



FUNDING AGREEMENT

FOR

Business Recovery Grants (Cyclone Gabrielle)

DATED the 1 day of March 2023

BETWEEN The Sovereign in Right of New Zealand acting by and through Te Tumu Whakarae mō Hikina Whakatutuki, Secretary for Business, Innovation and Employment and Chief Executive of the Ministry of Business, Innovation and Employment ("**Ministry**")

AND **Toi EDA** of Gateway West, Coastlands, Whakatāne 3194 ("**Recipient**")

BACKGROUND

The Ministry wishes to contribute to the Project by providing funding from the appropriation set out in the Details on the terms set out in this Agreement.

AGREEMENT

The Ministry will pay the Funding to the Recipient, and the Recipient accepts the Funding, on the terms and conditions set out in Schedule 1 (Details) and Schedule 2 (Funding Agreement Standard Terms and Conditions).

Signed by the Sovereign in Right of
New Zealand acting by and through Te
Tumu Whakarae mō Hikina
Whakatutuki, Secretary for Business,
Innovation & Employment and Chief
Executive of the **Ministry of Business,
Innovation and Employment** or their
authorised delegate:

Signature

Robert Pigou
**Deputy Chief Executive and Head of
Kānoa – Regional Economic
Development and Investment Unit**

Date: 3 March 2023

Signed for and on behalf Toi EDA by:

Signature

Print Full Name

Print Title

Date: _____

SCHEDULE 1 - DETAILS**1 Context**

- 1.1 Government has at times provided financial assistance and support for businesses in times of disasters. Recognising that adverse events are unique and affect communities and businesses in different ways, bespoke packages are developed for events at Ministerial discretion.
- 1.2 Cyclone Gabrielle has caused large-scale property and infrastructure damage in the upper and eastern North Island of New Zealand, bringing extensive disruption to communities and businesses. It is expected to be the most significant weather event New Zealand has seen since Cyclone Bola in 1988.
- 1.3 On 14 February 2023, following the declaration of local states of emergency across seven regions, a National State of Emergency was declared.
- 1.4 Cyclone Gabrielle meets the threshold for providing emergency business support, on the basis that it has had a sudden, significant and sustained impact on small businesses in impacted regions that is beyond their capabilities, and that of the local business community, to respond effectively.
- 1.5 On 20 February 2023, Cabinet agreed to deliver an interim business support recovery package which includes discretionary funding for cyclone recovery of up to \$25.0m.
- 1.6 The Ministry will fund the Recipient to address cyclone-impacted businesses' immediate cash-flow needs, with a secondary objective being to position businesses for a successful recovery.

2 Appropriation and approval process (Background)

- 2.1 Funding is from a non-departmental other expense appropriation Economic Development: Business Support Packages appropriation within Vote Business, Science and Innovation, authorised by Joint Ministers on 20 February 2023.

3 Funding (clause 2.1, Schedule 2)

- 3.1 This Agreement provides funding for a total amount of \$375,000 (plus GST if any), split between:
 - (a) \$355,000 (plus GST if any) for a Business Support Grants Programme for distribution of grants to businesses in the Recipient's district. The Business Support Grants Programme's purpose is to support viable businesses within the regional boundaries of Bay of Plenty Regional Council significantly impacted as a direct result of Cyclone Gabrielle to assist with specific business needs

- (b) \$20,000 (plus GST if any) to establish and administer the Business Support Grants Programme (such arrangements to be documented in the operational plan that the Recipient will prepare under clause 4 of this Schedule 1 below)

3.2 The Recipient will hold the Funding in a separate bank account until it can be distributed in accordance with clause 4 of Schedule 1 to this Agreement. Any interest earned by the Recipient on the Funding must be applied to distributions made in accordance with this Agreement.

3.3 Administration costs (referred to in clause 3.1(b)) will be incurred by the Recipient to deliver the Funding. Funds will be sourced from within the total Funding. Administration costs of the Recipient may include the costs to design, manage and report on the Business Support Grants Programme.

4 **Project** (*clause 2.3(a), Schedule 2*)

4.1 The Recipient will implement and manage the Business Support Grants Programme. Eligibility criteria for the Business Support Grants Programme are that a business:

- (c) be primarily located where a regional State of Emergency was declared;
- (d) face significant cashflow issues due to continued challenges with customer access, ability to source stock, supply chain issues, inability to operate as usual due to physical damage to equipment or premises, or delays in insurance assessment and repairs;
- (e) be an otherwise viable business both before and after the flooding;
- (f) not have received any funding from the MPI recovery fund;
- (g) commit to acting in line with employment law and with due regard to its employees; and
- (h) meets any other eligibility criteria set by the Recipient.

4.2 The Recipient will ensure that each drawdown on the Business Grants Support Programme is:

- (a) no more than \$40,000 per business supported (excluding GST if any);
- (b) for an amount proportionate to the scale of the business, the damage caused and takes account of any other relevant factors
- (c) applied for, and granted, no more than once per eligible business.

4.3 The Recipient must undertake the following Project Tasks to implement the Business Support Grants Programme:

- (a) implement an operational plan which will include (but is not limited to):

- (i) providing for an assessment panel that includes, at a minimum, representative of iwi, a local business representative, and a relevant local authority, to make funding recommendations to the Recipient ('the Assessment Panel'). The Assessment Panel may also seek other support and advice as it considers appropriate, including from a representative of central government;
 - (ii) a protocol to manage Assessment Panel members' conflicts of interest, including a register to record all conflicts and how they are managed;
 - (iii) how the Funding will be governed and managed awaiting distribution;
 - (iv) how the distribution of the Funding will be administered, including a list of authorised officers for fund distribution and delegated authorities;
 - (v) criteria by which distributions by the Recipient will be assessed (which will reflect the criteria noted under clause 4.1 and 4.2 Schedule 1 of this Agreement);
- (b) following consideration of the recommendations of the Assessment Panel distribute up to \$355,000 (plus GST if any) of the Funding to successful applicants of grants approved by the Assessment Panel; and
- (c) the Recipient may use up to \$20,000 (plus GST if any) to establish and administer the Business Support Grants Programme.

- 4.4 Prior to distribution of any Funding to a successful applicant, the Recipient must agree terms in writing with that successful applicant which:
- (a) specify the amount of the grant;
 - (b) specify how the grant money will be spent;
 - (c) require the successful applicant to report to the Recipient when the grant money has been spent; and
 - (d) permit the Ministry, at the Ministry's expense, to:
 - (i) inspect or audit all records relevant to this Agreement, if required as part of an inspection or audit under clause 5.2(b) Schedule 2 to this Agreement; and
 - (ii) take reasonable steps to verify the existence of the successful applicant and verify that the successful applicant meets the eligibility criteria.

5 **Payment terms** (*clause 2.1, Schedule 2*)

- 5.1 Payment in full on receipt of a valid invoice in accordance with clause 2.2, Schedule 2.

6 **Commencement Date** (*clause 4.1 Schedule 2*)

- 6.1 The Commencement Date is the date of this Agreement.

7 **Completion Date** (*clause 2.3(b), Schedule 2*)

- 7.1 The Completion Date is 30 June 2023.

8 **Reporting Requirements** (*clause 5.1, Schedule 2*)

- 8.1 Reports are to be provided weekly (day of week to be agreed) and within 20 Business Days of completion of the Project to the Ministry contact in clause 10, schedule 1.
- 8.2 A list of who the Recipient has distributed Funding to, and the amounts of such distributions, must be published on the Recipient's website and be updated fortnightly.

9 **Content of Report** (*clause 5.1, Schedule 2*)

- 9.1 The report must include:
- (a) progress of the Project, including achievement of Project Tasks (if any);

- (b) delivery metrics, including time taken to process each application, grants approved, businesses supported, funding disbursed;
- (c) a summary of expenditure to date, actual against budgeted;
- (d) any issues arising or expected to arise with the Project or this Agreement; and
- (e) any other information requested by the Ministry.

10 **Address for Notices** (*clause 12.5, Schedule 2*)

Ministry:	Recipient:
Ministry of Business, Innovation and Employment 15 Stout Street PO Box 1473 WELLINGTON 6011 Email address: portia.mckenzie@mbie.govt.nz Attention: Portia McKenzie	Toi EDA Gateway West, Coastlands, Whakatāne 3194 Email address: donna@toi-eda.co.nz Attention: Donna Perese

FUNDING AGREEMENT STANDARD TERMS AND CONDITIONS - SCHEDULE 2

1. Interpretation

1.1 In this Agreement, the following terms have the following meanings:

“**Agreement**” means this agreement, including Schedule 1 and this Schedule 2;

“**Business Day**” means any day not being a Saturday or Sunday or public holiday within the meaning of section 44 of the Holidays Act 2003;

“**Commencement Date**” means the commencement date set out in the Details or, if no commencement date is set out, the date of this Agreement.

“**Completion Date**” has the meaning given in the Details;

“**Confidential Information**” includes all information and data (in any form) concerning the organisation, administration, operation, business, clients, finance, and methods of the Ministry, including any information provided by the Ministry under or in connection with this Agreement;

“**Details**” means Schedule 1;

“**Funding**” means the funding amount set out in the Details;

“**GST**” means goods and services tax within the meaning of the Goods and Services Tax Act 1985;

“**Intellectual Property Rights**” includes copyright and all rights conferred under statute, common law or equity in relation to inventions (including patents), registered or unregistered trademarks and designs, circuit layouts, data and databases, confidential information, know-how, and all other rights resulting from intellectual activity;

“**Parties**” means the Ministry and the Recipient and their respective successors and permitted assigns;

“**Project**” means the project described in the Details; and

“**Project Tasks**” means the project tasks (if any) set out in the Details which must be

completed by the Recipient before a Funding payment is made by the Ministry.

1.2 References to clauses and Schedules are to clauses and Schedules of this Agreement and references to persons include bodies corporate, unincorporated associations or partnerships.

1.3 The headings in this Agreement are for convenience only and have no legal effect.

1.4 The singular includes the plural and vice versa.

1.5 “Including” and similar words do not imply any limitation.

1.6 References to a statute include references to that statute as amended or replaced from time to time.

1.7 Monetary references are references to New Zealand currency.

1.8 If there is any conflict of meaning between the Details and Schedule 2, Schedule 2 will prevail.

2. Funding

2.1 The Ministry must pay the Funding at the rate and in the manner set out in the Details. The Funding is the total amount payable by the Ministry for the Project.

2.2 The Recipient must provide a valid GST invoice to the Ministry for all Funding due in the manner set out in the Details. The invoice must:

- a. be sent directly to the Ministry in PDF format via email to mbie.invoices@mbie.govt.nz;
- b. be copied to the relevant Ministry contact as set out in paragraph 13 of the Details;
- c. include sufficient information reasonably required to enable the Ministry to validate the claim for payment including a reference to this Agreement (under which the invoice is issued);
- d. be clearly and legibly marked to

Ministry staff as advised by the Ministry to the Recipient from time to time.

- 2.3 The Ministry is not obliged to make any payment under this Agreement until an invoice which complies with clause 2.2 has been received by it from the Recipient. Payments will be made to the credit of a bank account to be designated in writing by the Recipient.
- 2.4 The Funding is inclusive of all taxation except GST. The Ministry will be entitled to deduct any withholding tax required to be withheld by law from payments made to the Recipient and will not be required to gross-up or increase any such payments in respect of such amounts withheld.
- 2.5 The Recipient must use the Funding only to carry out the Project in accordance with this Agreement.
- 2.6 In consideration of the Funding, the Recipient must:
- (a) complete each Project Task (if any) by the relevant payment date set out in the Details;
 - (b) complete the Project to the Ministry's satisfaction by the Completion Date;
 - (c) carry out the Project in accordance with:
 - (i) the methodology (if any) set out in the Details;
 - (ii) the best currently accepted principles and practice applicable to the field(s) of expertise relating to the Project; and
 - (iii) all applicable laws, regulations, rules and professional codes of conduct or practice; and
 - (d) refund any unspent Funding to the Ministry within 10 Business Days of the Completion Date.
- 2.7 Where all of the monies received by the Recipient to carry out the Project (including the Funding) exceeds the total cost of the Project, the Recipient must refund to the Ministry the excess amount. The Recipient is not required to refund, under this

clause 2.4, any amount that exceeds the total amount of Funding.

3. Project Progress

- 3.1 If:
- (a) the Ministry is not satisfied with the progress of the Project;
 - (b) the Recipient does or omits to do something, or any matter concerning the Recipient comes to the Ministry's attention, which, in the Ministry's opinion, may damage the business or reputation of the Ministry; or
 - (c) the Recipient breaches any of its obligations under this Agreement,
- the Ministry may (without limiting its other remedies):
- (d) renegotiate this Agreement with the Recipient; or
 - (e) terminate this Agreement immediately by notice to the Recipient, and clause 4.4, 4.5 and 4.6 will apply.

4. Term and Termination

- 4.1 Subject to clauses 4.2 and 4.3, this Agreement will commence on the Commencement Date and expire when:
- (a) the final report is completed and provided to the Ministry; and
 - (b) the Project is completed,
- to the satisfaction of the Ministry.
- 4.2 The Ministry may terminate this Agreement at any time by giving at least 10 Business Days' notice to the Recipient.
- 4.3 The Ministry may terminate this Agreement immediately by giving notice to the Recipient, if the Recipient:
- (a) is in breach of any of its obligations under this Agreement and that breach is not capable of being remedied;
 - (b) fails to remedy any breach of its obligations under this Agreement within 5 Business Days of receipt of notice of the breach from the Ministry;

- (c) does or omits to do something, or any matter concerning the Recipient comes to the Ministry's attention, which in the Ministry's opinion may cause damage to the business or reputation of the Ministry or of the Government of New Zealand;
 - (d) has given or gives any information to the Ministry which is misleading or inaccurate in any material respect; or
 - (e) becomes insolvent, bankrupt or subject to any form of insolvency action or administration.
- 4.4 Termination of this Agreement is without prejudice to the rights and obligations of the Parties accrued up to and including the date of termination.
- 4.5 On termination of this Agreement, the Ministry may (without limiting any of its other rights or remedies):
- (a) require the Recipient to provide evidence of how the Funding has been spent; and/or
 - (b) require the Recipient to refund to the Ministry:
 - (i) any of the Funding that has not been spent or committed by the Recipient. For the purposes of this clause, Funding is committed where it has been provided or promised to a third party for the purpose of carrying out the Project and the Recipient, after using reasonable endeavours, is unable to secure a refund or release from that promise (as the case may be); or
 - (ii) the proportion of the Funding that equates to the uncompleted part of the Project, as reasonably determined by the Ministry ; and/or
 - (c) if the Funding has been misused, or misappropriated, by the Recipient, require the Recipient to refund all Funding paid up to the date of termination, together with interest at the rate of 10% per annum from the date the Recipient was paid the money to the date the Recipient returns the money.
- 4.6 The provisions of this Agreement relating to termination (clause 4), audit and record-keeping (clause 5.2(b), (c) and (d)), warranties (clause 6), intellectual property (clause 7), confidentiality (clause 8), and liability and insurance (clause 9) will continue after the expiry or termination of this Agreement.
- 5. Reporting Requirements and Audit**
- 5.1 The Recipient must report on the progress of the Project to the Ministry:
- (a) as set out in the Details;
 - (b) as otherwise reasonably required by the Ministry; and
 - (c) in any format and on any medium reasonably required by the Ministry.
- 5.2 The Recipient must:
- (a) maintain true and accurate records in connection with the use of the Funding and the carrying out of the Project sufficient to enable the Ministry to meet its obligations under the Public Finance Act 1989 and retain such records for at least 7 years after termination or expiry of this Agreement;
 - (b) permit the Ministry, at the Ministry's expense, to inspect or audit (using an auditor nominated by the Ministry), from time to time until 7 years after termination or expiry of this Agreement, all records relevant to this Agreement;
 - (c) allow the Ministry reasonable access to the Recipient's premises or other premises where the Project is being carried out; and
 - (d) appoint a reputable firm of chartered accountants as auditors to audit its financial statements in relation to the use of the Funding;
- 6. Warranties**
- 6.1 Each Party warrants to the other Party that 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.

6.2 The Recipient warrants that:

- (a) it is not insolvent or bankrupt and no action has been taken to initiate any form of insolvency administration in relation to the Recipient;
- (b) all information provided by it to the Ministry in connection with this Agreement was, at the time it was provided, true, complete and accurate in all material respects; 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. Intellectual Property

7.1 All Intellectual Property Rights in the reports provided under clause 5.1 will be owned by the Ministry from the date the reports are created or developed.

7.2 All intellectual property produced by the Recipient or its employees or contractors in relation to the Project is, on creation, jointly owned by the Ministry and the Recipient. Each Party may use (which includes modifying, developing, assigning, or licensing) such intellectual property without obtaining the prior consent of the other Party. On request, the Recipient must provide to the Ministry such intellectual property in any format, and on any medium, reasonably requested by the Ministry.

7.3 The Recipient must ensure that material created or developed in connection with the Project does not infringe the Intellectual Property Rights of any person.

8. Confidentiality

8.1 The Recipient must:

- (a) keep the Confidential Information confidential at all times;
- (b) not disclose any Confidential Information to any person other than its employees or contractors to whom

disclosure is necessary for purposes of the Project or this Agreement;

- (c) effect and maintain adequate security measures to safeguard the Confidential Information from access or use by unauthorised persons; and
- (d) ensure that any employees or contractors to whom it discloses the Confidential information are aware of, and comply with, the provisions of this clause 8.

8.2 The obligations of confidentiality in clause 8.1 do not apply to any disclosure of Confidential Information:

- (a) to the extent that such disclosure is necessary for the purposes of completing the Project;
- (b) required by law; or
- (c) where the information has become public other than through a breach of the obligation of confidentiality in this clause 8 by the Recipient, or its employees or contractors, or was disclosed to a Party on a non-confidential basis by a third party.

8.3 The Recipient must obtain the Ministry's prior written agreement over the form and content of any public statement made by the Recipient relating to this Agreement, the Funding, or the Project.

9. Liability and Insurance

9.1 The Ministry is not liable for any loss of profit, loss of revenue or other indirect, consequential or incidental loss or damage arising under or in connection with this Agreement.

9.2 The maximum liability of the Ministry under or in connection with this Agreement whether arising in contract, tort (including negligence) or otherwise is the total amount which would be payable under this Agreement if the Project had been carried out in accordance with this Agreement.

9.3 The Recipient (including its employees, agents, and contractors, if any) is not an employee, agent or partner of the Ministry or of the Chief Executive of the Ministry. At

no time will the Ministry have any liability to meet any of the Recipient's obligations under the Health and Safety at Work Act 2015 or to pay to the Recipient:

- (a) holiday pay, sick pay or any other payment under the Holidays Act 2003; or
- (b) redundancy or any other form of severance pay; or
- (c) taxes or levies, including any levies under the Accident Compensation Act 2001.

9.4 The Recipient indemnifies the Ministry against any claim, liability, loss or expense (including legal fees on a solicitor own client basis) ("loss") brought or threatened against, or incurred by the Ministry, arising from or in connection with a breach of this Agreement by the Recipient or the Project, or from the negligence or wilful misconduct of the Recipient, its employees or contractors.

9.5 Where the Recipient is a trustee, the Ministry acknowledges that the Recipient has entered into this Agreement as a trustee of the trust named in Schedule 1 in an independent capacity without any interest in any of the assets of the trust other than as trustee. Except where the Recipient acts fraudulently, the Recipient is liable under this Agreement only to the extent of the value of the assets of the trust available to meet the Recipient's liability, plus any amount by which the value of those assets has been diminished by any breach of trust caused by the Recipient's wilful default or dishonesty.

9.6 The Recipient must effect and maintain for the term of this Agreement:

- (a) adequate insurance to cover standard commercial risks; and
- (b) other insurance reasonably required by the Ministry.

The Recipient must, upon request by the Ministry, provide the Ministry with evidence of its compliance with this clause.

10. Dispute Resolution

10.1 The Parties will attempt to resolve any dispute or difference that may arise under or in connection with this Agreement amicably and in good faith, referring the dispute to the Parties' senior managers for resolution if necessary.

10.2 If the Parties' senior managers are unable to resolve the dispute within 10 Business Days of it being referred to them, the Parties will refer the dispute to mediation or another form of alternative dispute resolution agreed between the Parties.

10.3 If a dispute is referred to mediation, the mediation will be conducted by a single mediator appointed by the Parties (or if they cannot agree, appointed by the Chair of LEADR New Zealand Inc.) and on the terms of the LEADR New Zealand Inc. standard mediation agreement (unless the Parties agree otherwise). The Parties will pay their own costs relating to any mediation or other form of alternative dispute resolution (unless they agree otherwise).

10.4 The Parties must continue to perform their obligations under this Agreement as far as possible as if no dispute had arisen pending final resolution of the dispute.

10.5 Nothing in this clause 10 precludes either Party from taking immediate steps to seek urgent relief before a New Zealand Court.

11. Force Majeure

11.1 Neither Party will be liable to the other for any failure to perform its obligations under this Agreement by reason of any cause or circumstance beyond the Party's reasonable control including, acts of God, communication line failures, power failures, riots, strikes, lock-outs, labour disputes, fires, war, flood, earthquake or other disaster, or governmental action after the date of this Agreement ("Force Majeure Event"). The Party affected must:

- (a) notify the other Party as soon as practicable after the Force Majeure Event occurs and provide full information concerning the Force Majeure Event including an estimate

of the time likely to be required to overcome it;

- (b) use its best endeavours to overcome the Force Majeure Event; and
- (c) continue to perform its obligations as far as practicable.

12. General

12.1 A waiver by either Party of any rights arising from any breach of any term of this Agreement will not be a continuing waiver of any other rights arising from any other breaches of the same or other terms or conditions of this Agreement. No failure or delay on the part of either Party in the exercise of any right or remedy in this Agreement will operate as a waiver. No single or partial exercise of any such right or remedy will preclude any other or further exercise of that or any other right or remedy.

12.2 Assignment:

- (a) The Recipient must not assign, delegate, subcontract or transfer any or all of its rights and obligations under this Agreement. The Recipient remains liable for performance of its obligations under this Agreement despite any approved subcontracting or assignment.
- (b) If the Recipient is a company, any transfer of shares, or other arrangement affecting the Recipient or its holding company which results in a change in the effective control of the Recipient is deemed to be an assignment subject to clause 12.2(a).

12.3 This Agreement may only be varied by agreement in writing signed by the Parties.

12.4 If any part or provision of this Agreement is invalid, unenforceable or in conflict with the law, the invalid or unenforceable part

or provision will be replaced with a provision which, as far as possible, accomplishes the original purpose of the part or provision. The remainder of the Agreement will be binding on the Parties.

12.5 Any notice to be given under this Agreement must be in writing and hand delivered or sent by email or registered post to the Parties' respective email address, postal address as set out in the Details. A notice is deemed to be received:

- (a) if personally delivered when delivered; or
- (b) if posted, three Business Days after posting;
- (c) if sent by email, at the time the email enters the Recipient's information system as evidenced by a delivery receipt requested by the sender and it is not returned undelivered or as an error,

provided that any notice received after 5pm or on a day which is not a Business Day shall be deemed not to have been received until the next Business Day.

12.6 This Agreement sets out the entire agreement and understanding of the Parties and supersedes all prior oral or written agreements, understandings or arrangements relating to its subject matter.

12.7 This Agreement may be signed in any number of counterparts (including emailed copies) and provided that each Party has signed a counterpart, the counterparts, when taken together, will constitute a binding and enforceable agreement between the Parties.

12.8 This Agreement will be governed by and construed in accordance with the laws of New Zealand.