Te Kāhui Whaihanga New Zealand Institute of Architects

ace new zealand — association of consulting and engineering

Practice Alert

Kāinga Ora Professional Services Agreement (July 2021)

The Issues

Kāinga Ora — Homes and Communities has now released its Conditions of Contract for Consultancy Services (**CCCS**), July 2021 (**Agreement**) to consultants following final negotiations with Te Kāhui Whaihanga New Zealand Institute of Architects (**Institute**) and the Association of Consulting and Engineering New Zealand (**ACE NZ**).

Practice Alert 28 Kāinga Ora Revised Form of Services Agreement dated June 2021, issued on 25 June noted that further detail on the revised agreement would be provided to members. Practice Alert 29 provides a summary of the Agreement contents, potential risks and matters for consideration by members. A final version of the Agreement has been placed on the Institute website under Practice Resources/Contract Documents and is available on the Kāinga Ora website under https://kaingaora.govt.nz/working-with-us/procurement-supplying-goods-and-services-to-us/.

Institute members should also refer to the earlier Industry Update 04: Kāinga Ora Professional Services Agreement issued 26 March 2021 which can be found here and NZIA Notices dated 10 November and 22 December 2020.

What you need to know

Members should familarise themselves with the updated Agreement and the key changes. The attached table outlines the key features and potential issues/risks for members.

The Institute and ACE NZ would prefer Purchasing Agencies under the MBIE Collaborative Marketplace Agreement and Construction Sector Accord to use the default All-of-Government (AoG) CCCS, or even the CCCS unamended.

A review in three months has been agreed by the Institute, ACE NZ and Kāinga Ora. If you have any feedback on the revised Agreement, please contact the Institute or ACE NZ directly. This alert is not intended as legal or insurance advice, nor is the table intended to be exhaustive in content. Members should seek assistance from their own legal or insurance advisers where they have concerns with the terms and conditions of the Agreement.

Like the Ministry of Education form of CCCS, the ACE NZ CCCS (2017) form of contract (including the General Conditions of Contract) has been referenced in the Agreement, but a copy has not been included in the Agreement. Members are encouraged to obtain a copy of this from ACE NZ website and file it with the signed Kāinga Ora contract for future reference.

Steps you should take

Members should review the Agreement carefully, and specifically the issues included in the table. The terms and conditions of the Agreement need to be considered carefully by each practice in relation to their project and specific practice risks.

All members engaging with Kāinga Ora for consulting services should ensure that they have the up-to-date version of the Agreement. Please check that Special Conditions Part A contains a reference to Additional documents, and Appendix H1 only contains a Deed of Novation – and not a Deed of Continuity or Duty of Care.

We will continue working collaboratively with Kāinga Ora to negotiate the issues and matters that remain or emerge for members under the new Agreement.

The Institute and ACE NZ would welcome feedback on any remaining or outstanding issues to be included in the three month review with Kāinga Ora.

Contact

Te Kāhui Whaihanga New Zealand Institute of Architects

Email: practice nzia.co.nz

ACE NZ

Email: service@acenz.org.nz

These notices are sent to the principals of NZIA Practice Members only and should be distributed within practices to those directly involved with the subject matter of this Notice.

For all Practice issues, please contact the NZIA on: practice@nzia.co.nz

Table Of Highlighted Issues In Kāinga Ora CCCS With Special Conditions July 2021

The comments below address some changes and issues of note for members in the Kāinga Ora CCCS June 2021 (KO CCCS), which has been negotiated by Te Kāhui Whaihanga New Zealand Institute of Architects (Institute) and ACE New Zealand (ACE NZ) with Kāinga Ora. Clauses from the Core Special Conditions of the Crown Agency All of Government CCCS (AoG CCCS) terms have been accepted as previously extensively negotiated with the Crown and industry bodies. Clauses from the Project Specific Special Conditions have been negotiated where possible e.g., set off clauses have been removed, and indemnity clauses amended to a more insurable breach of contract. MBIE guidance on the AoG CCCS Special Conditions can be found here [https://www.procurement.govt.nz/contracts/construction-consultancy-services-2/construction-consultancy-services-information-for-providers]

Consultants are also advised to carefully review any scoping documents for the inclusion of further legal obligations, such as any certification, or co-ordination.

Neither the Institute nor ACE NZ can provide legal or insurance advice to members and any concerns with respect to a specific practice or project should be raised with each member's legal advisors or insurers.

Subject	Detail
Form of Agreement New Appendix H: H1. Deed of Novation (Principal to Contractor). H2. Deed of Novation (Principal to Principal).	Kāinga Ora has updated the format of the agreement to be consistent with the Ministry of Education revised CCCS as requested by ACE NZ, where the ACE NZ CCCS 2017 is attached unamended as Annexure 1. There are two additional Appendices for Novation of the Consultant to a Contractor (H1) and to a Controlled Entity of Kāinga Ora (H2). This is to avoid multiple entities within the definition of "Client". Language has been inserted into the Novation Agreements to address increased aggregate liability on assignment or novation.
Part A Specific Conditions	
"Additional documents forming part of the Agreement include:"	This clause was initially removed by Kāinga Ora, but as the CCCS has an entire agreement clause, it is important to attach here any additional documents such as negotiations and clarifications to ensure they form part of the agreement.
1.3 Fixed Term Expiry Date [Insert date or "Not Applicable"] (if blank then the Fixed Term Expiry Date does not apply).	Kāinga Ora may have occasion to engage a consultant for a fixed term rather than on a project by project basis for operational reasons. An example may be a pilot project for developing GIS type information on our sites. If this does not apply, it should be shown as "Not Applicable" in the applicable project agreement.

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.**

Amendments include simplified invoicing requirements and processes to ensure timely issuing of purchase orders by Kāinga Ora who are unable to pay invoices without an order number. Professional services providers are not expected to commence services until an order number has been provided. Where this is not provided in a timely manner by Kāinga Ora, the consultant can notify the Client Representative that it is entitled to not commence Services (see bold wording).

Should payment issues arise for members, please direct your enquiry to the Institute or ACE NZ who will contact Kāinga Ora representatives to discuss confidentially.

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]**.

6.5 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).

Amendments include staged levels of liability and insurance.

Kāinga Ora has removed the link between consultant fee and project construction value to the levels of liability and required insurance and agreed new liability/ insurance levels for projects as set out in the table below (subject to further review).

Fee level	SFA < $50k	CCCS >$50k <$100k	CCCS $100k - $199k	CCCS $200k - $299k	CCCS $300k+
Public liability	$1,000,000	1,000,000	$2,000,000	$4,000,000	$5,000,000
Professional indemnity	$250,000	500,000	$1,000,000	$2,000,000	$3,000,000
Limit of liability	$250,000	500,000	$1,000,000	$2,000,000	$3,000,000

Motor Vehicle Third Party Insurance may be required where applicable.

Note that clause 7.4 Reduction in Scope allows that where scope has been reduced and the consultancy fee reduced, if the limitation of liability is expressly linked to the consultancy fee, the limitation of liability will be accordingly reduced to the agreed liability level for that reduced fee.

Suggested language:

Notwithstanding the above, the limitation of liability in this clause 6.2 is expressly linked to the consultancy fee. Where the fee is reduced under clause 7.4 Reduction in Scope liability will be reduced accordingly.

Part B Special Conditions	
1. Add **Programme**: 'Programme means: the programme set out in Appendix A, as amended from time to time in accordance with the Agreement.'	The new Kāinga Ora definition of Programme has been amended from *"The programme set out in Appendix A, if any, and any new or replacement programme notified to the Consultant by the Client from time to time"* to now be subject to the terms of the Agreement. Any amendments to the Programme by the Client should be considered with reference to variation clauses under Section 7, subject to new clause 2.12.
4. Clause 2.1 Consultants Obligations 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.	This clause reflects the AoG CCCS Core Conditions with additional language in bold The clause has been modified to allow for any consultant's concerns as a PCBU under the Health and Safety at Work Act 2015 (**HSWA**) to be acknowledged and addressed. Consultants may be required to attend a wide range of properties when working with Kāinga Ora. This may include those that are tenanted and there will be instances where tenants may be considered to present a higher risk. Kāinga Ora has required the discretion to unilaterally instruct health and safety requirements for the safety and wellbeing of consultants, contractors, staff and tenants. If there are aspects of Kāinga Ora's health and safety requirements that a consultant is not able to meet (e.g., budget constraints, safety in design matters) or raise concerns with compliance not complying with obligations as an employer PCBU under HSWA, please provide feedback to Kāinga Ora for review by their health and safety team.
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.'	As above. Consultants should notify Kāinga Ora where policies raise concerns such as a PCBU under the HSWA when providing Services, particularly in tenanted properties.

8. Clause 2.11 Public Statements Amend as follows: *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.* 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.'**	Amendments include greater requirements and restrictions of disclosure of Kāinga Ora projects in any form of media including websites and RFP responses. Kāinga Ora does not accept that consultants can refer to a project on its website or social media without the prior consent of Kāinga Ora. For example, a project may be sensitive and be the subject of engagement with mana whenua and the local community so public and/or media statements may not appropriate at that time. Kāinga Ora has clarified its previous requirement to not make media statements to expressly limit any use of project material for marketing, advertising or use in social media without prior written approval from Kāinga Ora. Notification must be given by the Consultant in writing as soon as it becomes aware of any actual or potential issues that could receive media attention. Opportunities to publicise a project at relevant stages, with Kāinga Ora internal approval, are currently being considered. Clause 2.11 has been modified to allow for disclosure in responses to RFPs in the public sector. A previous confidentiality amendment to standard clause 8 has now been removed.
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.'	As above
18. Clause 4.3 Key Personnel 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.'	This has been added to the Key Personnel provision, but Kāinga Ora have stringent probity requirements that appear to apply to all personnel in a consultant providing services to Kāinga Ora, with a nil gift policy in Appendix A Part E.
Clause 5.3 Payment	Kāinga Ora have removed the amendment to this clause which previously required each invoice to include proof of insurance, timesheets etc and allowed for arbitrary set off. A second set off clause 5.3 has been removed. Where set off is included it should only be as a debt due and payable in respect of claims and only on the named project.

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.'	This is an AoG CCCS Project Specific Special Condition, which under MBIE Guidelines should only be used where necessary for a specific project. Kāinga Ora requires the right to reduce scope if required due to business case changes, poor performance, delays due to meeting its obligations. Kāinga Ora has allowed an amendment (in bold) whereby on reduction of services and the consultancy fee is also reduced by such reduction, liability may also be reduced where expressly linked to Part A clause 6.2 limitation of liability (see above) This clause may however be used to terminate the engagement agreement as a "negative variation" as an alternative to Section 11 of the CCCS which allows termination for convenience. Both now allow for reasonable costs of reduction or termination.
23. Clause 9.1 Ownership of Intellectual Property 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.' 33. 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	Despite extensive discussions Kāinga Ora will continue to own intellectual property on projects up to and including three levels in the amended clause 9.1. The consultant has a very restricted licence for use of the New Intellectual Property. The consultant may not copy, use, disclose, distribute or sell any new intellectual property without the express written consent of the Kāinga Ora. This is an operational decision as Kāinga Ora looks to increase standardisation of design and build processes. For projects four levels and above, New Intellectual Property will be jointly owned by both parties with each providing a royalty free licence to the other in new clause 9.9. Mātauranga and Taonga Māori and the Intellectual Property Discussions with Kāinga Ora confirm that protecting mātauranga and taonga Māori and the intellectual property in connection with projects is paramount. Advisory services that involve the protection of taonga works and mātauranga Māori

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.	should be directly contracted with Kāinga Ora, and not by way of sub consultancy agreements. *Standard CCCS* *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*
24. Clause 9.2 Pre-Existing Intellectual Property 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." 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'	The new AoG CCCS Core Special Condition widens the uses for which the consultant must procure the use of third party Pre-existing Intellectual Property contained in their services, whether by Kāinga Ora or third parties. This combined with the amendment to clause 11.4 to transfer Pre-Existing Intellectual Property as well as New Intellectual Property may be onerous in circumstances where use of such third party Pre-Existing Intellectual Property is heavily restricted or allows only for single use.
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.'	An indemnification for Intellectual Property has been amended to a more insurable breach of contract. This amends the AoG CCCS Project Specific Special Condition (below) requiring an indemnity which was likely uninsurable to a breach of contract in relation to breach of intellectual property obligations. Indemnities are generally unlikely to be insurable as they may involve strict liability (no defences) and may be beyond common law obligations. Professional Indemnity Insurance cover aligns with a professional common law duty of care and breach of those obligations under the contract. Indemnification losses are unlikely to be covered as outside the usual types of damages for breach of contract.

	Clause 9.4 AoG CCCS Project Specific Special Condition Indemnification *Clause 9.4 is amended by adding the following at the end:* *"The Consultant will indemnify the Client against any loss, claim, damage, expense, liability or proceeding suffered or incurred at any time by the Client as a direct result of any breach of any of the Consultant's obligations, undertakings or warranties contained or implied in this clause 9.4."*
32. Clause 11.2 Payment of Early Termination 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.'	The initial amendment to this clause disallowed reasonable costs for staged delivery early termination. The current amendment uses the AoG CCCS Project Specific Conditions, clarifying limitations on payments where there is termination for convenience by the Kāinga Ora.
34. Clause 11.6 Suspension of Services	Kāinga Ora requires the ability to terminate or suspend services if the project is delayed or put on hold for any reason. Kāinga Ora has adopted AoG CCCS Project Specific Special Condition suspension clause with the right of suspension for convenience (in addition to termination for convenience).
35. Clause 12.7 Reporting '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.	This additional reporting requirement has been simplified and must be reasonable but should be allowed for by consultants for in their fee proposal as an additional service.

36. Clause 12.9 Assignment and Novation **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 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.	This clause is wider than the AoG CCCS Project Specific novation clause, allowing for (i) Assignment under (by consultant in discretion of client, and by client with reasonable consent of consultant unless to a Controlled Entity; and (ii) Novation to a third party (by client subject to reasonable approval by consultant, or without approval where to Controlled Entity) Appendix H contains two forms of novation agreements. (i) H2: The standard All-of-Government (AoG) form for the Deed of Novation for use if Kāinga Ora were to novate the consultant to a Contractor or third party; and (ii) H1: Kāinga Ora specific form of Deed of Novation which enables Kāinga Ora to transfer to a related entity but such that the overall liability of the Consultant shall be no higher in the aggregate despite any continuing liability to the original party. New language has been introduced in clause 7 of H1 to address this. *(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.*

	There were also concerns in clause 6 of H1 where Kāinga Ora required a licence of intellectual property to be given to itself as retiring party. Liability has been restricted by negotiation of the following clause. *(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.* Further clause 4 two subclauses requiring a reliance confirmation that there are no current breaches of contract and a covenant of performance have been removed.
Definition of Client and Privity **41. 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.'**	Based on feedback, Kāinga Ora has amended the definition of Client (which included several crown entities) to a single client but has included a privity clause. Initially the Client was defined to be *"Kāinga Ora – Homes and Communities and where the contract requires its wholly owned subsidiaries Housing New Zealand Limited and Housing New Zealand Build Limited"* The Client is now *"Kāinga Ora - Homes and Communities"*. The final sentence (in bold) has been negotiated to limit duplicating liability to several parties in privity by capping aggregate liability.

APPENDIX A PART E Policy – Audits & Probity

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.

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.

Strict probity requirements remain, where consultants may not accept any form of gift or compensation, even de minimis, from third parties in connection with providing design services to Kāinga Ora. Consultants may be subject to probity audits, where determined by Kāinga Ora.

The Audit and Probity clauses are very onerous and appear to mirror the government's strict obligations during tendering stage. While there is no objection in principle to audits, reasonable conditions should apply to deal with access, disclosure, confidentiality requirements and the like. These are not required by any other government agency nor addressed under the AoG CCCS. It is unclear why Kāinga Ora require these as they are more common to the contracting industry. Consultants only receive income directly from the Client, not purchase of goods and subcontractor services on behalf of the Client.

The definition of key personnel is very wide and beyond those within the direct control of the consultant such as its employees, whether working on Kāinga Ora Projects or not. The Consultant is required to obtain consent of all personnel to probity investigations which may be difficult where they are not within the control of the Consultant. Highlights of the restrictive nature are set out below:

Audit:

Kāinga Ora may audit: compliance with the CCCS agreement, general statutory, regulatory and contractual compliance; project management practices, record management practices and documentation; internal review, quality assurance and testing practices; sub-contractor arrangements (including Subconsultant arrangements); 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. (Clause 1.1)

Records are widely defined (see aside)

Probity

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. (Clause 2.2)

	The Consultant must not, and must ensure its employees, agents and those of any subconsultant or related company, not, directly or indirectly: (i) 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 (i) 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. (Clause 2.8) This is likely to apply to personal hospitality/discounts by specified suppliers as there is no "materiality" threshold which applies to most government departments. The Institute and ACE NZ have been unable to negotiate any of the current terms.
Employment Relations Act and Immigration Act	Kāinga Ora is updating all its contracts to include an express reference that the Consultant/Contractor/Supplier shall comply and take all practicable steps to ensure that its employees, contractors and sub consultants comply with the requirements of the Immigration Act 2009 and the Employment Relations Act 2000. These amendments have still to be added.