

Form of Agreement for Consultancy Services

Project:

Site:

Consultant:

Services:

Date:

CONDITIONS OF CONTRACT FOR CONSULTANCY SERVICES

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FORM OF AGREEMENT FOR ENGAGEMENT OF CONSULTANT

This **AGREEMENT** is made the [insert] day of 20[insert]

BETWEEN Kāinga Ora—Homes and Communities
("Client")

AND [insert]
("Consultant")

For Services in connection with [insert project code and sites] ("Client's Project")

THE Client engages the Consultant to provide the professional services set out in Appendix A and agrees to pay the Consultant as described in Appendix B and to undertake its other obligations set out in this Agreement.

THE Consultant agrees to perform the Services on the terms of this Agreement.

The following documents shall form the Agreement in order of precedence:

- Form of Agreement for Engagement of Consultant;
- The Special Conditions – Part A (Specific Conditions);
- The Special Conditions – Part B (Other Special Conditions);
- Additional documents specified in the Special Conditions;
- Engineering New Zealand/ACENZ: General Conditions of Contract for Consultancy Services (Fourth Edition, December 2017) (copy not included);
- Appendix A: Scope, Purpose, Programme and Completion Date for the Services;
- Appendix B: Fees, Expenses and Payment;
- Appendix C: Client's Representative;
- Appendix D: Consultant's Key Personnel, Consultant's Representative;
- Appendix E: Subconsultants and Subconsultants' Key Personnel;
- Appendix F: Other Consultants, Other Consultants' Insurances, Personnel, Equipment, Facilities and Information supplied by the Client;
- Appendix G: Client's Risk Identification and Notification; and
- Appendix H: H1. Deed of Novation (Principal to Contractor);
H2. Deed of Novation (Principal to Principal).

SIGNED for the Client by:

SIGNED for the Consultant by:

Signature

Signature

Name

Name

Position

Position

In the presence of:

In the presence of:

Signature
of Witness _____

Signature of
Witness _____

Name of
Witness _____

Name of
Witness _____

(NB: This document should be signed by an authorised person. Signatures should be witnessed.)

SPECIAL CONDITIONS – PART A (Specific Conditions of Contract)

References are to clauses in the Engineering New Zealand/ACENZ General Conditions of Contract for Consultancy Services (Fourth Edition, December 2017) (copy not included)

Clause No:

Agreement:

Additional documents forming part of the Agreement include:

1.3 Fixed Term Expiry Date

[Insert date or “Not Applicable”] (if blank then the Fixed Term Expiry Date does not apply).

5.3 Payment Timing

The Client will pay any valid invoice by the 20th day of the month following the month in which the invoice is dated, providing:

- a) The invoice is emailed to invoices@kaingaora.govt.nz no later than the 5th Working Day of that following month; and
- b) The correct Kāinga Ora order number related to this Agreement is recorded on the invoice.

An order number for this Agreement can be obtained by the Consultant from the Client's Representative. If an order number is not provided within 20 Working Days of request from the Consultant or the date of this Agreement (whichever is later) the Consultant shall notify the Client Representative in writing that it shall be entitled to not commence the Services.

6.2 Limitation of Liability

The maximum amount payable by the Consultant, whether in contract, tort or otherwise, in relation to claims, damages, liabilities, losses or expenses, shall be the sum of \$[Insert].

6.4 Duration of Liability

The duration of liability shall be six years.

6.5 Insurance

The amount of public liability insurance required shall be \$[insert].

The amount of professional indemnity insurance required shall be \$[insert] (or, where the limit of liability under clause 6.2 is higher, an amount not less than such limit of liability).

Motor Vehicle Third Party Insurance is not required.

12.8 Notices

Client's Address:

Physical Address:

Attention:

Postal Address:

Email address:

Consultant's Address:

Physical Address:

Attention:

Postal Address:

Email address:

SPECIAL CONDITIONS – PART B (Other Conditions of Contract)

1. Clause 1.1

The following definitions are amended or added to clause 1.1 as follows.

Amend **Client's Intellectual Property** by replacing 'and' with 'whether or not'.

Add **Controlled Entity**:

'Controlled Entity means:

- any government Ministry or department connected to or interested in housing, including the Ministry for Housing and Urban Development; or
 - any successor to or subsidiary of the Client; or
 - a community housing provider under section 166(3) of the Housing Restructuring and Tenancy Matters Act 1992; or
 - a Crown Entity within the meaning of section 7 of the Crown Entities Act 2004; or
 - a Schedule 4A company under the Public Finance Act 1989; or
 - a local authority under the Local Government Act 2002; or
 - the Crown represented by one or more Ministers of the Crown,
- and includes any entity controlled by one or more of the entities described above.'

Amend **New Intellectual Property**:

After 'documentation' in the second line insert 'or other works'.

After 'on behalf of the Consultant' in the fourth line insert 'including any Subconsultant'

Amend **Pre-existing Intellectual Property** by inserting ', including any Subconsultant' after 'third party'.

Add **Prior Services**:

'Prior Services means:

any of the Services that have been provided by the Consultant to the Client under any arrangement between the Parties which was made in contemplation of the Agreement.'

Add **Programme**:

'Programme means:

the programme set out in Appendix A, as amended from time to time in accordance with the Agreement.'

Amend **Variation** by adding the word ', cost' after 'supply'.

2. Clause 1.2

Amend by adding the following at the end:

'Where the Consultant comprises two or more people or entities, those people or entities will be jointly and severally liable for performance of the Consultant's obligations under this Agreement.'

3. Clause 1.3

Add the following as a new clause 1.3:

1.3 Term of Agreement

This Agreement continues until the earlier of:

- the Fixed Term Expiry Date (if any) specified in the Special Conditions – Part A; or
- the Services are completed; or

- it is terminated in accordance with this Agreement.

The Parties may agree to extend the term of this Agreement.

The Client does not guarantee any minimum fee will be payable under this Agreement and the Consultant does not have any exclusive right to provide the Services.'

4. Clause 2.1

Replace the word 'timetable' with the word 'Programme' in the second bullet point.

Add the following bullet points to the end of clause 2.1:

- 'provide sufficient employees (including Key Personnel) with the necessary qualifications, licenses, skills and experience to perform the Services to the standard required by this Agreement; and
- co-operate with the Client and use all reasonable endeavours to co-operate with any Other Consultants (as applicable); and
- at the Consultant's cost, correct any errors, omissions or both in any documentation prepared as part of the Services by the Consultant where the error or omission is the result of the Consultant failing to exercise the duty of care required by clause 2.2; and
- comply with all applicable legislation, regulations and any of the Client's rules, policies and standards (including access and security requirements of any tenanted properties) as described in Appendix A and as notified by the Client to the Consultant in writing from time to time, except to the extent that compliance with any of the Client's rules, policies or standards would constitute a breach of the Consultant's duty of care under this Agreement or its obligations as a PCBU under the HSWA. The Consultant may notify the Client where it considers any rule, policy or standard notified after the commencement of the Services results in a material increase in the Consultant's costs and such shall be treated as notice of a Variation for the purposes of clauses 2.13 and 7.'

5. Clause 2.2

Amend by adding at the end:

'for a project of a similar type and size to the Client's Project.'

6. Clause 2.8

After 'do not arise,' insert 'whether on the part of the Consultant or any of its personnel,'.

7. Clause 2.9

Amend by deleting and replacing with 'The Consultant must not instruct a Contractor to vary the Works in a material way, unless an emergency occurs. In emergency circumstances, the Consultant may vary the Works and shall immediately notify the Client about the changes.'

8. Clause 2.11

Amend as follows:

Amend by adding at the end:

'The Consultant must not display any details of the Agreement, the Services or the Works in its advertising or marketing material (including on social media):

- without the Client's prior written approval, such approval shall not be unreasonably withheld; or
- except where the Consultant is responding to any State service (as defined in the State Sector Act 1988) request for proposals for the provision of services and provided that any such response is protected by commercially reasonable confidentiality obligations.'

9. Clause 2.12

Amend as follows:

Replace the words 'programme set out in Appendix A' in the first paragraph with the word 'Programme'.

Add the following after the first paragraph:

'The Client and Consultant agree that the Consultant shall only be responsible for delays within the Consultant's reasonable control, and in particular, if at any time the Consultant's performance of the Services falls behind the Programme due to matters which are within the Consultant's control, then the Consultant shall, at the Consultant's cost, take all reasonably practicable steps to accelerate the performance of the Services to meet the Programme. The Consultant shall not be responsible for:

- delays in the completion of services by any Other Consultant and the Works by any Contractor directly engaged by the Client; or
- market constraints of labour or materials; or
- delays due to the requirement of an Other Consultant, Contractor or the Client to obtain any approval from any government body, utility provider or other entity.'

10. Clause 2.13

Replace 'programme and completion date for the Services' with 'Programme'.

11. Clause 2.14

Add the following as a new clause 2.14:

'2.14 Tenanted properties

The Consultant acknowledges that the Services relate to properties that are or may be tenanted by the Client's tenants. If a property is tenanted, the Consultant must comply with all of the Client's access, security and other requirements in respect of such a property.'

12. Clause 2.15

Add the following as a new clause 2.15:

'2.15 Delegation of powers

Notwithstanding anything else in this Agreement, nothing in this Agreement shall be construed as a delegation of the Client's functions or powers to the Consultant, whether under the Crown Entities Act 2004 or otherwise and, in relation to any such matters, the Consultant's role is recommendatory only.'

13. Clause 2.16

Add the following as a new clause 2.16:

'The Consultant must notify the Client in writing as soon as it becomes aware of any actual or potential issues that could receive media attention.'

14. Clause 3.3

Amend by adding at the end:

'The Consultant shall, in every case where it requires the Client to make a decision, accompany the request for a decision with a reasonable level of information to enable the Client to consider the matter at issue. The Client is entitled to request further information as may be reasonably required by the Client to assist it in making the relevant decision. The provision of information pursuant to this clause 3.3 shall be at no additional cost to the Client except where such is beyond what would reasonably be expected to be provided by the Consultant as part of the Services.'

15. Clause 3.6

Amend by adding at the end:

'Notwithstanding the foregoing, in an urgent or emergency situation the Client may give instructions directly to Other Consultants and/or third parties directly contracted to the Client but in such an event the Client as soon as reasonably practicable must notify the Consultant that instructions have been given.'

16. Clause 3.7

After the word 'must' on the second line insert ', as soon as reasonably practicable,'.

Add the following after the first paragraph:

'The Client shall not be required to inform the Consultant of anything which will affect the scope or timing of the Services that is related to another Government agency or entity outside of the direct matters for which the Client is responsible as a Government agency or entity.'

17. Clause 3.9

Amend by adding at the end:

'Without limitation to the Client's obligations in the 4th bullet point of clause 3.2, any approval by the Client of information submitted to it by the Consultant (such information must in all cases be provided by email or in hard copy by the Consultant) shall not be taken to signify that the Client has checked the accuracy or completeness of such information received from the Consultant and shall not relieve the Consultant of any of its obligations under this Agreement unless approval is expressly given on that basis or the parties expressly agree such in writing.'

18. Clause 4.3

Amend by adding a new paragraph after the first paragraph:

'The Consultant shall comply with the Client's probity requirements as set out in clause 2 of Appendix A.'

19. Clause 6.1

Amend by inserting the following words after 'special loss':

',' loss of opportunity, loss of future fees.'

20. Clause 6.5

Amend as follows:

The first bullet point is deleted and replaced with the following: 'professional indemnity insurance for the amount as set out in the Special Conditions;'

The following is added at the end of clause 6.5:

'The Consultant's public liability insurance shall include the Client (which shall include the Client's officers and employees) as an additional insured in respect of their vicarious liability arising from the Consultant's negligence in relation to the performance of this Agreement.'

The Consultant insurances required to be taken out by the Consultant shall be with insurers with a minimum unsecured credit rating of at least "A-" from Standard & Poor's (or equivalent) immediately on the execution of this Agreement. The Consultant shall keep them in force for the length of time set out in the Special Conditions except that in the case of professional indemnity insurance the maintenance obligation is as stated in the second paragraph of this clause 6.5.'

21. Clauses 7.1, 7.2 and 7.3

Amend by replacing 'programme and completion date for the Services' with 'Programme'.

22. Clause 7.4

Add a new clause 7.4 as follows:

'7.4 Reduction in Scope

The Client may reduce either or both of the scope of the Project, and the scope of the Services, and may engage another party to undertake any such works so removed from the scope, and in any such event the Consultant shall not be entitled to claim any breach, damages or loss of profits against the Client.

Within 15 days of any notice under this clause, the Consultant shall forward to the Client:

- (a) the proposed reduction in the consultancy fee for the reduction in the Services, such amount to be agreed in accordance with Clauses 7.2 and 7.3; and
- (b) the proposed amount of any reasonable out of pocket costs that the Consultant incurs solely because of the reduction in Services.

Upon determination of the reduction of the consultancy fee in accordance with this clause:

- (c) the consultancy fee; and
- (d) if the limitation of liability set out in clause 6.2 is expressly linked to the consultancy fee, then such limitation,

shall be reduced accordingly.'

23. Clause 9.1

Clause 9.1 is deleted and replaced with the following:

'Subject to clause 9.9, all New Intellectual Property held in any medium, whether electronic or otherwise shall be solely owned by the Client. The Consultant may not copy, use, disclose, distribute or sell any New Intellectual Property without the express written consent of the Client (which it may grant or withhold in the Client's sole and absolute discretion on whatever conditions the Client deems appropriate) except as required for the purpose of delivering the Services.'

24. Clause 9.2

Clause 9.2 is amended as follows:

Delete the words 'to the extent reasonably required to enable the Client to make use of the Services or use, adapt, update or amend the Works' and replace with the following:

'in relation to or in connection with this Agreement, the Services, the Works or the Client's Project, including for the planning, design, engineering, procurement, construction, testing, commissioning, completion, operation, maintenance, repair, replacement, modification, renewal, expansion and/or alteration of the Services, Works or the Client's Project.'

25. Clause 9.3

Clause 9.3 is amended by inserting the words: 'part of the' after the words 'concerning the' on the fourth line.

26. Clause 9.4

Amend by inserting the following at the end of the clause:

'The Consultant is liable to the Client for reasonably foreseeable claims, damages, liabilities (including any liability of the Client to a third party), losses or expenses caused directly by any breach of any of the Consultant's obligations, undertakings or warranties contained or implied in this clause 9.4.'

27. Clause 9.9

Add a new clause 9.9 as follows:

'If the Client's Project includes buildings that exceed 3 levels, then subject to clause 9.6, all New Intellectual Property held in any medium, whether electronic or otherwise, shall be jointly owned by the Client and the Consultant. The Client and the Consultant hereby grant to the other an unconditional, unrestricted, irrevocable, royalty-free license in perpetuity to copy or use such New Intellectual Property and each Party is free to make whatever use they wish of the New Intellectual Property without any obligation to obtain the other's consent or to account for any future benefits.'

28. Clause 10.1

Clause 10.1 is amended by deleting the words 'best endeavours' and replacing them with 'reasonable endeavours'.

29. Clause 10.2

Clause 10.2 is deleted and replaced with the following:

'If the parties cannot resolve the dispute themselves within a reasonable time (but in any event within 20 Working Days or such longer period agreed in writing), then either Party may require that the dispute be referred to mediation by serving written notice on the other.'

30. Clause 10.3

Clause 10.3 is amended by deleting the words 'a reasonable time' and replacing them with '20 Working

Days of the date of either Party's notice requiring mediation issued pursuant to clause 10.2 (or such longer or shorter period as may be expressly agreed by the Parties).'

31. Clause 10.6

Add a new clause 10.6 as follows:

'Nothing in this clause 10 shall prevent or prejudice the ability of either party to apply to any court in order to seek interim injunctive relief against the other.'

32. Clause 11.2

Add the following paragraph at the end of clause 11.2 as follows:

'The Client will not in any circumstances be responsible for abandonment costs or lost fees for stages of the Services not performed as at the date of termination (including without limitation any loss of profit, or lost opportunity costs or claims suffered by the Consultant) or for any fees for any Services for which the Client had not, as at the date of termination, instructed the Consultant to proceed with.'

33. Clause 11.4

Amend by adding ' and (subject to and in accordance with clause 9.2) Pre-existing Intellectual Property' after 'New Intellectual Property'.

34. Clause 11.6

Add a new clause 11.6 as follows:

The Client may suspend the performance of the Services by the Consultant at any time by written notice specifying the reasons why the Services are suspended. As soon as such notice is received by the Consultant, the Consultant will stop the performance of the Services. The Client may withdraw the suspension of the Services at any time by giving further written notice to the Consultant.

Suspension of the performance of the Services will not prejudice or affect the accrued rights or claims and liabilities of the Parties.

Where the Services are suspended other than for the default of the Consultant the Client shall:

- grant the Consultant additional time to complete the Services commensurate with the period of suspension plus the period of time reasonably required by the Consultant to remobilise should the Client later withdraw the suspension, and the Consultant shall not be entitled to a Variation due to suspension under this clause 11.6;
- pay the Consultant for the Services provided to the date of suspension and any reasonable costs incurred by the Consultant solely as a result of such suspension (the Consultant will take all reasonable steps to minimise all such costs);
- have no claim against the Consultant solely by reason of any delay caused by or arising from the suspension; and
- not be responsible for any costs or losses resulting from any such suspension other than the reasonable costs which may be payable under the 2nd bullet above.

The Consultant may terminate this Agreement by written notice to the Client where the Services remain suspended for a continuous period of more than three months and the Client has not withdrawn the suspension or the parties have not agreed a further extension of the suspension.

Where the Client gives notice to the Consultant withdrawing a suspension the Consultant must remobilise, and as far as reasonably possible reassign Key Personnel to the Project and provide sufficient employees (including Key Personnel) with the necessary qualifications, licenses, skills and experience to perform the Services to the standard required by this Agreement within a reasonable time from the date it receives the Client's notice."

35. Clause 12.7

Add to the end:

'The Consultant shall submit to the Client a regular written report on the matters discussed at the times and in such form as the parties may agree from time to time or the Client reasonably requires.'

36. Clause 12.9

Amend by replacing clause 12.9 with the following:

'12.9 Assignment and Novation

The Consultant must not assign, transfer, novate or subcontract all or part of its rights or obligations under this Agreement without the Client's prior written approval. This approval may be refused without the need to give reasons, except that, in the case where the Consultant requests approval to subcontract to a related company of the Consultant, such approval shall not be unreasonably withheld.

The Client must not assign, transfer or subcontract all or part of its rights or obligations under this Agreement without the Consultant's prior written approval (not to be unreasonably withheld or delayed) except:

- this clause does not apply to the vesting of assets, liabilities, rights, and obligations pursuant to legislation; and
- the Consultant's prior approval shall not be required where the assignee, transferee or subcontractor is a Controlled Entity,

provided that the terms of any such assignment and transfer do not impose any greater liability on the Consultant than the Consultant owes or owed to the Client.

The Client may:

- novate this Agreement to a Controlled Entity without seeking the approval of the Consultant, and the Consultant must execute the deed of novation in the form attached as Appendix H2 to this Agreement; and
- with the Consultant's prior written approval (not to be unreasonably withheld or delayed), novate this Agreement to any Third Party and the Consultant must execute the deed of novation substantially in the form attached as Appendix H1 to this Agreement.

If either Party assigns or transfers its rights, the Party assigning or transferring will remain liable for the performance of its obligations under this Agreement, unless specifically stated to the contrary in any written consent or document giving effect to an assignment or transfer. For the avoidance of doubt, this paragraph shall not apply to a novation effected by the forms attached as Appendix H1 or H2 to this Agreement.

37. Clause 12.10

Amend by replacing clause 12.10 with the following:

'12.10 Survival of Provisions

Add the following after the reference to "9" in clause 12.10:

"and 10, 11 and 12"

38. Clause 12.15

The following is added to the end of clause 12.15:

'For the avoidance of doubt, any exercise of a regulatory function by the Client shall not constitute a breach of this Agreement.'

39. New clause 12.19

Add the following as a new clause 12.19:

'12.19 Prior Services

For the avoidance of doubt, where the Consultant has performed any Prior Services, the Agreement will retrospectively apply to those Prior Services from the date that it is executed by both Parties.'

40. Clause 12.20

Add the following as a new clause 12.20:

'12.20 Other Services

The Consultant acknowledges and agrees that:

- where the Services are of a nature that do not relate to a specific Client's Project or specific site(s), the Client may in its sole discretion and at any time enter into agreements with other consultants and contractors for the provision of services similar to the Services and allocate the sites and services between the consultants and contractors as it sees fit; and
- the Consultant will not directly or indirectly make any claim against the Client in respect of the subject matter of this clause 12.20.'

41. Clause 12.21

Add the following as a new clause 12.21:

'12:21 Contract and Commercial Law Act

The obligations of the Consultant under the Agreement shall, for the purposes of Part 2, Subpart 1 (Contractual privity) of the Contract and Commercial Law Act 2017, be deemed to be for the benefit of Housing New Zealand Limited and Housing New Zealand Build Limited (including their respective successors and assigns) and shall be enforceable by Housing New Zealand Limited and Housing New Zealand Build Limited against the Consultant but not so as to impose any greater liability on the Consultant towards Housing New Zealand Limited and Housing New Zealand Build Limited than the Consultant owes or owed to the Client. For the avoidance of doubt, the Consultant's aggregate liability under or in connection with the Agreement, under contract, tort, statute or otherwise (including to the Client and Housing New Zealand Limited and Housing New Zealand Build Limited (including their respective successors and assigns)) shall be collectively no greater than the applicable monetary limit of its liability under the Agreement.'

APPENDICES

- Appendix A: Scope, Purpose, Programme and Completion Date for the Services**
- Appendix B: Fees, Expenses and Payment**
- Appendix C: Client's Representative**
- Appendix D: Consultant's Key Personnel, Consultant's Representative**
- Appendix E: Subconsultants and Subconsultants' Key Personnel**
- Appendix F: Other Consultants, Other Consultant's Insurances, Personnel, Equipment, Facilities and Information Supplied by the Client**
- Appendix G: Client's Risk Identification and Notification**
- Appendix H: H1: Deed of Novation (Principal to Contractor)**
- H2: Deed of Novation (Principal to Principal)**

Appendix A: Scope, Purpose, Programme and Completion Date for the Services

PART A – The Client’s Project

[Insert a description of the project and the works.]

PART B – The Services

[Insert a description of the Services to be provided, together with any specific deliverables. This should be completed to reflect Appendix B of the RFP]

PART C – Tags and Excluded Services

[Insert details of the services excluded from the scope of this Agreement.]

PART D – Programme and Completion Date

[Insert the Programme and Completion Date. Insert Returnable Schedule 11: Programme from RFP]

PART E – Policy

1. Audits

1.1 Client entitled to undertake audit

The Client may at any time and from time to time initiate an audit of all or any of the Consultant’s:

- compliance with this Agreement; and
- statutory, regulatory and contractual compliance generally; and
- project management practices, record management practices and documentation; and
- internal review, quality assurance and testing practices; and
- sub-contractor arrangements (including Subconsultant arrangements); and
- resources and technical infrastructures being utilised by the Consultant in its supply of the Services; and
- development, technical and operational processes and methodologies and all documentation associated with those processes and methodologies.

1.2 Conduct of audit

The Client must give the Consultant written notice (being not less than seven days) of when the audit is to be conducted and advise the Consultant of the individuals to whom the Client wishes to have access.

The Client must maintain the confidentiality of the information provided to it in the course of the audit and must use that information only for the purposes permitted under this Agreement. The Client shall ensure that any person appointed by it to conduct an audit under clause 1.1 of this Appendix A that is not an employee of the Client enters into an appropriate confidentiality agreement prior to the commencement of that audit.

The Consultant must:

- provide such Records, information, explanations and documentation reasonably requested by the persons undertaking the audit for the Client that are relevant to the conduct of the audit;
- arrange for those undertaking the audit on behalf of the Client to meet with the Consultant’s internal quality assessors and external auditors if so required; and

- make relevant records available to those undertaking the audit.

1.3 Results of audit

Upon the conclusion of any audit, the auditor shall make its report available to the Client and the Consultant. If that report reveals failure on the part of the Consultant to comply with any of its obligations, the Consultant shall at its own cost promptly take such steps necessary to remedy or mitigate the effect of those failures.

If an audit establishes that the Consultant is in material breach of this Agreement, or has acted negligently or fraudulently in the performance of any of the Services, the Client's reasonable costs of performing the audit will be met by the Consultant. In all other cases the Consultant will not be liable for any costs incurred by the Client in performing the audit. If an audit fails to establish that the Consultant is in material breach of this Agreement, or has acted negligently or fraudulently in the performance of any of the Services, the Client will pay the Consultant's reasonable costs resulting from the performance of the audit. If the Consultant disputes any findings in the auditor's report such dispute will be resolved in accordance with clause 10 of the Agreement and the liability for costs incurred by the Consultant as a consequence of meeting its obligation to remedy or mitigate the effects of such failures will be determined in the same dispute resolution process.

1.4 Controller and Auditor-General

The Controller and Auditor-General or any person appointed by the Controller and Auditor-General may examine all or any part of the Records for the purposes of the *Public Audit Act 2001*, and may require the Consultant, any Consultant's sub-contractor, Subconsultant or Key Personnel to provide oral and written explanations as required by the Controller and Auditor-General or his or her delegate.

1.5 Records

The Consultant shall maintain up to date and complete Records and shall maintain such Records for at least 3 years after the termination or expiry of this Agreement.

The Client acknowledges and agrees that clauses 1.1 to 1.5 inclusive of this Appendix A are inserted in this Agreement for the sole benefit of Kāinga Ora—Homes and Communities and (in the case of a novation under clause 12.8 of the Agreement) a Controlled Entity and shall not operate for the benefit of any other person including any successor to Kāinga Ora—Homes and Communities or a Controlled Entity.'

2 Probity

2.1 Key personnel

For the purposes of this clause 2 of Appendix A only, key personnel comprise any director, officer, employee, sub-consultant or agent of the Consultant or a Consultant Related Person that:

- has the ability to exercise influence or control in matters relating to the Services or the Client's Project;
- has access to information that is Confidential Information of the Client; or
- will attend a property owned by the Client or engage with any tenant of the Client.

2.2 Consultant not to cause probity event

The Consultant must use reasonable endeavours to ensure that no event, matter or thing arises in connection with the Consultant or any key personnel which is or is likely to have a material adverse impact on the name, brand or credibility of the Client, the public interest or confidence in the Client or the reputation or credibility of the Client or any of its tenants. A breach of this clause will be a default entitling the Client to terminate this Agreement.

2.3 Probity Investigations

The Consultant must use reasonable endeavours to ensure that all key personnel referred to in clause 2.1 of this Appendix A are fit and proper people or entities to be involved in the Services or the Client's Project as applicable and that such key personnel do not cause an event, matter or thing referred to in clause 2.2 of this Appendix A.

For the purposes of complying with this clause 2.3 of Appendix A, the Consultant must carry out and keep

a Record of appropriate Probity Investigations.

2.4 Client requested Probity Investigations

At any time the Client may:

- request copies of Probity Investigations carried out by the Consultant on key personnel, along with the Consultant's reasons for its conclusions under clause 2.3 of this Appendix A in respect of relevant key personnel; and/or
- conduct, or require the Consultant to conduct, additional Probity Investigations in respect of any key personnel or proposed key personnel.

If the Client requires the Consultant to conduct additional Probity Investigations, it must notify the Consultant in writing of the key personnel and any specific Probity Investigations it requires. The Consultant shall promptly carry out the relevant investigations and provide a copy of the results (and its conclusions under clause 2.3 of this Appendix A) to the Client.

Any review, conduct or request for Probity Investigations by the Client shall not relieve the Consultant from any liability or obligation under clauses 2.2 or 2.3 of this Appendix A.

2.5 New key personnel to be notified

The Consultant shall advise the Client at least 10 Working Days prior to the proposed appointment of a person or entity proposed to become a key personnel referred to in clause 2.1 of this Appendix A.

2.6 Client's right to exclude key personnel

If the Client reasonably believes as a result of the Probity Investigation that any key personnel referred to in clause 2.1 of this Appendix A is either:

- not a fit and proper person or entity to be involved in the Services or the Client's Project; or
- will cause or is likely to cause a breach of clause 2.2 of this Appendix A,

then:

- the Client may at any time exercise the rights under clause 2.5 of this Appendix A in respect of such key personnel; and
- the Consultant shall pay to the Client, on or before 30 days from presentation of an invoice by the Client, all direct expenses reasonably incurred by the Client in carrying out Probity Investigations in respect of such key personnel.

If the Client reasonably believes as a result of the Probity Investigation that there is no basis to exercise the rights in clause 2.5 of this Appendix A, then the Client shall pay to the Consultant, on or before 30 days from presentation of an invoice by the Consultant, all direct expenses reasonably incurred by the Consultant as a result of the Probity Investigations in respect of such key personnel.

In exercising its rights under clause 2.5 of this Appendix A, as contemplated by this clause 2.6 of this Appendix A, the Client agrees to act reasonably.

2.7 Consents to Probity Investigations

The Consultant must obtain all consents and waivers from key personnel that may be required from time to time to permit the conduct (by the Client or the Consultant) or disclosure (including to the Client) of any Probity Investigations referred to in this clause.

2.8 Consultant not to receive rebates, etc.

The Consultant must not, and must ensure its employees, agents and those of any Consultant Related Person do not, directly or indirectly:

- receive from any person or entity any commission, amount, benefit, refund, rebate, discount (including on other contracts or arrangements), gift, entertainment, or other equivalent services, goods or benefits in kind, directly or indirectly, on account of or by reference to any amount that is to be paid directly or indirectly by, for, or on behalf of the Client to any Other Consultant, Sub

consultant, Contractor or other person; or

- enter into any arrangement, agreement, plan or understanding, whether enforceable or unenforceable (and including all steps and transactions by which it is carried into effect) to receive any of the things referred to in the above.

The Client acknowledges and agrees that clauses 2.1 to 2.8 inclusive of this Appendix A are inserted in this Agreement for the sole benefit of Kāinga Ora—Homes and Communities and (in the case of a novation under clause 12.9 of the Agreement) a Controlled Entity and shall not operate for the benefit of any other person including any successor to Kāinga Ora—Homes and Communities or a Controlled Entity.

2.9 Confidential Information

The Client acknowledges that it will not seek and is not entitled to access to any information held by the Consultant that is subject to an obligation of confidentiality in favour of any of the Consultant's other clients.

3. Interpretation

For the purposes of this Appendix A the following meanings shall apply:

3.1 Consultant Related Person means a "related company" of the Consultant (as that term is defined in section 2(3) of the Companies Act 1993) or Subconsultant.

3.2 Probity Investigation means all investigations reasonably necessary to assess the character, honesty and integrity of persons or entities for the purpose of ensuring that such person or entity is fit and proper for involvement in relation to, arising out of or in connection with the Services and includes such investigations as are required by law or by the Client (in its absolute discretion) from time to time.

3.3 Records means all records that would reasonably be expected to be kept by a professional consultant acting in accordance with clause 2.2 of the Agreement, that the Client expressly requires the Consultant to keep or that would otherwise reasonably be required to facilitate the conduct of an audit under clause 1 of this Appendix A, including:

- records relating to the Services, including: details of Services carried out, the Consultant's performance monitoring, Probity Investigations, compliance with applicable laws, all insurance claims relating to the Client's Project (save for documentation recording the Consultant's assessment of liability) and all incidents or near misses relating to health, safety and security; and
- financial records, including: timesheets, payments made to or received from Subconsultants and contractors, and such other items as may reasonably be required from time to time to conduct cost audits for verification of cost expenditure or estimated expenditure, for the purpose of this Agreement.'

Appendix B: Fees, Expenses and Payment

Part A - Fee components (fixed, estimated, capped, provisional, disbursements)

Total fee (excluding GST) of \$[insert total (excl. GST)], comprised of:

	Fee component	Fee Type	Amount (excl. GST)
1.	[Insert]	[Insert]	
2.	[Insert]	[Insert]	

Fixed fees:

Unless otherwise stated, the obligation of the Client to pay the Consultant for a component of the Services specified in this part must be calculated and paid to reflect the level of completion of the relevant Service component (as that is agreed between the Client and the Consultant), up to the fixed fees stated in this part.

Payment of a fixed fee specified in this part by the Client satisfies any obligation of the Client to pay the Consultant any amount in any way in relation to, arising out of or in connection with the relevant component of the Services.

Other fees and estimates (Estimated Fee):

For any component of the Services that is not the subject of a fixed fee under Part A, the obligation of the Client to pay the Consultant for the Services under this Agreement must be calculated and paid in accordance with the hourly rates specified in Part B, up to a cap equivalent to the Estimated Fees set out above. Each Estimated Fee shall operate as a guaranteed maximum price for the relevant service component and shall not be exceeded other than with the prior written approval of the Client.

Part B – Rates

Role	Rate (excl. GST)
[Insert]	[Insert]
[Insert]	[Insert]

Appendix C: Client's Representative

Client Representative

Name:

Address:

Occupation:

Email:

Phone:

Appendix D: Consultant's Key Personnel, Consultant's Representative

Consultant's Representative

Name:
Address:
Occupation:
Email:
Phone:

Consultant's Key Personnel

Name:
Address:
Occupation:
Email:
Phone:

Appendix E: Subconsultants and Subconsultants' Key Personnel

Subconsultants

Name:
Address:
Role:
Email:
Phone:

Subconsultants' Key Personnel

Name:
Address:
Occupation:
Email:
Phone:

Appendix F: Other Consultants, Other Consultant’s Insurances, Personnel, Equipment, Facilities and Information supplied by the Client

Other Consultants

Name:
Address:
Role:
Email:
Phone:

and any other person or entity the Client engages to carry out other consulting or advisory services related to the Services.

Insurances, Personnel, Equipment, Facilities and Information supplied by the Client

Appendix G: Client's Risk Identification and Notification

Appendix H1: Deed of Novation (Principal to Contractor)

Contract for [Contract Name & Contract Number]

THIS DEED is made on ('the Effective Date')

BY ('the Client')

..... ('the Contractor')

..... ('the Consultant')

IT IS MADE IN THE FOLLOWING CIRCUMSTANCES

- A. The Client and the Consultant are parties to the agreement entered into on, a copy of which is attached and marked 'A' ('the Agreement').
- B. With effect on and from the Effective Date, the Client wishes to:
- (i) Transfer all of its rights and obligations under the Agreement to the Contractor; and
 - (ii) Be released from its obligations under the Agreement.
- C. With effect on and from the Effective Date, the Contractor wishes to accept the transfer of all the Client's rights and obligations under the Agreement.

THE PARTIES AGREE

1. **THIS** deed shall take effect on and from the date of its execution ('the Effective Date').
2. **THE Client:**
 - (a) Transfers to the Contractor all of its rights and obligations under the Agreement;
 - (b) Warrants it has performed all of its obligations under the Agreement up to the Effective Date;
 - (c) Shall remain liable to the Consultant for any breach of the Agreement by the Client which occurred prior to the Effective Date; and
 - (d) Subject to the terms of any continuity deed entered into between the Client and the Consultant, releases the Consultant from all of its obligations under the Agreement for the period following the Effective Date.
3. **THE Contractor:**
 - (a) Accepts the transfer with effect from the Effective Date;
 - (b) Confirms that, as from the Effective Date:
 - (i) The Contractor is substituted for the Client under the Agreement as if it had originally executed the Agreement in place of the Client;
 - (ii) All references in the Agreement to the Client are to be read and construed as if they were references to the Contractor; and
 - (iii) The Contractor may exercise all the Client's rights under the Agreement; and

- (c) Shall perform all of the Client's obligations under the Agreement from the Effective Date.
4. **THE Consultant:**
- (a) Consents to the transfer;
 - (b) Releases the Client from all of its obligations under the Agreement for the period following the Effective Date (but for of any breach of the Agreement that occurred prior to the Effective Date);
 - (c) Confirms that, as from the Effective Date:
 - (i) The Contractor is substituted for the Client under the Agreement as if it had originally executed the Agreement in place of the Client
 - (ii) All references in the Agreement to the Client are to be read and construed as if they were references to the Contractor
 - (iii) The Contractor may exercise all of the Client's rights under the Agreement; and
 - (d) Shall remain liable to the Client for any breach of the Agreement by the Consultant which occurred prior to the Effective Date.
5. **THE** terms of the Agreement continue in full force and effect.
6. **EACH** party is to pay its own costs (including, without limitation, legal expenses) in entering into this deed.
7. **EACH** party is, at its own expense and at the request of any other party, to execute and deliver or cause its successors and permitted assigns to do all things as may be reasonably requested by that other party to obtain the full benefit of this document according to its true intent.
8. **AN** amendment to this deed will only be effective if it is in writing and signed by all parties.
9. **THIS** deed shall be construed and take effect in accordance with the laws of New Zealand.
10. **NOTWITHSTANDING** anything to the contrary in this deed and for the avoidance of doubt, the Consultant will:
- (a) not owe or have any greater obligations or liability, whether in scope or duration, to the Contractor that the Consultant would have owed or had to the Client; and
 - (b) be entitled to raise all limitations and to raise all defences to liability as would have been available to it against the Client, had the Client remained a party to the Agreement.
11. **FOR** the avoidance of doubt, the Consultant's aggregate liability under or in connection with the Agreement or this deed, whether prior to or following the novation of the Agreement, under contract, tort, statute or otherwise (including to the Client and the Contractor) shall be collectively no greater than the applicable monetary limit of its liability under the Agreement.

EXECUTED as a deed

SIGNED on behalf of the Client by:

.....
Authorised Signatory of Principal

SIGNED on behalf of the Contractor by:

.....
Director

.....
Director

SIGNED on behalf of the Consultant by:

.....
Director

.....
Director

NOTE -

- (1) A copy of the design agreement being transferred ('the Agreement) shall be attached and marked 'A'.
- (2) This deed shall be executed by the Contractor, the Client, and the Consultant in the manner required for execution of a deed. Any of these parties which are a company shall execute the bond by having it signed, under the name of the company, by two or more directors. If there is only one director, it is sufficient if the deed is signed under the name of the company by that director, but the signature shall be witnessed by another person. The witness shall not only sign but shall also add his or her occupation and address. Alternatively, companies may execute under power of attorney. Any party which is a body corporate (other than a company) shall execute in the same manner as a company by persons in a comparable position to a company director or otherwise in accordance with section 9 of the Property Law Act 2007. In the case of a party who is an individual, the party shall sign and the signature shall be witnessed by another person. The witness shall not only sign but shall also add his or her occupation and address.

Schedule 1

Agreement

Appendix H2: Deed of Novation (Principal to Principal)

Deed of Novation

Kāinga Ora—Homes and Communities

[insert] Limited

[insert] Limited

Date:

PARTIES

Kāinga Ora—Homes and Communities (*the Retiring Party*)

[INSERT] Limited (CN [INSERT COMPANY NUMBER]) (*the New Party*)

[INSERT] Limited (CN [INSERT COMPANY NUMBER]) (*the Continuing Party*)

BACKGROUND

- A The Retiring Party and the Continuing Party are parties to the Agreement.
- B With effect on and from the Effective Date, the Retiring Party wishes to novate all of its rights and obligations under the Agreement to the New Party and to be released from its obligations under the Agreement.
- C With effect on and from the Effective Date, the New Party wishes to accept the novation of all the Retiring Party's rights and obligations under the Agreement.

THE PARTIES AGREE:

1 INTERPRETATION

In this deed, unless the context otherwise requires, terms defined and references construed in the Agreement have the same meanings and constructions in this deed.

Other terms in this deed, unless the context otherwise requires, have the following meanings:

Agreement means the form agreement for consultant engagement dated [INSERT DATE] and made between the Retiring Party (1) and the Continuing Party (2), a copy of which is attached as an Appendix to this deed;

Effective Date means [INSERT DATE NOVATION IS TO TAKE EFFECT]; and

Novate and Novation mean the substitution of the Retiring Party's rights and obligations under the Agreement in favour of the New Party pursuant to clause 3.

2 NOVATION

The Retiring Party:

- (a) novates in favour of the New Party all of its rights and obligations under the Agreement (including liability for any breach of the Agreement by the Retiring Party prior to the Effective Date);
- (b) covenants in favour of the New Party and the Continuing Party to perform all of its obligations under the Agreement up to the Effective Date; and
- (c) releases the Continuing Party from all of its obligations under the Agreement for the period following the Effective Date.

3 NEW PARTY'S ACCEPTANCE

The New Party accepts the Novation with the effect that:

- (a) the New Party is substituted for the Retiring Party under the Agreement as if it had originally executed the Agreement in place of the Retiring Party;
- (b) all references in the Agreement to the Retiring Party are to be read and construed as if they were references to the New Party;
- (c) the New Party may exercise all the Retiring Party's rights under the Agreement; and
- (d) the New Party will perform all of the Retiring Party's obligations under the Agreement.

4 CONTINUING PARTY'S CONSENT, RELEASE AND CONFIRMATION

The Continuing Party:

- (a) consents to the Novation;
- (b) releases the Retiring Party from all of the Retiring Party's obligations to the Continuing Party under the Agreement; and
- (c) confirms that, from the Effective Date:
 - (i) the New Party is substituted for the Retiring Party under the Agreement as if it had originally executed the Agreement in place of the Retiring Party;
 - (ii) all references in the Agreement to the Retiring Party are to be read and construed as if they were references to the New Party; and
 - (iii) the New Party may exercise all of the Retiring Party's rights under the Agreement; and

5 AGREEMENT CONTINUES

As between the Continuing Party and the New Party, and except to the extent to which they are varied by this deed, the covenants, terms and conditions expressed and implied in the Agreement will continue in full force.

6 LICENCE OF INTELLECTUAL PROPERTY

- (a) The New Party and the Continuing Party grant to the Retiring Party a non-exclusive, non-assignable, royalty-free licence in perpetuity to copy or use any New Intellectual Property and Pre-Existing Intellectual Property for the purpose of projects other than the Client's Project provided that the Retiring Party acknowledges and agrees that if it uses New Intellectual Property or Pre-Existing Intellectual Property in relation to any project other than the Client's Project, then:
 - (i) the Continuing Party accepts no liability (whether in contract tort or otherwise) arising from the use of the New Intellectual Property or the Pre-Existing Intellectual Property by the Retiring Party in relation to such other project; and
 - (ii) the Retiring Party shall not use or refer to the name of the Continuing Party in relation to such other project without the Continuing Party's prior written consent.

- (b) The licence of the New Intellectual Property and Pre-Existing Intellectual Property required from each party under this clause 6 shall be limited to that party's interest in the New Intellectual Property and/or Pre-Existing Intellectual Property under the Agreement.
- (c) For the purposes of this clause "Pre-Existing Intellectual Property", "New Intellectual Property" and "Client's Project" shall have the meaning given to those terms in the Agreement.

7 LIABILITY

- (a) Notwithstanding anything to the contrary in this deed and for the avoidance of doubt, the Continuing Party will:
 - (i) not owe or have any greater obligations or liability, whether in scope or duration, to the New Party that the Continuing Party would have owed or had to the Retiring Party; and
 - (ii) be entitled to raise all limitations and to raise all defences to liability as would have been available to it against the Retiring Party, had the Retiring Party remained a party to the Agreement.
- (b) For the avoidance of doubt, the Continuing Party's aggregate liability under or in connection with the Agreement or this deed, whether prior to or following the novation of the Agreement, under contract, tort, statute or otherwise (including to the Retiring Party and the New Party) shall be collectively no greater than the applicable monetary limit of its liability under the Agreement.

8 COSTS

Each party will pay its own costs of and incidental to the preparation and completion of this deed, every further assurance pursuant to the following clause and any and all related disbursements.

9 FURTHER ASSURANCE

Each party, at its own expense, and at the request of any other party, will execute and deliver all relevant documents and do all things as may be reasonably requested by that other party, or will cause its successors and permitted assigns to do so, so that each party obtains the full benefit of this deed according to its true intent.

10 ASSIGNMENT

Each party to this deed may only transfer or assign any of its rights or obligations under this deed with the prior written consent of the other parties.

11 GOVERNING LAW

This deed will be construed and take effect in accordance with the laws of New Zealand.

12 COUNTERPARTS

This deed may be executed in any number of counterparts. All counterparts together will be taken to constitute one instrument. This deed may be executed on the basis of an exchange of facsimile copies or copies sent by electronic transmission and execution of this deed by such means is to be a valid and sufficient execution.

EXECUTION

EXECUTED AS A DEED by **KĀINGA ORA—HOMES AND COMMUNITIES** by its duly authorised attorney in the presence of:

Attorney

.....
Witness Signature

Name (Please Print)

.....
Witness Name (Please Print)

.....
Occupation (Please Print)

.....
Address (Please Print)

EXECUTED AS A DEED by:

.....
(The New Party)

.....
Director

Director

.....
Name (Please Print)

Name (Please Print)

EXECUTED AS A DEED by:

.....
(The Continuing Party)

.....
Director

Director

.....
Name (Please Print)

Name (Please Print)

APPENDIX: AGREEMENT
(Clause 1)

Note – *This deed must be executed by the Retiring Party, the New Party and the Continuing Party in the manner required for execution of a deed. Any of these parties which are a company must execute the bond by having it signed, under the name of the company, by two or more directors. If there is only one director, it is sufficient if the bond is signed under the name of the company by that director, but the signature must be witnessed by another person. The witness must not only sign but must also add his or her occupation and address. Alternatively, companies may execute under power of attorney. Any party which is a body corporate (other than a company) must execute by affixing its seal, which must be attested in the manner provided for in the rules of, or applicable to, the body corporate. In the case of a party who is an individual, the party must sign and the signature must be witnessed by another person. The witness must not only sign but must also add his or her occupation and address.*