



**PROVINCIAL
GROWTH
FUND**

FUNDING AGREEMENT

BETWEEN

**MINISTRY OF BUSINESS,
INNOVATION AND EMPLOYMENT**

AND

FAR NORTH HOLDINGS LIMITED

FOR

**RUSSELL WHARF
EXTENSION & UPGRADE PROJECT**

PART 1: KEY DETAILS

1 Parties	<p>MINISTRY The Sovereign in right of New Zealand, acting by and through the Chief Executive of the Ministry of Business, Innovation and Employment (Ministry)</p> <p>RECIPIENT Far North Holdings Limited (849248) a limited liability company having its Registered office address at Unit 9b, 15 Baffin Street, Opua (Recipient)</p>
2 Funding Start Date	Commencement Date.
3 End Date	Commercial Information
4 Background	<p>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.</p> <p>The Recipient was incorporated by the Far North District Council (the Council) to act as a vehicle for delivery of the Council’s commercial activities. It is a Council Controlled Organisation under the Local Government Act 2002. The Council is the sole shareholder in the Recipient.</p> <p>As the Council’s commercial trading vehicle, the Recipient facilitates and creates commercial and infrastructural assets in the Far North District, in doing so, it:</p> <ul style="list-style-type: none"> - Operates under good governance; - Seeks new business development opportunities; - Identifies, collaborates or enters joint venture opportunities; - Manages existing assets and bring commercial expertise in property management; and - Creates profits for the Council and improves asset value. <p>The Recipient leads the delivery of property and infrastructure assets in its ownership and under its management. These actions contribute to the development of the Far North District.</p> <p>The Recipient’s primary roles are:</p> <ul style="list-style-type: none"> - To plan, manage, operate and develop land, maritime, aviation and public assets within its ownership; or under the terms of any management agreement entered into; and - To plan, facilitate and secure commercial outcomes in its area of Influence that support the growth of the Far North District. <p>The Recipient will assume any project cost short falls and fully underwrites the Project.</p> <p>The Recipient has sought a funding contribution from the Ministry for the purposes of the Project described below. The Ministry has agreed to contribute funding on the terms and conditions of this Agreement (Agreement).</p> <p>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</p>

	out in Part 3 .								
<p>5 Conditions Precedent</p>	<p>No Funding is payable under this Agreement until the Ministry has confirmed to the Recipient in writing that it has received, and found, in its sole discretion, to be satisfactory to it in form and substance, the following documents and evidence:</p> <ul style="list-style-type: none"> (a) Evidence the Recipient is the legal owner of the Russell Wharf and all necessary land and related interests required carry out the Project. (b) A copy of the extract of resolution of the Recipient’s board in the form provided to the Ministry on or about <small>Commercial Information</small> signed by the Chair and two Directors. (c) A copy of the executed Construction Contract in respect of the Project. (d) A copy of a letter from the Recipient confirming the Co-Funding commitments at item 11 below. 								
<p>6 Project</p>	<p>The Project is an upgrade to Russell Wharf and includes:</p> <ul style="list-style-type: none"> - replacing low tidal landings with floating concrete pontoons - removing the fixed timber landing jetty and replacing it with a concrete pontoon - a new dinghy dock - a wharf extension to the west for more visitor space and improved passenger flow - a sewage and water service to be provided as required by the RWT. <p>The Project excludes the Russell Wharf Building, re-develop the information centre and the café building. Such building to be built by FNHL as a part of its Co-Funding of the Project.</p> <p>A copy of the proposed “project plan” is provided at the Annexure to this Agreement.</p>								
<p>7 Project Deliverables</p>	<p>The Recipient is to complete the following Deliverables for the Project to the satisfaction of the Ministry by the following dates:</p> <table border="1" data-bbox="469 1518 1445 1966"> <thead> <tr> <th data-bbox="469 1518 959 1585">Completion Date</th> <th data-bbox="959 1518 1445 1585">Deliverable</th> </tr> </thead> <tbody> <tr> <td data-bbox="469 1585 959 1715"></td> <td data-bbox="959 1585 1445 1715">Appointment of Approved Contractor(s) for the construction contract acceptable to the Ministry</td> </tr> <tr> <td data-bbox="469 1715 959 1906"><small>Commercial Information</small></td> <td data-bbox="959 1715 1445 1906">Duly executed construction contract based on <small>Commercial Information</small> with the Approved Contractor to deliver the Wharf Project for the budgeted cost of NZ\$<small>Commercial Information</small></td> </tr> <tr> <td data-bbox="469 1906 959 1966"><small>Commercial Information</small></td> <td data-bbox="959 1906 1445 1966">Construction commenced</td> </tr> </tbody> </table>	Completion Date	Deliverable		Appointment of Approved Contractor(s) for the construction contract acceptable to the Ministry	<small>Commercial Information</small>	Duly executed construction contract based on <small>Commercial Information</small> with the Approved Contractor to deliver the Wharf Project for the budgeted cost of NZ\$ <small>Commercial Information</small>	<small>Commercial Information</small>	Construction commenced
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8 Key Personnel	<p>Privacy of natural persons Far North Holdings Ltd</p> <p>Privacy of natural persons Far North Holdings Ltd</p> <p>Privacy of natural persons Engineer and Project Manager</p> <p>Privacy of natural persons Engineer and Project Manager</p>										
9 Approved Contractors	Commercial Information or any other person approved in writing by the Ministry.										
10 Funding	The aggregate total Funding available under this Agreement is NZ\$1,114,000 excluding GST (if any). This is the Total Maximum Amount Payable.										
11 Co-Funding	<p>The Recipient must have secured and committed the following Co-Funding to be used for the Project of no less than:</p> <ul style="list-style-type: none"> NZ\$ Commercial Information excluding GST (if any) from the Recipient, in respect of the Project; and NZ\$ Commercial Information excluding GST (if any) from the Recipient to build the information centre on the wharf, between Commercial Information Co-funding must be applied to fund Project costs pro rata with Funding. 										
12 Reporting	<p>The Recipient will provide the Ministry with the following reports:</p> <ul style="list-style-type: none"> A monthly report by the 10th Business Day following the end of each month and within 20 Business Days of completion of the Project. A Post Contract Outcomes Report submitted within 2 months of completion of the Project. <p>Each monthly report must include the following information:</p> <ol style="list-style-type: none"> Description and analysis of actual progress of the Project against planned progress; Progress and achievement of any of the Deliverables; Images of the progress of any development aspects of the Project; The number of new jobs created and FTE employed in relation to the Project; 										

	<ul style="list-style-type: none"> (e) The training and development schemes provided in relation to the Project including the number of people who receive the training; (f) A statement of the Funding and any Co-Funding received, spent and remaining; (g) A costs update (including actual to date and cost to completion for each Deliverable and the Project); (h) Plans for the next month (not required in the final report following completion of the Project); (i) Any major risks arising or expected to arise with the Project, costs or performance of this Agreement; (j) Copies of any proposed and any published promotional material, media publicity or other documentation relevant to the Project or the Deliverables; <p>Each Post Contract Outcome report must include the following information:</p> <ul style="list-style-type: none"> (a) an analysis of how the Funding has enabled the Recipient to achieve the key outcomes of the Project; (b) an analysis of how the Funding and the Project has brought wider benefits to the region/province; (c) detail of the number of jobs that the Project created; (d) detail of any training or development schemes that were provided in delivery of the Project and how many people that training and development was provided to; (e) detail of environmental sustainability created by the Project; (f) detail of better use of iwi assets; (g) detail of increased resilience to any proximate infrastructure; (h) detail of increased resilience of the regional economy; and (i) any other information that is notified by the Ministry in writing to the Recipient.
<p>13 Insurance</p>	<p>Prior to commencement of construction of the Project the Recipient must ensure that at all times insurances are maintained in full force and effect, which:</p> <ul style="list-style-type: none"> (a) insure in respect of its interests in the property and the plant and equipment on the property (including fixtures and improvements) for their full replacement value (being the total cost of entirely rebuilding, reinstating or replacing the relevant asset if it is completely destroyed, together with all related fees and

	<p>demolition costs) and to:</p> <ul style="list-style-type: none"> (i) provide customary cover against loss or damage, including by fire, storm, tempest, flood, earthquake, lightning, explosion, impact, aircraft and other aerial devices and articles dropped from them, riot, civil commotion and malicious damage, bursting or overflowing of water tanks, apparatus or pipes and all other normally insurable risks of loss or damage; (ii) provide cover for site clearance, shoring or propping up, professional fees and tax; (iii) provide for contractor's all risks insurance covering all contractors; (iv) provide for professional indemnity insurance covering all contractors and consultants with a design responsibility; <p>(b) include public liability and third party liability insurance;</p> <p>insure such other risks as a prudent person or entity in the same business would insure.</p>
<p>14 Special Terms</p>	<p>Without prior consent of the Ministry, the Recipient may not sell, lease, dispose, transfer, assign or cease to legally and beneficially own the Project and related property for a term of 20 years.</p> <p>The Recipient must maintain sufficient co-funding to complete the project at all times, given the residual funding available under this Agreement and then expected cost to complete the Project.</p> <p>Upon completion of the Project, the Recipient will maintain the completed Project and related facilities at the Russell Wharf and all related assets in accordance with best industry practice, in any way necessary to maintained in:</p> <ul style="list-style-type: none"> (a) good and substantial repair and condition and, as appropriate, in good working order; and (b) such repair, condition and order as to enable them to be let in accordance with all applicable laws and regulations; for this purpose, a law or regulation will be regarded as applicable if it is either: <ul style="list-style-type: none"> (i) in force; or (ii) it is expected to come into force and a prudent property owner in the same business as the Recipient would ensure that its buildings, plant, machinery, fixtures and fittings were in such condition, repair and order in anticipation of that law or regulation coming into force. <p>The Recipient must comply with all financial covenants in respect of its finance arrangements, and represents and warrants that entry into, and the performance of, its obligations under this Agreement, will not be or cause an 'event of default' (however so described) under its financing arrangements.</p> <p>The Recipient acknowledges that the Ministry has entered into this agreement by way of a grant, not a loan on commercial terms, on the representation made by the Recipient that a loan (in aggregate across all three wharf projects: Opuia, Russell and Paihia) would cause it to exceed its financial covenants and debt to equity ratio.</p>

<p>15 Contact Person</p>	<p>Ministry's Contact Person: Name: Ward Tuite Email: ward.tuite@mbie.govt.nz</p>	<p>Recipient's Contact Person: Name: Email:</p>
<p>16 Address for Notices</p>	<p>To the Ministry: Level 4 160 Lambton Quay PO Box: 1473 Wellington 6140 Attention: Stephanie Weller Email: pgf@mbie.govt.nz and cc stephanie.weller@mbie.govt.nz</p>	<p>To the Recipient: PO Box 7, Opua 0200 Attention: <small>Privacy of natural persons</small> Email: <small>Privacy of natural persons</small></p>
<p>SIGNATURES</p>	<p>SIGNED for an on behalf of the SOVEREIGN IN RIGHT OF NEW ZEALAND by the person named below, being a person duly authorised to enter into obligations on behalf of the Ministry of Business, Innovation and Employment:</p> <p>_____</p> <p>Name: Position: Date:</p>	<p>SIGNED for and on behalf of the RECIPIENT by the person named below, being a person duly authorised to enter into obligations on behalf of the Recipient:</p> <p>_____</p> <p>Name: <small>Privacy of natural persons</small> Position: <small>Privacy of n</small> Date:</p>

END OF PART 1

PART 2: GENERAL TERMS

1 FUNDING

- 1.1 The Ministry will pay the Funding (up to the “Total Maximum Amount Payable” specified in the Key Details) to or on account of the Recipient, subject to the terms of this Agreement. The Recipient must use the Funding for, or ensure the Funding is applied towards, the purposes of the Project.
- 1.2 The Recipient can only request payment of the Funding in accordance with this Agreement and to the extent necessary to cover Eligible Costs.
- 1.3 The Recipient may submit a Payment Request to the Ministry’s Contact Person, at the same time as the relevant monthly report is delivered to the Ministry.
- 1.4 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;
 - (b) a breakdown of total Eligible Costs incurred by the Recipient and which the requested Funding is to meet and confirmation that such costs are Eligible Costs for the purpose of this Agreement have been paid or are currently due and payable or will become payable within 30 days of the date of this Payment Request;
 - (c) originals of invoices received by the Recipient from 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) if Co-Funding is provided for in the Key Details, contain a breakdown of the total Eligible Costs incurred and paid for, and/or to be incurred and paid for, by the Recipient, demonstrating that Co-Funding has or will be applied to satisfy a proportional amount of these Eligible Costs in accordance with clause 2(a)(ii);
 - (e) if the Payment Request includes a GST component, contain a valid GST invoice complying with the Goods and Services Tax Act 1985; and
 - (f) contain any other information required by the Ministry.
- 1.5 The Ministry is not required to pay any Funding in respect of a Payment Request:
- (a) where the Ministry is not satisfied with the progress of the Project;
 - (b) if any Deliverable(s) have not been completed by the relevant “Completion Date” specified in the Key Details;
 - (c) if the Ministry is not satisfied with the information that is contained within, or provided in connection with, the monthly reports or the Payment Request noting that in the context of the Payment Request the Ministry may elect to pay the Recipient for certain Eligible Costs that are the subject of the Payment Request and withhold payment for other Eligible Costs that the Ministry disputes;

- (d) if the Ministry is not satisfied that the Recipient has applied Co-Funding in accordance with clause 2(a)(ii) of this Agreement;
- (e) if payment will result in the Funding exceeding the “Maximum Amount Payable” specified in the Key Details;
- (f) while there are one or more Termination Event(s);
- (g) if this Agreement has expired or been terminated; and/or
- (h) while the Recipient is in breach of this Agreement.

1.6 Subject to the terms of this Agreement, the Ministry will 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 CO-FUNDING

The Recipient must:

- (a) ensure that during the term of this Agreement the Co-Funding:
 - (i) is and remains secured and available to the Recipient to be applied towards the Project on the same terms and conditions approved by the Ministry; and
 - (ii) is applied to Eligible Costs proportionally with Funding provided under this Agreement; and
- (b) immediately notify the Ministry if it becomes aware of any circumstances that may result in the Co-Funding (or any part of the Co-Funding) not being secured and available to the Recipient to be applied towards the Project.

3 RECIPIENT’S RESPONSIBILITIES

Standards and compliance with laws

- 3.1 The Recipient will use reasonable endeavours to undertake the Project as described in this Agreement.
- 3.2 In undertaking the Project, the Recipient will comply with all applicable laws, regulations, rules and professional codes of conduct or practice.

Deliverables, Key Personnel, Contractors and the Project

- 3.3 The Recipient will ensure that the Deliverables and the Project are 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.

- 3.4 The Recipient will ensure that the Deliverables are completed by the relevant “Completion Date” specified in the Key Details.
- 3.5 The Recipient will ensure that the Key Personnel undertake their respective roles in connection with the Project as specified in the Key Details, except as otherwise approved in writing by the Ministry. If any Key Personnel become unavailable to perform their role, the Recipient must promptly arrange replacement Key Personnel acceptable to the Ministry.
- 3.6 The Recipient may not contract (either directly or indirectly) the delivery of the Project or any of its obligations under this Agreement or the related construction contract except where:
- (a) it has the Ministry’s prior written approval (which may be given on any conditions specified by the Ministry);
 - (b) the contractors are named as “Approved Contractors” in respect of particular roles in the Key Details; or
 - (c) the contract is for less than \$50,000.
- 3.7 The Recipient is responsible for the acts and omissions of any contractors.
- 3.8 The Recipient will ensure (and will procure that the head contractor when engaging with any other contractor ensures) that all agreements it enters into with contractors or any other party in connection with the 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 3.8 in response to any request by the Ministry from time to time.

Information Undertakings

- 3.9 The Recipient will 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.
- 3.10 The Recipient will provide the Ministry with any other information about the Project requested by the Ministry within the timeframe set out in the request.
- 3.11 The Recipient shall 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 Project, or result in a Termination Event or a breach of any term of this Agreement by the Recipient.
- 3.12 The Recipient will 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 will 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

- 3.13 The Recipient will 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.

- 3.14 The Recipient must keep full and accurate records (including accounting records) of the 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 Project and will allow the Ministry and/or the auditor access to the Recipient's premises, systems and personnel for the purposes of this inspection.
- 3.15 The Recipient must appoint a reputable firm of chartered accountants as auditors to audit its financial statements in relation to the use of the Funding.

Capital Assets

- 3.16 If the Recipient uses the Funding to purchase or develop any Qualifying Capital Asset and, at any point during the term of this Agreement or during the 20 years after the End Date, either:
- (a) the Recipient sells, disposes or transfers the Qualifying Capital Asset, without the Ministry's prior written consent; or
 - (b) the Qualifying Capital Asset will no longer be used for the purpose intended by the Ministry at the time this Agreement was entered into,

then the Recipient must immediately repay to the Ministry an amount equal to the amount of Funding used by the Recipient in the purchase or development of the Qualifying Capital Asset, as determined by the Ministry. The Recipient shall notify the Ministry promptly upon taking any step or action to sell, dispose, transfer or change the purpose of the Project.

Insurance

- 3.17 The Recipient must effect and maintain insurance that is adequate to cover its obligations under this Agreement, plus any other insurance specified in the Key Details. The Recipient will, on request, provide the Ministry with evidence of its insurance cover required under this clause.

Health and Safety

- 3.18 Without limiting its other obligations under this Agreement, the Recipient will:
- (a) consult, cooperate and coordinate with the Ministry to the extent required by the Ministry to ensure that the Ministry and the Recipient will each comply with their respective obligations under the Health and Safety at Work Act 2015 as they relate to this Agreement and the Project;
 - (b) perform its, and ensure that the contractors perform their, obligations under this Agreement and the Project (as applicable) in compliance with its and their obligations under the Health and Safety at Work Act 2015;
 - (c) comply with all directions of the Ministry relating to health, safety, and security; and
 - (d) report any health and safety incident, injury or near miss, or any notice issued under the Health and Safety at Work Act 2015, to the Ministry to the extent that it relates to, or affects, this Agreement or the Project.

4 PROJECT GOVERNANCE

- (a) If advised in writing by the Ministry the Recipient will:

- (i) provide reasonable notice to the Ministry of all Project management group meetings and Project governance group meetings; and
 - (ii) provide copies of all documents and notices to be tabled at the Project management group meetings and Project governance group meetings to the Ministry no later than a reasonable period prior to the meetings, and the minutes of those meetings within a reasonable period after each meeting
- (b) The Ministry may appoint observers who will be entitled to attend and speak at all Project management group meetings and Project governance group meetings (but will not be entitled to vote on any matter at those meetings).

5 INTELLECTUAL PROPERTY

- 5.1 The Ministry acknowledges that the Recipient and its licensors will retain ownership of 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.
- 5.2 The Recipient grants a perpetual, irrevocable, world-wide, royalty-free, non-exclusive licence (including the right to sublicense) to the Ministry to use, reproduce and distribute each Licensed Work.
- 5.3 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 5.2 without infringing the intellectual property rights of any third party.

6 TERM AND TERMINATION

- 6.1 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 have either been satisfied (in the opinion of the Ministry) or waived by the Ministry.
- 6.2 This Agreement will remain in force until the End Date, unless terminated in accordance with this Agreement (the **Term**).
- 6.3 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 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 Project;
- (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.

6.4 However, where the Ministry considers that a Termination Event set out in clause 6.3(d) can be remedied, the Ministry will give notice to the Recipient requesting a remedy, and will 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.

6.5 The Ministry may recover Funding from the Recipient as follows:

- (a) **Misspent Funding.** 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 misspending to the date the money is repaid.
- (b) **Co-Funding not provided.** On expiry or termination of this Agreement, if Co-Funding has not been used for the Project, the Ministry may recover an amount that represents the same proportion of the Funding as the proportion of Co-Funding that has not been used is of the total Co-Funding.
- (c) **Project abandoned.** If the Recipient has abandoned the Project or stated an intention to abandon the Project, and does not within 10 Business Days of being requested to do so by the Ministry demonstrate to the Ministry's satisfaction that the Recipient will proceed with the Project, the Ministry may recover an amount up to the total value of the Funding, provided the Ministry may not recover under this subclause if the Recipient satisfies the Ministry that it acted on reasonable grounds in deciding to abandon the Project.

6.6 Clauses 1.5, 3.2, 3.13, 3.14, 3.16, 5, 6, 7, 8, 9, 10, 11, 12 and 13 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.

7 WARRANTIES

- 7.1 The Recipient warrants that, in the course of its activities in connection with the Project, it will not infringe any intellectual property or other rights of any third party.
- 7.2 The Recipient warrants that, as at the date of this Agreement:
- (a) 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;
 - (b) it has disclosed to the Ministry all matters known to the Recipient (relating to 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
 - (c) 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.
- 7.3 The Recipient acknowledges that the Ministry has entered into this Agreement in reliance on these warranties.
- 7.4 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 Project other than the Funding.

8 LIABILITY

- 8.1 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.
- 8.2 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.

9 CONFIDENTIALITY

- 9.1 Subject to clause 9.2 and 9.3, each party will keep the other party's Confidential Information in confidence, and will 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 will 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 third party any Licensed Work, provided that prior to any such disclosure the Ministry removes all information that is commercially sensitive to the Recipient from the relevant work.

9.2 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 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 "no surprises" policy advised by Ministers of the Crown; 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 Project, on websites; in media releases; general announcements and annual reports.

9.3 The Recipient acknowledges that:

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

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, in terms of the Official Information Act 1982, to withhold it.

10 PUBLICITY

- 10.1 Before making any media statements or press releases 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.
- 10.2 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.
- 10.3 The Recipient will acknowledge the Ministry as a source of funding in all publications 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).

- 10.4 If requested by the Ministry, the Recipient will establish or erect temporary and/or permanent signage (which may be in the form of a plaque) at the site of the Project acknowledging the Ministry as a source of funding for the Project. The Ministry may provide such signage and the Ministry will consult with the Recipient in respect of a suitable location for such signage.
- 10.5 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.

11 DISPUTES

- 11.1 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 11 (*Dispute Notice*). As soon as reasonably practicable following receipt of a Dispute Notice, the parties will meet (in person, or by audio or video conference) and endeavour to resolve the Dispute by discussion, negotiation and agreement.
- 11.2 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 11. However, nothing in this clause will prevent either party from seeking urgent interim relief from a court (or other tribunal) of competent jurisdiction.

12 CONTACT PERSONS

- 12.1 All matters or enquiries regarding this Agreement will be directed to each party's Contact Person (set out in the Key Details).
- 12.2 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.

13 GENERAL

- 13.1 Each notice or other communication given under this Agreement (each a notice) will 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.

- 13.2 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.
- 13.3 No legal partnership, employer-employee, principal-agent or joint venture relationship is created or evidenced by this Agreement.
- 13.4 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.
- 13.5 No amendment to this Agreement will be effective unless agreed in writing and signed by both parties.
- 13.6 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.
- 13.7 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 Project or this Agreement.
- 13.8 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.
- 13.9 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.
- 13.10 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.
- 13.11 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.
- 13.12 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.
- 13.13 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

PART 3: DEFINITIONS AND CONSTRUCTION**Defined terms**

In this Agreement, unless the context requires otherwise:

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

Authorisation is defined as any consent, authorisation, registration, certificate, licence, permission approval, authority, exemption or waiver required from, by, or with a governmental agency or require by law, including any consent under the Resource Management Act 1991.

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.

Co-Funding means the “Co-Funding” or any part of the Co-Funding (as the context requires), described in the Key Details.

Commencement Date has the meaning given in clause 6.1 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 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 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, in respect of the Project, the actual costs reasonably incurred by the Recipient:

- (a) on or after the Funding Start Date and no later than the End Date;
- (b) in good faith for the purpose of carrying out the Project or for purposes incidental to the Project, including all internal costs, disbursements and expenses incurred by the Recipient for such purposes (and to the extent the Recipient is carrying out any other activities) reasonably and proportionately allocated towards such purposes; and
- (c) to the extent that the expenditure relates to work performed by parties not at "arm's length", that expenditure is assessed at reasonable market value, and contains no unacceptable overhead and no element of "in group profit".

End Date means the "End Date" specified in the Key Details.

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.

Funding Start Date means the "Funding Start Date" specified in the Key Details.

Key Details means Part 1 of this Agreement.

Key Personnel means the "Key Personnel" specified in the Key Details.

Licensed Work means all reports, documents, information and other materials provided by the Recipient to the Ministry under or in connection with the Project or this Agreement.

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.

Project means the "Project" described in the Key Details.

Qualifying Capital Asset means a capital asset (as determined in accordance with generally accepted accounting practice, as defined in the Financial Reporting Act 2013) purchased or developed by the Recipient using no less than \$50,000 of Funding.

Recipient means the Recipient specified in the Key Details.

Termination Event means any one or more of the events or circumstances set out in clause 6.3.

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.

END OF PART 3

Schedule: Payment Request

To: MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT

Dated: [•]

PAYMENT REQUEST NO. [•]

1. We refer to the Funding Agreement dated [•] and agreement number [•] between [x] as recipient (**Recipient**) and The Sovereign in right of New Zealand, acting by and through the Chief Executive of 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 1.4 of the Agreement.
3. The Deliverables which are the subject of this Payment Request are:

[insert description of Deliverables].
4. The amount of Funding requested is \$[x] excluding GST if any.
5. The Funding requested in this Payment Request is required to meet the following Eligible Costs that have been incurred by us:

[include breakdown description of Eligible Costs].
6. Invoices/statements and accounts evidencing the above Eligible Costs are attached.

**Note that for any Eligible Costs that are more than \$1,000 (on an individual basis or when grouped by supplier or subject matter) a copy of the original invoices received from third parties in relation to the Eligible Costs must be provided.*
7. That each of the items referred to in paragraph 6 are Eligible Costs for the purpose of the Agreement have been paid or are currently due and payable or will become payable within 30 days of the date of this Payment Request.
8. [Co-Funding will be used to meet the following Eligible Costs that have been incurred by us:

[include breakdown description of Eligible Costs that Co-Funding will meet]
9. *[Include valid GST invoice if relevant].*
10. 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.

Except to the extent otherwise agreed in writing by the Ministry, all those items forming part of the Eligible Costs identified in the previous Payment Request as due or becoming due and payable, have been paid in full.

By and on behalf of the Recipient by

[insert name of Recipient]

Director

Authorised Officer

Annexure: Project Plan

Commercial Information

