



PROVINCIAL  
DEVELOPMENT  
UNIT

New Zealand Government

# **DEVELOPMENT PHASE FUNDING AGREEMENT**

BETWEEN

**MINISTRY OF BUSINESS,  
INNOVATION AND EMPLOYMENT**

AND

**WHAKATOHEA MUSSELS (OPOTIKI) LIMITED**

FOR

**MUSSEL FARMING AND PRODUCTION  
FACILITY**

## PART 1: KEY DETAILS

- 1 **Parties** The Sovereign in right of New Zealand, acting by and through the Chief Executive of the Ministry of Business, Innovation and Employment (**Ministry**)  
Whakatohea Mussels (Opotiki) Limited, company number 5351102, with offices at 96 Waioeka Road, RD 1, Opotiki (**Recipient**)
- 2 **Funding Start Date** Commencement Date
- 3 **End Date** **Commercial Information**
- 4 **Background** Through the Provincial Development Unit, the Ministry is responsible for administering the Provincial Growth Fund, which aims to lift productivity potential in New Zealand's provinces. Its priorities are to enhance economic development opportunities, create sustainable jobs, enable Māori to reach full potential, boost social inclusion and participation, build resilient communities, and help meet New Zealand's climate change targets.  
The Recipient is a NZ Limited Company.  
Whakatohea Mussels (Opotiki) Limited was formed in 2014 to develop and operate an open ocean greenshell mussel farm located 8.5 kilometres off the coast of Opotiki. The mission of the company is to develop the farming and vessel capacity to produce the volume of mussels required to build a mussel processing facility in Opotiki.  
The Recipient has sought a funding contribution from the Ministry for the purposes of delivering the Development Phase Project described below. The Ministry has agreed to contribute funding on the terms and conditions of this Agreement (**Agreement**).  
Key details of this Agreement are set out in this **Part 1**. The full terms and conditions are set out in **Part 2**. Defined terms and rules of interpretation are set out in **Part 3**.
- 5 **Development Phase Project Description** The project funding is being used to:  
(i) assess the funding requirements to accelerate mussel farming and contract servicing for new mussel farmers  
(ii) specify the product requirements for a **Commercial Information**  
(iii) complete the plant design and consenting for the proposed factory, and  
(iv) to refresh the Business Case for the early building of the proposed factory.  
The refreshed Business Case will include consideration of:  
  - Further acceleration (beyond 1,086ha) of the Recipient's current water space for mussel farming;
  - Securing rights to grow spat lines in the adjoining **Commercial Information**
  - Securing new mussel farm establishment and servicing control work from **Commercial Information**
  - Licensing the mussel farm systems **Commercial Information** ;
  - The impact of additional mussels volumes **Commercial Information** on the viability of a staged factory build;
  - Future proofing the processing facility to allow for further development of Half Shell Processing **Commercial Information**;
  - Product development including marketing and consumer insights;

- On water monitoring systems and testing; and
- Business model and financial structure to best service a vertically integrated company.

The expected Project Outcomes are:

- refreshed Business Case for investment in the proposed mussel processing facility
- detailed plans submitted for resource and building consents for the proposed processing facility (including completed applications)
- **Commercial Information**
- refreshed financial and viability model, including plans for accelerated mussel farming and servicing other offshore mussel farmers.

**6 Development Phase Deliverables and Instalments**

The Recipient is to complete the following Deliverables for the Development Phase Project to the satisfaction of the Ministry by the following dates:

| Completion Date        | Deliverable   | Instalment payable on completion   |
|------------------------|---|--|
| Commercial Information | Funding Agreement executed by both parties.   | up to \$ Commercial Inform   |
| Commercial Information | Draft Marine Farming Development Plan; Factory Processing Plan and Factory Site Plan.   | Up to \$ Commercial Inform (claimable on a monthly basis based on actual invoices) |
| Commercial Information | Final refreshed Business Case, approved by the Board of Directors of the applicant and submitted to the Ministry<br><br>All Progress Reports received by their due date (refer to item 10 below), and the Final Report submitted. | up to \$ Commercial Inform   |

**7 Key Personnel**

| Key Personnel    | Respective Roles |
|------------------|------------------|
| Peter Vitasovich | Project Manager  |

**8 Approved Contractor**

| Contractor                 | Role                            |
|----------------------------|---------------------------------|
| Privacy of natural persons | Business Case Adviser           |
| Privacy of natural persons | Business Case financial support |

|                            |   |
|----------------------------|---|
| Privacy of natural persons | Consenting authority                              |
| Privacy of natural persons | Consenting authority                              |
| Privacy of natural persons | Project and expenses management                   |
| Privacy of natural persons | Refrigeration and electrical engineers            |
| Privacy of natural persons | Project management and design                     |
| Privacy of natural persons | Processing equipment design                       |
| Privacy of natural persons | Construction advisers                             |
| Privacy of natural persons | Environmental engineers                           |
| Privacy of natural persons | Mussel Commercial Inform R&D                      |
| Privacy of natural persons | Mussel Commercial Inform processing               |
| Privacy of natural persons | Mussel Commercial Inform R&D production           |
| Privacy of natural persons | Mussel Commercial Inform R&D production           |
| Privacy of natural persons | Water monitoring and mussel Commercial Inform R&D |
| Privacy of natural persons | Mussel Commercial Inform R&D production           |
| Privacy of natural persons | Water monitoring                                  |
| Privacy of natural persons | Wastewater engineers                              |
| Privacy of natural persons | Air quality engineers                             |
| Privacy of natural persons | Shell waste disposal                              |
| Privacy of natural persons | Export factory assessment                         |
| Privacy of natural persons | Design and construction engineers                 |
| Privacy of natural persons | Process and production planner                    |
| Privacy of natural persons | Legal advisers                                    |

## 9 Funding

The total Funding available under this Agreement is up to **NZ\$850,000.00** plus GST (if any). This is the Total Maximum Amount Payable.

The Funding must be paid in instalments on the payment dates set out in item 6, subject to completion of each Deliverable by the relevant completion date; receipt of a Payment Request in accordance with clause 1 of Part 2 and the terms and conditions of this Agreement.

## 10 Reporting

The Recipient will provide the Ministry with:

1. Monthly Progress Reports by **Commercial Information** (and any month end thereafter); and
2. A Final Report submitted to the Ministry together with the final refreshed Business Case.

**Each Progress Report** must include the following information:

- (a) An update on the status of **Commercial Information** design plans; consenting and refreshing of the Business Case; and
- (b) A summary of expenditure, actual against budgeted for this Development Phase Project.

**The Final Report** must include the following information:

- (a) Description and analysis of actual progress of the Development Phase Project against planned progress including a final update on each of the Project Outcomes detailed in item 5 above;
- (b) A summary of Funding and any co-funding received for the Development Phase Project, and a summary of expenditure, actual against budgeted;
- (c) Detail the Recipient's proposed next steps;
- (d) Copies of any proposed and any published promotional material, media publicity or other documentation relevant to the Development Phase Project; and
- (e) Any other information that is notified by the Ministry in writing to the Recipient

## 11 Special Terms

|    |   |
|----|---|
| 1. | That the refreshed Business Case be approved by the Recipient's Board of Directors, prior to acceptance by the Ministry.  |
| 2. | Any further investment by the Crown, <b>Commercial Information</b> , will be subject to the Ministry first receiving and being satisfied with the refreshed Business Case. Any further investment will also be conditional on agreeing commercial and legal terms for that subsequent investment. |

## 12 Contact Person

Ministry's Contact Person:

Name: David Caselli

Email: **Commercial Information**

Recipient's Contact Person:

Name: Peter Vitasovich, Chief Executive

Email: **Privacy of natural persons**

## 13 Address for Notices

To the Ministry:

15 Stout Street,

PO Box 1473

Wellington 6140

Attention: Provincial Development Unit

Email: [monitorpgf@mbie.govt.nz](mailto:monitorpgf@mbie.govt.nz)

To the Recipient:

96 Waioeka Road

RD 1

Opotiki

Attention: Peter Vitasovich, Chief Executive

Email: **Privacy of natural persons**

**SIGNATURES**

**SIGNED** by the **SOVEREIGN IN RIGHT OF NEW ZEALAND** acting by and through the Chief Executive of the Ministry of Business, Innovation and Employment or his or her authorised delegate:

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Name:  
Position:  
Date:

**SIGNED** for and on behalf of the **Whakatohea Mussels (Opotiki) Limited** by the person named below, being a person duly authorised to enter into obligations on behalf of the Recipient:

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Name:  
Position:  
Date:

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Name:  
Position:  
Date:

*Each signatory warrants that the persons signing on behalf of the Recipient have the necessary authority to execute this Agreement on behalf of the Recipient.*

**END OF PART 1**

PROACTIVELY RELEASED

## PART 2: GENERAL TERMS

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### 1 FUNDING

- 1.1 The Ministry must pay the Funding (up to the "Total Maximum Amount Payable" specified in the Key Details) to the Recipient, subject to the terms of this Agreement. Unless stated otherwise in this Agreement, the Recipient may only claim the Funding to the extent necessary to cover Eligible Costs incurred by the Recipient. If the Recipient receives any Funding before it has incurred corresponding Eligible Costs, the Recipient must use the Funding solely on Eligible Costs.
- 1.2 The Recipient must submit a Payment Request to [monitorpgf@mbie.govt.nz](mailto:monitorpgf@mbie.govt.nz) and copying in Ministry's Contact Person on completion of Deliverables in accordance with item 6 (Development Phase Deliverables and Instalments) in the Key Details.
- 1.3 Each Payment Request is to be signed by a Director and an authorised signatory of the Recipient and must be in the form set out in the Schedule and include the confirmations set out therein, and must include:
- (a) the amount of Funding requested, which must not exceed the Instalment set out in the Key Details;
  - (b) a breakdown of total Eligible Costs incurred by the Recipient for the Development Phase Project and confirmation that such costs are Eligible Costs for the purpose of this Agreement and have been paid or are currently due and payable (not required for any initial payment to be paid on the Commencement Date);
  - (c) copies of invoices received by the Recipient from the Approved Contractor or third parties in relation to the Eligible Costs where those Eligible Costs are more than \$1,000 (on an individual basis or when grouped by supplier or subject matter) and statements and accounts showing the Eligible Costs incurred;
  - (d) a valid GST invoice complying with the Goods and Services Tax Act 1985; and
  - (e) contain any other information required by the Ministry.
- 1.4 The Ministry is not required to pay any Funding in respect of a Payment Request if:
- (a) if any Deliverable(s) have not been completed by the relevant "Completion Date" (if any) specified in the Key Details;
  - (b) if payment will result in the Funding exceeding the "Total Maximum Amount Payable" specified in the Key Details;
  - (c) if this Agreement has expired or been terminated; and/or
  - (d) while the Recipient is in breach of this Agreement.
- 1.5 Subject to the terms of this Agreement, the Ministry must pay each valid Payment Request by the 20th day of the month after the month the Payment Request is dated, and if such day is not a Business Day, on the next Business Day.

### 2 RECIPIENT'S RESPONSIBILITIES

#### Standards and compliance with laws

- 2.1 The Recipient must comply with all applicable laws, regulations, rules and professional codes of conduct or practice.

## **Development Phase and Contractors**

- 2.2 The Recipient must ensure that the Development Phase Project is carried out:
- (a) promptly with due diligence, care and skill, and in a manner that meets or exceeds Best Industry Practice;
  - (b) by appropriately trained, qualified, experienced and supervised persons; and
  - (c) in accordance with any directions of the Ministry, notified by the Ministry in writing from time to time.
- 2.3 The Recipient is responsible for the acts and omissions of any contractors.
- 2.4 The Recipient must ensure that all agreements it enters into with the Approved Contractor or any other party in connection with the Development Phase Project are on an "arm's length" basis, provide value-for-money and do not give rise to any Conflict of Interest. The Recipient must provide the Ministry with reasonable evidence of compliance with this clause 2.4 in response to any request by the Ministry from time to time.

## **Information Undertakings**

- 2.5 The Recipient must provide the Ministry with the reports (if any) specified in the Key Details, in accordance with the timeframes and reporting requirements set out in the Key Details.
- 2.6 The Recipient must provide the Ministry with any other information about the Development Phase Project requested by the Ministry within the timeframe set out in the request.
- 2.7 The Recipient must promptly notify the Ministry if:
- (a) the Recipient (or any of its personnel or contractors) becomes aware of, or subject to, a Conflict of Interest;
  - (b) the Recipient becomes aware of any matter that could reasonably be expected to have an adverse effect on the Development Phase Project and any related project, or result in a Termination Event or a breach of any term of this Agreement by the Recipient.
- 2.8 The Recipient must not at any time do anything that could reasonably be expected to have an adverse effect on the reputation, good standing or goodwill of the Ministry. The Recipient must keep the Ministry informed of any matter known to the Recipient which could reasonably be expected to have such an effect.

## **Funding, records and auditors**

- 2.9 The Recipient must receive and manage all Funding in accordance with good financial management and accounting practices and to a high standard that demonstrates appropriate use of public funds.
- 2.10 The Recipient must keep full and accurate records (including accounting records) of the Development Phase Project, and retain them for at least 7 years after the last payment of Funding under this Agreement. The Recipient must permit the Ministry (or any auditor nominated by the Ministry) to inspect all records relating to the Development Phase Project and must allow the Ministry and/or the auditor access to the Recipient's premises, systems and personnel for the purposes of this inspection.

## **3 INTELLECTUAL PROPERTY**

- 3.1 The Ministry acknowledges that the Recipient and its licensors own all pre-existing intellectual property which they contribute to the Project, and all new intellectual property which they create in the course of the Project.



- 3.2 The Recipient grants an irrevocable, perpetual, royalty-free, sub-licensable licence to the Ministry to use all reports, documents, information and other materials created or provided by the Recipient to the Ministry under or in connection with the Project and this Agreement.
- 3.3 The Recipient warrants that it has obtained (or will obtain, prior to creation of each relevant work) all rights and permissions necessary to enable the grant and exercise of the licence in clause 3.2 without infringing the intellectual property rights of any third party.

#### 4 TERM AND TERMINATION

- 4.1 This Agreement will be effective on and from the Commencement Date, which will be the latest to occur of:
- (a) the date this Agreement has been signed by both parties and
  - (b) the date on which the Ministry has provided written notice to the Recipient that the Conditions Precedent specified in the Key Details, if any, have either been satisfied (in the opinion of the Ministry) or waived by the Ministry.
- 4.2 This Agreement will remain in force until the End Date, unless terminated in accordance with this Agreement (the **Term**).
- 4.3 The Ministry can terminate this Agreement with immediate effect, by giving notice to the Recipient, at any time while:
- (a) the Ministry reasonably considers that the Recipient has become or is likely to become, insolvent or bankrupt;
  - (b) the Recipient is subject to the appointment of a liquidator, receiver, manager or similar person in respect of any of its assets;
  - (c) the Recipient has ceased to carry on its operations or business (or a material part of them) in New Zealand; or
  - (d) any one or more of the follow events or circumstances remains unremedied:
    - (i) the Recipient is materially in breach of any obligation, or a condition or warranty, under this Agreement;
    - (ii) the Recipient has provided the Ministry with information in connection with or under this Agreement that (whether intentionally or not) is materially incorrect or misleading, and/or omits material information;
    - (iii) the Ministry reasonably considers that this Agreement or the Development Phase Project has caused, or may cause, the Ministry and/or the New Zealand Government to breach any legal obligations (including its international trade obligations);
    - (iv) the Recipient abandons the Development Phase Project or if it becomes apparent that any related project that the Development Phase Project is investigating will not proceed;
    - (v) the Recipient is involved in any intentional or reckless conduct which, in the opinion of the Ministry, has damaged or could damage the reputation, good standing or goodwill of the Ministry, or is involved in any material misrepresentation or any fraud;
    - (vi) the Recipient (or any of its personnel or contractors) is subject to a Conflict of Interest which cannot be managed to the Ministry's satisfaction; or

- (vii) any change in law, regulations, government policy or other circumstances materially affects the Ministry's ability to perform its obligations under this Agreement.

4.4 However, where the Ministry considers that a Termination Event set out in clause 4.3(c) can be remedied, the Ministry must give notice to the Recipient requesting a remedy, and must not exercise its right of termination unless the relevant event remains unremedied for at least 14 days (or any longer period agreed with the Recipient) after that notice has been provided by the Ministry.

4.5 On expiry or termination of this Agreement, where the total Funding paid under this Agreement and any other money received by the Recipient to carry out the Development Phase Project exceeds the funding required to perform the Development Phase Project, the Recipient must upon request refund to the Ministry the excess amount. The Recipient is not required to refund, under this clause 4.4, any amount that exceeds the total amount of Funding.

4.6 At any time the Ministry may recover the amount of any Funding that has been spent or used other than in accordance with this Agreement, together with interest on all such amounts calculated at 10% per annum from the date of the mispending to the date the money is repaid.

4.7 Clauses 1.4, 2.1, 2.9, 2.10, 3, 4, 5, 6, 7, 8, 9, 10 and 11 survive expiry or termination of this Agreement, along with any other parts of this Agreement necessary to give effect to those provisions. Expiry or termination of this Agreement does not affect any accrued rights, including any rights in respect of a breach of this Agreement or Termination Event that occurred before expiry or termination.

## 5 WARRANTIES

5.1 The Recipient warrants that, in the course of its activities in connection with the Development Phase Project, it will not infringe any intellectual property or other rights of the Approved Contractor or any third party.

5.2 The Recipient warrants that, as at the date of this Agreement:

- (a) It has full power and authority to enter into and perform its obligations under this Agreement which, when executed, will constitute binding obligations on it in accordance with this Agreement's terms;
- (b) all information and representations disclosed or made to the Ministry by the Recipient in connection with this Agreement are true and correct, do not omit any material matter, and are not likely to mislead or deceive the Ministry as to any material matter;
- (c) it has disclosed to the Ministry all matters known to the Recipient (relating to Development Phase Project, the Recipient or its personnel) that could reasonably be expected to have an adverse effect on the reputation, good standing or goodwill of the Ministry; and
- (d) it is not aware of any material information that has not been disclosed to the Ministry which may, if disclosed, materially adversely affect the decision of the Ministry whether to provide the Funding.

5.3 The Recipient acknowledges that the Ministry has entered into this Agreement in reliance on these warranties.

5.4 The Recipient acknowledges and agrees that the Ministry has made no warranty or representation that any funding or financial support is or will be available to the Recipient in respect of the Development Phase Project, or any subsequent phase of that project, other than the Funding. The Recipient must not make any statement or representation to any person (including the media) that the Ministry has agreed to provide any funding or financial support to the Project (other than the funding of the Development Phase Project).

## 6 LIABILITY

- 6.1 The maximum liability of the Ministry under or in connection with this Agreement, whether arising in contract, tort (including negligence) or otherwise, is limited to the total amount of Funding paid or payable under this Agreement.
- 6.2 The Ministry is not liable for any claim under or in connection with this Agreement, whether arising in contract, tort (including negligence) or otherwise, where such claim is or relates to any loss of profit, loss of revenue, loss of use, loss of reputation, loss of goodwill, loss of opportunity (in each case whether direct, indirect or consequential) or any other indirect, consequential or incidental loss or damages of any kind whatsoever.

## 7 CONFIDENTIALITY

- 7.1 Subject to clause 7.2 and 7.3, each party must keep the other party's Confidential Information in confidence, and must use or disclose that Confidential Information only to the extent necessary to perform its obligations, and/or take the intended benefit of its rights, under this Agreement. However, this will not prohibit:
- (a) either party from using or disclosing any information with the written prior consent of the other party;
  - (b) use or disclosure of information that has become generally known to the public other than through a breach of this Agreement;
  - (c) either party from disclosing information to its personnel or contractors with a need to know, so long as the relevant personnel and contractors use the information solely to enable that party to perform its obligations and/or take the intended benefit of its rights under this Agreement, and so long as they are informed of the confidential nature of the information and in the case of the Recipient, the Recipient receives an acknowledgement from its personnel or contractors that they acknowledge, and must comply with, the confidentiality obligations in this Agreement as if they were party to it;
  - (d) disclosure required by any law, or any compulsory order or requirement issued pursuant to any law; or
  - (e) the Ministry from using or disclosing to any party any documents, reports or information received in relation to this Agreement, provided that prior to any such disclosure the Ministry removes all information that is commercially sensitive to the Recipient from the relevant work.
- 7.2 The Recipient acknowledges and agrees that nothing in this Agreement restricts the Ministry's ability to:
- (a) discuss, and provide all information in respect of, any matters concerning the Recipient, the Development Phase Project or this Agreement with any Minister of the Crown, any other government agency or any of their respective advisors;
  - (b) meet its obligations under any constitutional or parliamentary convention (or other obligation at law) of or in relation to the New Zealand Parliament, the New Zealand House of Representatives or any of its Committees, any Minister of the Crown, or the New Zealand Auditor-General, including any obligations under the Cabinet Manual including the "no surprises" principle; and
  - (c) publicise and report on the awarding of the Funding, including the Recipient's and any of its contractor's names, the amount and duration of the Funding and a brief description of the Development Phase Project, on websites; in media releases; general announcements and annual reports.

7.3 The Recipient acknowledges that:

- (a) the contents of this Agreement; and
- (b) information provided to the Ministry (including the Development Phase Deliverables),

may be official information in terms of the Official Information Act 1982 and, in line with the purpose and principles of the Official Information Act 1982, this Agreement and such information may be released to the public unless there is good reason under the Official Information Act 1982, to withhold it.

## 8 PUBLICITY

8.1 Before making any media statements or press releases (including social media posts) regarding this Agreement and/or the Ministry's involvement with the Project, the Recipient will consult with the Ministry, and will obtain the Ministry's prior approval to any such statements or releases.

8.2 The Recipient will refer any enquiries from the media or any other person about the terms or performance of this Agreement to the Ministry's Contact Person.

8.3 The Recipient will acknowledge the Ministry as a source of funding in all publications (including any digital presence) and publicity regarding the Project, provided that the Recipient must obtain the Ministry's approval of the form and wording of the acknowledgement prior to including the acknowledgement in the publication or publicity (as the case may be).

8.4 The Recipient does not have the right to enter into any commitment, contract or agreement on behalf of the Ministry or any associated body, or to make any public statement or comment on behalf of the Ministry.

## 9 DISPUTES

9.1 In the event of any dispute, controversy or claim arising out of or in connection with this Agreement, or in relation to any question regarding its existence, breach, termination or invalidity (in each case, a Dispute), either party may give written notice to the other specifying the nature of the Dispute and requesting discussions under this clause 9. As soon as reasonably practicable following receipt of a Dispute Notice, the parties must meet (in person, or by audio or video conference) and endeavour to resolve the Dispute by discussion, negotiation and agreement.

9.2 A party must not commence any proceedings in connection with a Dispute unless at least 40 days have elapsed since the issue of a corresponding Dispute Notice, and that party has used reasonable endeavours to comply with this clause 9. However, nothing in this clause will prevent either party from seeking urgent interim relief from a court (or other tribunal) of competent jurisdiction.

## 10 CONTACT PERSONS

10.1 All matters or enquiries regarding this Agreement must be directed to each party's Contact Person (set out in the Key Details).

10.2 Each party may from time to time change the person designated as its Contact Person on 10 Business Days' written notice to the other Party.

## 11 GENERAL

11.1 Each notice or other communication given under this Agreement (each a notice) must be in writing and delivered personally or sent by post or email to the address of the relevant party set out in the Key Details or to any other address from time to time designated for that purpose by at least 10 Business Days' prior written notice to the other party. A notice under this Agreement is deemed to be received if:

- (a) **Delivery:** delivered personally, when delivered;
- (b) **Post:** posted, 5 Business Days after posting or, in the case of international post, 7 Business Days after posting; and
- (c) **Email:** sent by email:
  - (i) If sent between the hours of 9am and 5pm (local time) on a Business Day, at the time of transmission; or
  - (ii) If subclause (i) does not apply, at 9am (local time) on the Business Day most immediately after the time of sending,

provided that an email is not deemed received unless (if receipt is disputed) the party giving notice produces a printed copy of the email which evidences that the email was sent to the email address of the party given notice.

- 11.2 The Recipient agrees to execute and deliver any documents and to do all things as may be required by the Ministry to obtain the full benefit of this Agreement according to its true intent.
- 11.3 No legal partnership, employer-employee, principal-agent or joint venture relationship is created or evidenced by this Agreement.
- 11.4 This Agreement constitutes the sole and entire understanding with respect to the subject matter hereof and supersedes all prior discussions, representations and understandings, written or oral.
- 11.5 No amendment to this Agreement will be effective unless agreed in writing and signed by both parties.
- 11.6 The Recipient may not assign or transfer any of its contractual rights or obligations under this Agreement, except with the Ministry's prior written approval.
- 11.7 The Ministry may assign or transfer any of its contractual rights or obligations under this Agreement without the Recipient's prior approval. The Ministry may at any time disclose to a proposed assignee or transferee any information which relates to, or was provided in connection with, the Recipient, the Development Phase Project, the Project or this Agreement.
- 11.8 No failure, delay or indulgence by any party in exercising any power or right conferred on that party by this Agreement shall operate as a waiver. A single exercise of any of those powers or rights does not preclude further exercises of those powers or rights or the exercise of any other powers or rights.
- 11.9 The exercise by a party of any express right set out in this Agreement is without prejudice to any other rights, powers or remedies available to a party in contract, at law or in equity, including any rights, powers or remedies which would be available if the express rights were not set out in this Agreement.
- 11.10 This Agreement is not intended to confer any benefit on or create any obligation enforceable at the suit of any person not a party to this Agreement.
- 11.11 Any provision of this Agreement that is invalid or unenforceable will be deemed deleted, and will not affect the other provisions of this Agreement, all of which remain in force to the extent permitted by law, subject to any modifications made necessary by the deletion of the invalid or unenforceable provision.
- 11.12 This Agreement is to be governed by the laws of New Zealand, and the parties submit to the non-exclusive jurisdiction of the courts of New Zealand.

11.13 This Agreement may be executed in any number of counterparts (including scanned and emailed copies). So long as each party has received a counterpart signed by each of the other parties, the counterparts together shall constitute a binding and enforceable agreement.

*END OF PART 2*

PROACTIVELY RELEASED

### PART 3: DEFINITIONS AND CONSTRUCTION

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#### Defined terms

In this Agreement, unless the context requires otherwise:

*Approved Contractor* means an “Approved Contractor” specified in the Key Details.

*Best Industry Practice* means that degree of skill, care and foresight and operating practice that would reasonably and ordinarily be expected of a skilled and competent supplier of services engaged in the same type of undertaking as that of the Recipient or any contractors (as applicable) under the same or similar circumstances as those contemplated by this Agreement.

*Business Day* means any day other than a Saturday, Sunday or public holiday within the meaning of section 44 of the Holidays Act 2003.

*Commencement Date* has the meaning given in clause 4.1 of Part 2.

*Confidential Information* of a party (Owner), means any information in the possession or control of another party (Holder) that:

- (a) was originally acquired by the Holder in connection with this Agreement through disclosures made by or at the request of the Owner; and/or
- (b) was originally acquired by the Holder in connection with this Agreement through any access to, or viewing, inspection or evaluation of, the premises, facilities, documents, systems or other assets owned or controlled by the Owner; and/or
- (c) is derived from information of a kind described in paragraph (a) or (b) above;

but excludes any information which the Holder can show:

- (d) was lawfully acquired by the Holder, entirely independently of its activities in connection with this Agreement, and is free of any other obligation of confidence owed to the Owner; and/or
- (e) has been independently developed by the Holder without reference to the Owner’s Confidential Information, and without breaching any other obligation of confidence owed to the Owner.

Notwithstanding the foregoing, the terms of this Agreement are Confidential Information of which each Party is both an Owner and a Holder.

*Conflict of Interest* means any matter, circumstance, interest or activity of the Recipient, its personnel or contractors, or any other person with whom the Recipient has a relationship that:

- (a) conflicts with:
  - (i) the obligations of the Recipient (or its personnel or contractors) to the Ministry under this Agreement; or
  - (ii) the interests of the Recipient in relation to this Agreement and/or the procuring of the Development Phase Project; or
- (b) otherwise impairs or might appear to impair the ability of the Recipient (or any of its personnel or contractors) to diligently and independently carry out the Development Phase Project in accordance with this Agreement.

*Deliverable* means a deliverable to be provided by the Recipient to the Ministry, as set out in the Key Details.

*Eligible Costs* means the actual costs reasonably incurred by the Recipient on or after the Funding Start Date and no later than the End Date to deliver the Development Phase Deliverables.

*Funding* means the funding or any part of the funding (as the context requires) payable by the Ministry to the Recipient in accordance with the terms of this Agreement, as described in the Key Details.

*Key Details* means Part 1 of this Agreement.

*Objectives* means each of the following:

- (a) jobs and sustainable economic development;
- (b) social inclusion and participation;
- (c) Māori development;
- (d) Climate change commitments and environmental sustainability; and

increasing the resilience of the regional and national economy through critical infrastructure and diversification of New Zealand's economy.

*Payment Request* means a request submitted to the Ministry by the Recipient seeking payment of Funding substantially in the form set out in the Schedule to this Agreement.

*Termination Event* means any one or more of the events or circumstances set out in clause 4.3.

### **Construction**

In the construction of this Agreement, unless the context requires otherwise:

*Currency*: a reference to any monetary amount is to New Zealand currency;

*Defined Terms*: words or phrases appearing in this Agreement with capitalised initial letters are defined terms and have the meanings given to them in this Agreement;

*Documents*: a reference to any document, including this Agreement, includes a reference to that document as amended or replaced from time to time;

*Inclusions*: a reference to "includes" is a reference to "includes without limitation", and "include", "included" and "including" have corresponding meanings;

*Joint and Several Liability*: any provision of this Agreement to be performed or observed by two or more persons binds those persons jointly and severally;

*Parties*: a reference to a party to this Agreement or any other document includes that party's personal representatives/successors and permitted assigns;

*Person*: a reference to a person includes a corporation sole and also a body of persons, whether corporate or unincorporate;

*Precedence*: if there is any conflict between the different parts of this Agreement, then unless specifically stated otherwise, Part 2 will prevail over the Key Details, and the Key Details will prevail over any Attachments;

*Related Terms*: where a word or expression is defined in this Agreement, other parts of speech and grammatical forms of that word or expression have corresponding meanings;

*Statutes and Regulations*: a reference to an enactment or any regulations is a reference to that enactment or those regulations as amended, or to any enactment or regulations substituted for that enactment or those regulations;

*Writing*: a reference to "written" or "in writing" includes email and any commonly used electronic document format such as .DOC or .PDF.

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END OF PART 3



## SCHEDULE: PAYMENT REQUEST

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To: MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT

Dated: [•]

### PAYMENT REQUEST

1. We refer to the Funding Agreement dated [•] between Whakatohea Mussels (Opotiki) Limited as recipient (**Recipient**) and the Ministry of Business, Innovation and Employment (**Ministry**) (the **Agreement**). Terms defined in the Agreement have the same meaning in this Payment Request.
2. This is a Payment Request for the purpose of clause 1.3 of the Agreement.
3. Each of the Deliverables that have been completed are:  
  
*[insert description of each Deliverable completed]*
4. The amount of Funding requested is \$[•] plus GST if any.
5. The Funding requested in this Payment Request is required to meet the Eligible Costs.
6. Invoices/statements and accounts evidencing the above
7. *Eligible Costs* are attached
8. We confirm that:
  - (a) no Termination Event is subsisting, and
  - (b) each of the warranties set out in the Agreement are correct as at the date of this Payment Request.

By and on behalf of the Recipient by

Whakatohea Mussels (Opotiki) Limited

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Position: Director

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Authorised Officer