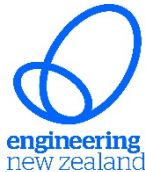


# Conditions of Contract for Consultancy Services



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This document has been endorsed for use by the following organisations:



# **CONDITIONS OF CONTRACT FOR CONSULTANCY SERVICES**

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## FOREWORD

The Conditions of Contract for Consultancy Services were developed jointly in 2000 by the Auckland Region Contracts Group (ARCG), ACENZ (now ACE New Zealand), IPENZ (now Engineering New Zealand), ALGENZ (Ingenium, now IPWEA NZ) and Transit NZ (now NZ Transport Agency).

A second edition was prepared in 2005 and a third edition in 2009. This fourth edition is the result of experience from use of the earlier editions and changes in health and safety and construction contracts legislation. The fourth edition has been developed by representatives of ACE New Zealand, CEAS, Engineering New Zealand, Institute of Public Works Engineering Australasia NZ, New Zealand Institute of Architects, central and local government organisations.

These Conditions of Contract for Consultancy Services (fourth edition) are recommended for general use for contracts for the purpose of procuring and providing professional consulting services. They have been developed to apply to a wide range of consulting services and for most types of projects. This document is for use where the Services are being procured for the purposes of a business.

The General Conditions of Contract are intended to be amplified or adapted as required to suit particular engagements by use of the Special Conditions. A *pro forma* is included with the document. Similarly, a formal Agreement is also included.

Users are invited to copy this document in order to bind it into a contract, on the condition that any variations should be clearly identified to all parties.

## COPYRIGHT

Copyright of this CCCS version is held by ACE New Zealand and endorsed for use by those organisations listed on page 2.

Whilst use of this document is encouraged as best practice in New Zealand, the General Conditions should not be modified or amended and passed off as this document.

## ACCESS

The document is free to download from

<http://www.acenz.org.nz/library> as a Microsoft Word document with limited editable fields and as a PDF. Special Conditions Part A and Part B are available as separate documents with Part B being completely editable.

The *pro forma* Agreement can be copied in an editable version for completing as can the Special Conditions and Appendices. Such customisation of these *pro forma* is acceptable.

# FORM OF AGREEMENT FOR ENGAGEMENT OF CONSULTANT

This **AGREEMENT** is made the \_\_\_\_\_ day of \_\_\_\_\_ (month, year)

**BETWEEN**

Of  
("Client")

**AND**

Of  
("Consultant")

For Services in connection with  
("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
- General Conditions of Contract for Consultancy Services (Fourth Edition)
- 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
- 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

**SIGNED** for the Client by:

\_\_\_\_\_

Signature

\_\_\_\_\_  
Name

\_\_\_\_\_  
Position

**SIGNED** for the Consultant by:

\_\_\_\_\_

Signature

\_\_\_\_\_  
Name

\_\_\_\_\_  
Position

**In the presence of:**

Signature  
of Witness

\_\_\_\_\_

Name of  
Witness

\_\_\_\_\_

**In the presence of:**

Signature of  
Witness

\_\_\_\_\_

Name of  
Witness

\_\_\_\_\_

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

# GENERAL CONDITIONS OF CONTRACT FOR CONSULTANCY SERVICES

## 1. Definitions and Interpretation

### 1.1 Definitions

#### **Agreement**

The Agreement is:

the contract between the Consultant and the Client. The documents forming the contract are listed in the Form of Agreement for Engagement of Consultant.

#### **CCA**

The CCA is:

the Construction Contracts Act 2002.

#### **Client**

The Client is:

the Party named as the Client in the Agreement.

#### **Client's Project**

The Client's Project is as stated in the Form of Agreement.

#### **Client's Representative**

The Client's Representative is:

the person named as the Client's Representative in Appendix C.

#### **Confidential Information**

Unless otherwise noted:

- all professional advice or other information of a sensitive nature; and
- all information about the Parties, or their businesses, or their clients gained during the currency of this Agreement that is not already in the public domain,

shall be considered as Confidential Information.

However, information that is public knowledge (otherwise than through a breach of confidentiality obligations by either Party) shall not be considered as Confidential Information.

#### **Consultant**

The Consultant is:

the Party named as the Consultant in the Agreement.

#### **Consultant's Representative**

The Consultant's Representative is:

the person named as the Consultant's Representative in Appendix D.

## **Contractor**

Contractor means:

a person or entity that the Client engages to carry out the whole or part of the Works and includes any subcontractor engaged by a Contractor.

## **Designer**

Designer means:

a PCBU who undertakes designs of plant, substances or structures as defined in the HSWA.

## **HSWA**

The HSWA is:

the Health and Safety at Work Act 2015.

## **Intellectual Property**

New Intellectual Property means:

all intellectual property rights, including (but not limited to) copyright, in all concepts, designs, drawings, specifications, plans, studies, reports, models, software and documentation collated, prepared or created in any medium by the Consultant (or persons on behalf of the Consultant) in carrying out the Services and provided to the Client as deliverables but not including Pre-existing Intellectual Property.

Pre-existing Intellectual Property means:

all intellectual property rights owned by the Consultant or any third party and provided or used by the Consultant in carrying out the Services.

Client's Intellectual Property means:

all intellectual property rights owned by the Client and provided to the Consultant for the purposes of carrying out the Services or the Works.

## **Key Personnel**

Key Personnel are:

the persons named as the Consultant's and/or Subconsultant's Key Personnel in Appendix D or E, including the Consultant's Representative.

## **Other Consultant**

Other Consultant means:

a person or entity listed in Appendix F (other than the Consultant) the Client engages to carry out other consulting or advisory services related to the Services. It does not include a Contractor.

## **Party**

Party means:

the Client or Consultant; "Parties" means the Client and the Consultant and "Third Party" means any other person or entity as the context requires, including a Contractor and Other Consultants, but excluding Subconsultants.

**PCBU**

PCBU means a person conducting a business or undertaking as defined in the HSWA.

**Services**

The Services are:

the services listed in Appendix A.

**Subconsultant**

Subconsultant means:

a person or entity, as listed in Appendix E, engaged by the Consultant to assist in the provision of the Services, together with any Subconsultants appointed under clause 2.4.

**Variation**

Variation means:

a change in the provisions of the Services, including scope, time of supply or scale.

**Working Day**

A Working Day is:

a calendar day other than a Saturday, Sunday, statutory or public holiday or any day falling within the period from 24 December to 5 January both inclusive irrespective of the days on which work is actually carried out.

**Works**

Works means:

the physical and other works (if any) relating to the Services, to be carried out by a Contractor or by the Client, including goods and equipment to be supplied to the Client.

**1.2 Interpretation**

In these General Conditions of Contract for Consultancy Services, the singular shall include the plural, the masculine shall include the feminine, and vice versa where the context requires.

A reference to a Party includes their respective successors, executors and administrators.

A reference to any Act or Regulation shall include all subsequent Acts or Regulations in amendment of, or substitution for, the same.



## **2. Obligations of the Consultant**

### **2.1 The Services**

The Consultant must:

- provide the Services set out in Appendix A; and
- perform the Services in accordance with the timetable set out in Appendix A; and
- advise the Client promptly if additional briefing or information is required from the Client to avoid any delay to the provision of Services or Works; and
- act for the Client as set out or implied in Appendix A; and
- subject to clause 7, comply with all reasonable instructions issued by the Client in relation to the Agreement.

### **2.2 Duty of Care**

In providing the Services, the Consultant must use the degree of skill, care and diligence reasonably expected of a professional consultant providing services similar to the Services.

### **2.3 Duty of Independent Judgement**

Where the Services require the Consultant to certify, decide or use discretion under a contract between the Client and a Third Party, the Consultant must act independently, and with professional skill and judgement, according to the terms of the contract between the Client and the Third Party.

### **2.4 Subconsultants**

Subconsultants may be appointed at any time subject to prior approval by the Client, such approval not to be unreasonably withheld.

Subject to clause 12.9, the Consultant shall appoint, direct and pay any Subconsultant. The Consultant is responsible to the Client for the services of any Subconsultant.

The sub-contracting of any of the Services shall not relieve the Consultant from any liability or obligation under the Agreement.

If the Client decides for good reason that a Subconsultant is unsuitable, the Client can require the Consultant not to have that Subconsultant perform the Services. The Consultant shall then replace that Subconsultant.

### **2.5 Other Consultants**

The Consultant must direct and/or co-ordinate the work of Other Consultants where required by the Services. The Consultant shall not be responsible for the services and/or work of Other Consultants.

### **2.6 Ordering Client Materials or Services**

The Consultant must obtain the Client's written approval before purchasing or ordering any goods or services, materials or equipment on behalf of the Client.

### **2.7 Client Concerns**

The Consultant must remedy any concerns notified by the Client under clause 3.3 to the satisfaction of the Client, or agree with the Client a plan for remedying any such concerns, before proceeding to the next stage of the Services.

### **2.8 Conflicts of Interest**

The Consultant must try to ensure that conflicts of interest do not arise, and notify the Client immediately in writing if it is thought that a conflict of interest may arise or has arisen.

Where a conflict of interest is identified and the Client has given informed consent, the Consultant must establish structures and practices which:

- ensure that the conflict is avoided in practice; or
- if avoidance is not practicable, ensure that the effects of conflict are minimised.

In either situation, the Consultant must inform the Client of the structures and practices that have been established.

## **2.9 Instructions to Contractors**

The Consultant may instruct the Contractor and/or vary the Works to the extent authorised in Appendix A. The Consultant must not instruct a Contractor to vary the Works in a material way beyond this authority, unless an emergency occurs. In emergency circumstances, the Consultant may vary the Works and shall immediately notify the Client about the changes.

## **2.10 Health and Safety**

The Consultant must have in place a health and safety management plan that is appropriate for the Services and comply with any health and safety plan operated by the Party or Third Party who manages or controls the workplace.

The Consultant is responsible for health and safety issues relating to the provision of the Services including:

- being aware of and complying with any of the Consultant's obligations (including obligations of the Consultant where the Consultant is acting as a Designer) under the HSWA; and
- so far as is reasonably practicable, (as defined in the HSWA) consulting, cooperating and coordinating activities with the Client and other relevant parties (including Contractors); and
- where the Services expressly include management duties in relation to the Works, assisting the Client in complying with the Client's obligations, in relation to the Contractor, under the HSWA, including raising health and safety issues with the Contractor and the party who manages or controls the workplace.

The Consultant has not and will not assume any duty imposed on the Client pursuant to the HSWA in connection with the Agreement.

## **2.11 Public Statements**

The Consultant must not make any public or media statements to anyone about this Agreement, the Services or the Works without the Client's written approval.

## **2.12 Delay**

If at any time the Consultant's performance falls behind the programme set out in Appendix A (as amended from time to time in accordance with the Agreement), then the Consultant shall notify the Client and, where due to matters within the control of the Consultant, shall take all practicable steps to remedy such delay.

## **2.13 Consultant to give Early Warning**

The Consultant must notify the Client in writing as soon as the Consultant becomes aware, or should reasonably have become aware, of any direction or other circumstance which could impact the provision of the Services, and whether or not the Consultant considers the direction or other circumstance to be a Variation. Within 15 Working Days of the notice date the Consultant shall provide the Client with details of the estimated impact of the direction or other circumstance on the cost of the Services, likely or estimated impact on the programme and completion date for the Services and make recommendations on how to proceed.

## **3. Obligations of the Client**

### **3.1 Payment**

The Client must pay the Consultant for the Services according to Appendix B and the terms and conditions set out in Section 5.

### **3.2 Provision of Information to the Consultant**

The Client must:

- provide, free of charge, the information listed in Appendix F; and
- declare any ownership or proprietary rights any other person may have to this information and pay for any royalties or fees required to be paid for the Consultant to use such information to provide the Services; and
- in response to the Consultant's request, provide additional relevant information, within a timeframe that does not materially delay the Services or the Works; and
- accept responsibility for the accuracy of information provided. The Consultant is expected to review all the information provided to ensure that it contains no manifest errors or omissions. No Variation will exist if the information contains manifest errors or omissions that the Consultant should reasonably have been expected to find.

### **3.3 Client Decisions**

The Client must respond to any written request from the Consultant for a decision within a reasonable time, to avoid or minimise any delay to the provision of the Services or Works.

If the Services are to be provided in stages, then the Client must approve the current stage before the Consultant may proceed with the next stage. If the Client has any concerns with the current stage, the Client shall notify the Consultant of these in writing prior to giving approval for the Consultant to proceed to the next stage.

### **3.4 Assistance to the Consultant**

The Client must co-operate with the Consultant and not obstruct the proper performance of the Services.

The Client must, as soon as practicable:

- provide, free of charge, the personnel, equipment and facilities described in Appendix F; and
- allow the Consultant to visit the site and other locations associated with the Services; and
- obtain and pay for all consents, certificates, approvals, authorities, licences and permits that are needed to lawfully carry out the Works, except where they are to be obtained by the Consultant as set out in Appendix A.

### **3.5 Other Consultants**

Where the Consultant has to direct and/or co-ordinate the work of Other Consultants, the Client must include in the conditions of contract with the Other Consultants a requirement that the Other Consultants have the required insurance and that they will work under the direction of, and co-operate with, the Consultant. The amount of insurance required by each Other Consultant shall be the amount specified in Appendix F. If no sum is specified, it shall be not less than that required of the Consultant under Section 6 and the Special Conditions, unless the Client and Consultant specifically agree otherwise.

The Client shall arrange and must pay for the services provided by Other Consultants.

The Client shall be responsible for the services or work provided by Other Consultants.

Where the Client wishes to appoint an Other Consultant not included in Appendix F, the Client shall, where relevant, confer with the Consultant prior to the appointment of an Other Consultant regarding the scope of work, conditions of contract and selection of the Other Consultant.

### **3.6 Instructions to Others**

If, under this Agreement, the Consultant has to direct and/or co-ordinate work carried out by Other Consultants and/or Third Parties directly contracted to the Client, the Client shall give all instructions to such Other Consultants and/or Third Parties through the Consultant.

### **3.7 Client to give Early Warning**

As soon as the Client becomes aware of anything that will materially affect the scope or timing of the Services, the Client must inform the Consultant in writing.

### **3.8 Health and Safety**

The Client shall provide to the Consultant a list of known identified risks to health and safety relevant to the Services and as set out in Appendix G, and any safety risk register or health and safety management plan operated by the Client that is relevant to the Services.

As a PCBU, the Client shall, so far as reasonably practicable, consult, cooperate with and coordinate activities with other PCBUs which have a duty in relation to the same matter.

- for Services where the Consultant is acting as Designer, the Client shall participate in consultation undertaken by the Consultant, and
- for sites where there are multiple suppliers providing services and works, the Client shall work with other PCBUs to determine who manages or controls the work place, and will collaborate and consult with them as appropriate.

The Client does not assume any obligation of the Consultant under the HSWA.

### **3.9 Approvals**

Where approval of the Client is sought under this Agreement, it shall not be unreasonably withheld or delayed.

Where the Client gives its consent, review or approval in respect of any matter arising in relation to the Services, such consent, review or approval shall not reduce the liability of the Consultant in respect of the matter approved except:-

- where the matter being approved reasonably carries some risk; and
- the risk has been identified to the Client in writing; and
- the Client has accepted that risk in writing.

## **4. Personnel**

### **4.1 Client's Representative**

The Client's Representative has authority to give the Consultant instructions on the Client's behalf; and may monitor, review, approve, accept, reject or confirm any part, or all, of the Services.

If the Client changes the Client's Representative, the Client shall first inform the Consultant in writing.

### **4.2 Consultant's Representative**

The Consultant's Representative has authority to receive instructions on behalf of the Consultant and for co-ordinating and providing the Services as agreed on a day-to-day basis, and must communicate with the Client's Representative when required.

### **4.3 Key Personnel**

The written approval of the Client shall be obtained by the Consultant before Key Personnel can be replaced or substituted.

If the Client decides for good reason that one of the Key Personnel is unsuitable:

- the Client can require the Consultant not to have that person perform the Services; and
- the Consultant shall then replace that person with someone acceptable to the Client; and
- the Client shall not bear any cost or liability arising from the replacement of that person.

## **5. Payment**

### **5.1 Right to progress payments**

The Consultant is entitled to progress payments monthly or at any other frequency or timing set out in Appendix B.

Payment shall be due on the 20<sup>th</sup> of the month following the month of issue of each GST Invoice or at such other timing set out in Appendix B.

### **5.2 Payment on Account**

Payment to the Consultant by the Client does not constitute approval of any part of the Services and will be payment on account only.

### **5.3 Time for Payment**

The Client must pay the Consultant all undisputed amounts claimed and due under the Agreement. Where an invoice, or part of an invoice, is not paid as required by this clause 5.3, or any disputed amount that is not paid is subsequently found to be payable, the Client must pay interest on the unpaid amount from due date to the date of actual payment at the Consultant's non-penalty overdraft interest rate.

### **5.4 Disputed Invoices**

Where the nature of the Services is such that it is covered by the CCA and the Consultant has issued a payment claim in accordance with the CCA, the provisions of the CCA shall apply. In all other cases, if the Client, acting reasonably, disputes an invoice, or part of an invoice, the Client must promptly give the reasons for withholding the disputed amount and pay any undisputed amount in accordance with clause 5.3.

## **6. Liability and Insurance**

### **6.1 Liability**

Where the Consultant breaches this Agreement, 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 the breach.

A Party shall not be liable to the other Party under this Agreement for the other Party's indirect, consequential or special loss, or loss of profit, however arising, whether under contract, in tort or otherwise.

### **6.2 Limitation of Liability**

The maximum aggregate amount payable, whether in contract, tort or otherwise, in relation to claims, damages, liabilities, losses or expenses, is as specified in the Special Conditions.

### **6.3 Contributory Conduct**

If either Party is found liable to the other (whether in contract, tort or otherwise), and the claiming Party and/or a Third Party has contributed to the loss or damage, the liable Party shall only be liable to the proportional extent of its own contribution.

### **6.4 Duration of Liability**

Without limiting any defences a Party may have under the Limitation Act 2010 or any other legislation, neither party shall be liable for any loss or damage occurring after the period stated in the Special Conditions from the date on which the Services were completed.

### **6.5 Insurance**

The Consultant shall take out and maintain for the duration of the Services:

- professional indemnity insurance for the amount of the liability under clause 6.2; and
- public liability insurance cover as set out in the Special Conditions; and
- other insurance as set out in the Special Conditions; and
- provision for reasonable defence costs.

The Consultant shall use all reasonable endeavours to maintain professional indemnity insurance for the duration of liability stated under clause 6.4. If at any time the Consultant is unable to obtain or maintain professional indemnity cover as required by the Agreement, or if any material change to the terms and conditions of the cover occurs, the Consultant shall, as soon as practicable, notify the Client in writing.

### **6.6 Proof of Insurance**

If the Client asks, the Consultant must produce certificates evidencing the currency of such cover and proving that professional indemnity and public liability insurance policies meet the requirements in clause 6.5.

## **7. Variations**

### **7.1 Variations to the Services**

The Client may order a Variation to the Services, in writing, or may ask the Consultant to propose a Variation to the Services, the impact of which on the cost, programme and completion date for the Services shall be agreed as in 7.2.

Where the Consultant notifies the Client under clause 2.13 that any direction or circumstance should be treated as a Variation, the Client shall as soon as practicable after receiving such notice, but within 15 Working Days, respond to the Consultant in writing whether or not it considers the direction or other circumstances to be a Variation and give the reasons for its decision. If the Consultant did not notify the Client in accordance with clause 2.13 that a direction or circumstance should be treated as a Variation, any Variation arising out of the matter shall be valued as if notification had been given and that notification might reasonably have resulted in the impact of the matter being avoided or reduced.

The Client shall not be bound to agree that a direction or circumstance should be treated as a Variation to the extent the relevant direction or circumstance was required as a result of a breach of this Agreement by, or the negligent act or omission of, the Consultant.

If the Client does not consider the direction or other circumstance to be a Variation then the Client and Consultant shall attempt to resolve the matter as soon as practicable, and if a Variation entitlement is agreed, proceed as in 7.2.

### **7.2 Agreement of Variations**

Where Appendix B contains rates or prices applicable to the circumstances, nature of work and resources required to undertake the Variation, then those rates and prices may be used to value the Variation. Where Appendix B does not include applicable rates or prices, the Client and the Consultant shall agree, in writing, the value of the Variation or the mechanism under which the value will be derived. In either case, the Client and Consultant shall agree, in writing, the impact of the variation on the programme and completion date for the Services.

Where practicable the value of the Variation and impact on the programme and completion date for the Services shall be agreed between the parties prior to the Variation works progressing.

Where the value of the Variation cannot practicably be agreed between the Parties prior to the Variation works commencing, the parties shall agree to a budget for the Variation works that shall not be exceeded without further agreement between the Parties.

### **7.3 Failure to Agree**

In the event that the Parties are unable to reach agreement on whether a direction or circumstance should be treated as a Variation, or on the value and impact on the programme and completion date for the Services, the matter shall be treated as a dispute and resolved in accordance with clause 10.



## **8. Confidentiality**

### **8.1 Client Obligations**

The Client must:

- keep all Confidential Information relating to the Consultant confidential and only use it for the purposes it was made available; and
- not disclose Confidential Information relating to the Consultant without the Consultant's written approval, unless it is necessary for the purposes of the Services or the Works to disclose it to any appropriate third party, or as required by law.

### **8.2 Consultant Obligations**

The Consultant must:

- keep all Confidential Information relating to the Client or the Client's Project confidential and only use it for the purposes it was made available; and
- not disclose any Confidential Information relating to the Client or the Client's Project or the Works without the Client's written approval, unless it is necessary for the purposes of the Services or Works to disclose it to any appropriate third party, or as required by law.

### **8.3 Exclusions**

If the Client is subject to the Official Information Act 1982, the Local Government Official Information and Meetings Act 1987 or the Privacy Act 1993 then the Consultant acknowledges that, pursuant to those Acts, the Client may be required to release information about the Services, the Client's Project or this Agreement.

If either Party is legally bound to disclose Confidential Information, that Party must first advise the other Party what information will be provided and limit the information to that required by the law.

The Consultant's and any Subconsultant's personnel may be required to disclose Confidential Information if required by their code of professional ethics. In such cases the Consultant shall advise the Client of this requirement and limit the information disclosed to that necessary to comply with the applicable code of ethics.

### **8.4 Return of Confidential Information**

Upon request, and except as in clause 11.3, the Consultant must promptly return to the Client or destroy all Confidential Information which is in the Consultant's possession or control.

## 9. Intellectual Property

- 9.1** 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 unrestricted 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.
- 9.2** All Pre-existing Intellectual Property shall remain the property of the original owner. The Client's Intellectual Property shall remain the property of the Client. The Consultant hereby grants to the Client, or agrees to procure the grant to the Client of, an unrestricted royalty-free licence to use and copy Pre-existing Intellectual Property to the extent reasonably required to enable the Client to make use of the Services or use, adapt, update or amend the Works. The Client hereby grants to the Consultant, an unrestricted royalty-free licence to use and copy the Client's Intellectual Property provided to the Consultant to the extent reasonably required to enable the Consultant to provide the Services.
- 9.3** The Client's rights in relation to New Intellectual Property or to any licence in respect of Pre-existing Intellectual Property are conditional upon, on each occasion, the Client having paid all amounts due and payable to the Consultant in accordance with clauses 5.3 and 5.4 concerning the Services which produced the New Intellectual Property or made use of the Pre-existing Intellectual Property. Until such payment is made, the related deliverables in whatever medium will remain the property of the Consultant.
- 9.4** The Consultant confirms (save in respect of any of the Client's Intellectual Property and subject to clause 9.5) that the New Intellectual Property, the Pre-existing Intellectual Property, the Services and the Services as incorporated in the Works will not infringe any intellectual property or other rights of any third party.
- 9.5** The Consultant accepts no liability for use of New Intellectual Property or Pre-existing Intellectual Property other than to the extent reasonably required for the intended purposes relating to:
- The Services, and the Client's Project; and
  - Where the Client's Project involves Works: the construction, operation, maintenance, repair, renovation or demolition of the resulting structure or installation.
- 9.6** The Client owns, or has the right to use, Confidential Information disclosed or provided to the Consultant under this Agreement.
- 9.7** The ownership of data and factual information collected by the Consultant and paid for by the Client shall, after payment by the Client, lie with the Client.
- 9.8** Notwithstanding clause 9.7, unless otherwise agreed, and in all cases where the Consultant has made use of the New Zealand Geotechnical Database on the Client's behalf, new geotechnical factual information (both raw data and graphical logs) collected in the course of providing the Services shall be uploaded by the Consultant in digital format to the New Zealand Geotechnical Database.

## 10. Disputes

- 10.1** If there is a dispute between the Parties in relation to this Agreement, or any matter arising from it, the Parties will in good faith in the first instance use their best endeavours to resolve the dispute themselves.
- 10.2** If the dispute cannot be resolved by the Parties themselves within a reasonable time, then they must explore whether the dispute can be resolved by use of mediation or other alternative resolution technique.
- 10.3** If the dispute is not settled within a reasonable time, then either Party may refer the dispute to arbitration by a sole arbitrator under the provisions of the Arbitration Act 1996 and the substantive law of New Zealand. The arbitrator will be appointed by agreement between the Parties within 15 Working Days of written notice of referral by the referring party to the other or, failing agreement, by the President of the Arbitrators' and Mediators' Institute of New Zealand (AMINZ) or its successor body, or any nominee of the President. In either case, the arbitrator must not be a person who has participated in any informal dispute resolution procedure in respect of the dispute.
- 10.4** No dispute arising gives either Party the right to suspend their obligations under the terms of this Agreement.
- 10.5** Where the nature of the Services is such that it is covered by the CCA nothing in 10.4 shall affect the Consultant's rights under that Act.

# 11. Termination

## 11.1 Termination of the Agreement

The Client may terminate this Agreement at any time, or under the provisions of clause 12.5, by written notice to the Consultant. As soon as this notice is received, the Consultant shall stop the Services.

The Consultant may terminate this Agreement by written notice only if the Client has materially breached the terms of the Agreement.

At the completion of the Services and return of all data and information pertaining to the Services, referred to in Clauses 11.3 and 11.4, the Agreement is hereby terminated.

Termination of this Agreement shall not prejudice or affect the accrued rights or claims and liabilities of the Parties.

## 11.2 Payment on Early Termination

If the Client terminates this Agreement, or the Consultant terminates this Agreement because the Client has breached it, then the Client must immediately pay the Consultant for Services provided to the date of termination.

If the Client terminates the Agreement for reasons other than a default by the Consultant, or if the Consultant terminates the Agreement because of a default by the Client, the Client must immediately pay the Consultant for Services provided to the date of termination and also pay any reasonable costs that the Consultant incurs solely because of the early termination of the Agreement.

If the Client terminates this Agreement because of a material breach of the Agreement by the Consultant the Client shall not be obliged to pay for the Services that have caused the material breach.

## 11.3 Return of Property/Equipment

At the end of the Services, the Consultant must return to the Client any property, including the Client's Intellectual Property, or equipment of the Client which is in the Consultant's possession or control.

Notwithstanding any other provision in this Agreement the Consultant shall be entitled to retain a copy of all documentation including Confidential Information, drawings, specifications, reports, correspondence, computer files and records of every description for its record keeping purposes only. Such documentation shall include all relevant New, Pre-existing and Client's Intellectual Property. The Consultant shall treat all such documentation as Confidential Information and shall mark it confidential.

## 11.4 Transfer of New Intellectual Property

In the event of termination by the Client, the Consultant shall provide reasonable assistance to the Client in the transfer of the Services (including delivering copies of any New Intellectual Property in the Consultant's control) to the new consultant provided that the Client has made all payments due and owing under the Agreement.

## 11.5 Right of Suspension for Non-payment

If the Client fails to make the payment that is due and payable in accordance with clauses 5.3 and 5.4 and that default continues for 10 Working Days, the Consultant may provide written notice to the Client specifying the default and requiring payment within 5 Working Days from the date of the notice. Unless payment has been made by the Client in full, the Consultant may suspend performance of the Services any time after expiration of the notice period. The Consultant must promptly lift the suspension after the Client has made the payment.

## 12. General Provisions

### 12.1 Law and Currency

This Agreement is subject to New Zealand law. References to dollars are references to New Zealand dollars unless otherwise stated. Any arbitration or court proceedings about this Agreement, or the Services, must be brought and heard in New Zealand.

### 12.2 Services Supplied to a Consumer

Subject to clause 12.3, where the Services are supplied to the Client as a “consumer” as defined in the Consumer Guarantees Act 1993, nothing in the Agreement will exclude or limit the Client’s rights or remedies under that Act.

### 12.3 Services Acquired in trade

Where the Client is in trade, the Services are acquired in trade and it is fair and reasonable under section 43 of the Consumer Guarantees Act 1993 or section 5D of the Fair Trading Act 1986 (as applicable), the Parties agree that in connection with the Services and the Agreement:

- they will be bound by this clause 12.3, and
- the provisions of the Consumer Guarantees Act 1993 will not apply; and
- Section 9 (misleading conduct), section 12A (unsubstantiated representations) and section 13 (false or misleading representations) of the Fair Trading Act 1986 will not apply to either Party’s conduct or representations if unintentional.

### 12.4 Changes in Legislation

If, after the date of this Agreement, the cost or duration of the Services alter because of changes or additions to any statute, regulation or by-law, or requirements of any authority that has jurisdiction over any part of the Works or the Services, the agreed changes to cost and duration of the Services will be treated as a Variation.

### 12.5 Events beyond Control

Should any event occur which:

- is beyond the control of either Party; and
- is neither directly nor indirectly caused by either Party; and
- prevents the performance of the Services (in whole or in part) required under this Agreement,

then those Services will be suspended until such time that it becomes practicable to recommence the Services. This does not include events personal to either Party, such as ill-health or lack of funding or resources.

In the event that there is a reasonable likelihood that the Services are not able to be recommenced, then this Agreement may be terminated by the Client.

In circumstances where the Services or part of the Services have to be suspended or delayed, the Consultant will be allowed extra time to complete the Services and such extra time should be reasonable in the circumstances.

In the event that the suspension continues for greater than 6 months, then this Agreement may be terminated by the Consultant.

### 12.6 Advertising

The Consultant must first obtain the Client’s written permission if it wants to put up a sign on or near the site of the Works (or to which the Services relate) that directly or indirectly shows its involvement with the Works

## **12.7 Reporting**

The Client and the Consultant shall review and discuss the progress of the Services, as agreed from time to time, or as reasonably requested.

## **12.8 Notices**

All demands, notices, requirements and consents this Agreement authorises or requires, or that relate to this Agreement, must be in writing and will take effect from receipt at any one of the addresses shown in the Special Conditions. These may be delivered:

- by hand or by facsimile, in which case a written confirmation of receipt is required, or
- by registered letter, or
- by email, in which case receipt will take effect upon receipt by the sender of the email message indicating that the email has been opened at the recipient's terminal, provided that any communication received, or deemed received after 5pm, or on a day which is not a Working Day, shall be deemed not to have been received until the next Working Day.

## **12.9 Assignment**

Neither Party shall assign, transfer or subcontract all or part of its rights or obligations under this Agreement without the other Party'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 (as defined in the Companies Act 1993), such approval shall not be unreasonably withheld.

If either Party assigns or transfers its rights, the Party will remain liable for the performance of its obligations under this Agreement, unless specifically stated to the contrary in any written consent to an assignment or transfer.

## **12.10 Survival of Provisions**

The provisions of clauses 2.10, 2.11, 5, 6, 8 and 9 shall continue in effect after termination of the Agreement.

## **12.11 No Waiver**

Any waiver given by either Party in connection with this Agreement is binding only if it is in writing, and then strictly in accordance with the terms on which it is given. Subject to this clause, no waiver given by either Party for the purposes of this Agreement affects or limits that Party's rights against the other Party under this Agreement.

## **12.12 Severability**

Each term of this Agreement is separately valid and binding. If for any reason either Party cannot rely on any term, all other terms will remain valid and binding, and the Parties will negotiate in good faith for an alternative term with similar financial effect for both Parties.

## **12.13 No Partnership**

Nothing in this Agreement is to be construed as evidence of a partnership between the Parties.

## **12.14 GST**

Where there is a reference to any payment under this Agreement, GST (or any similar tax) is to be added to the amount of that payment.

## **12.15 Client's Regulatory Functions**

If the Client has regulatory functions outside of the Agreement, the Client shall be deemed not to be acting in the capacity of the Client under this Agreement when exercising these functions in good faith.

### **12.16 Entire Agreement**

The Agreement constitutes the entire agreement between the Client and the Consultant for the performance of the Services by the Consultant. The Agreement supersedes all previous negotiations, representations and warranties except as may be expressly incorporated in the Agreement.

### **12.17 Counterparts**

This agreement may be signed in any number of counterparts, each of which is an original and all of which, taken together, form one single document.

### **12.18 Amendments to the Agreement**

No amendment to this Agreement shall be effective unless it is in writing and signed by both Parties.

# APPENDICES

(COMPLETE ON SEPARATE SHEETS AS REQUIRED)

**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,  
Other Key Personnel**

**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**



# **SPECIAL CONDITIONS – PART A**

## **Specific Conditions of Contract**

(AVAILABLE AS A SEPARATE DOCUMENT WITH LIMITED EDITABILITY)

# **SPECIAL CONDITIONS – PART B**

## **Other Conditions of Contract**

**(AVAILABLE AS A SEPARATE DOCUMENT WITH COMPLETE EDITABILITY)**