

Step	Process
1	Sign a blank piece of paper. Use white paper and a black ink pen. This will give you the best resolution. Sign several times so that you can choose the best example of your signature.
2	Scan the page and email it to yourself. Your office multi-functional-device will normally have a scanning function, or you may have a separate scanner. The scanner copies the page then sends the copy to your email address as a <i>pdf</i> file.
3	<p>Open the pdf file. Right click on the image and select 'copy image'.</p> <p>Open a photo or image editor software suite (such as Microsoft Office Picture Manager, Adobe Photo Shop, or Picasa). Paste the image into the image editor and save as a file.</p> <p>Note: Image editors (also known as photo editors) allow you to create and modify images. This includes cropping and changing the colour of the text of your signature.</p>
4	<p>Use the edit features to:</p> <ul style="list-style-type: none"> • Make sure the signature is up the right way. You may need to rotate it. • Where you have signed several times select the best image. • Using the crop tool to cut the paper as close to the image as possible. • You can also change the colour of your signature or make it darker. Black or dark blue are best. <p>Save these edits.</p>

2. Compose your e-signature in Outlook

Step	Action
1	open Microsoft Office Outlook, then select  from the Toolbar
2	choose 
3	select the  tab
4	Click on the  button then click on the  button
5	Enter a name to identify this signature e.g. 'e-signature' - then click 
6	<p>Right click and select </p> <p>From the browse function select the scanned copy of your signature and click 'ok'</p>

-
- 7 Click 'enter' once to take you to a new line
Type your signature details below your scanned signature. Include:
- your name
 - your position / title
 - the name of your organisation, street address & postal address, phone and fax numbers

Add the following statement:

“For the purpose of Government Model Contracts the above is an e-signature. This signals my intention on behalf of [the Ministry or Department of XX] to agree to, and be legally bound by, the business transaction to which this email message relates.”

- 8 Select 'finish' and 'ok'
-

3. Using your e-signature

Step	Action
1	In Outlook, when composing an email, insert your e-signature by selecting 'insert' from the toolbar
2	Then choose 'signature'
3	Select and click on your email signature. This inserts the signature in the text of your email
