

## 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;

“**Committed**” means funding that has been spent with a third party or that the Recipient has contractually agreed to spend with 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 its obligations to the third party in relation to that funding;

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

“**Confidential Information**” means any information that is disclosed by the Ministry in connection with this Agreement and that the Ministry makes known is confidential or that would reasonably be expected to be confidential;

“**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 trade marks 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;

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

“**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; and

“**Uncommitted Funding**” means any Funding that is not Committed.

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, except where expressly stated otherwise.

1.8 If there is any conflict of meaning between the Details and Schedule 2, Schedule 2 will prevail, except where the Details expressly state otherwise.

### 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 use the Funding only to carry out the Project in accordance with this Agreement.

2.3 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.

2.4 Where the total of the Funding under this Agreement and any other money received by the Recipient to carry out the Project exceeds the total cost of the Project, the Recipient must upon request refund to the Ministry the excess amount.

### 3. Term and Termination

3.1 Subject to clauses 3.2 and 3.3, 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.

3.2 The Ministry may terminate this Agreement at any time by giving at least 20 Business Days notice to the Recipient. Without limiting this clause 3.2, the Ministry may give notice of termination if the Project has not

been completed within any timeframe that is specified in this Agreement or in the Recipient's funding application documents or, where no such timeframe was specified, within a reasonable period from the date of this Agreement.

3.3 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.

3.3 Termination of this Agreement is without prejudice to the rights and obligations of the Parties accrued up to and including the date of termination.

3.4 On termination of this Agreement:

- (a) the Ministry may require the Recipient to provide evidence of how the Funding has been spent;
- (b) any Funding that has not yet been paid by the Ministry will not be paid;
- (c) the Ministry may require the Recipient to refund to the Ministry:
  - (i) any Uncommitted Funding; and/or
  - (ii) where this Agreement is terminated under clause 3.3, the proportion of the Funding that equates to the uncompleted part of the Project, as reasonably determined by the Ministry;
- (d) if the Funding has been misused or misappropriated by the Recipient, the Ministry may also 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.

3.5 The provisions of this Agreement relating to termination (clause 3), audit and record-keeping (clause 4.2(b), (c) and (d)), warranties (clause 5), intellectual property (clause 6), confidentiality (clause 7), and liability (clause 8) will continue after the expiry or termination of this Agreement.

#### **4. Reporting Requirements and Audit**

4.1 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.

4.2 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;

#### **5. Warranties**

5.1 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.

5.2 The Recipient warrants that:

- (a) it is not insolvent or bankrupt and no action has been taken to initiate any form of insolvency or administration in relation to the Recipient;
- (b) all information provided by it to the Ministry in connection with this Agreement (including any funding application or similar documents) 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.

#### **6. Intellectual Property**

6.1 All Intellectual Property Rights in the reports provided under clause 4.1 will be owned by the Ministry from the date the reports are created or developed.

6.2 All Intellectual Property Rights in any documentation produced by the Recipient or its employees or contractors and provided to the Ministry 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 documentation in any format, and on any medium, reasonably requested by the Ministry.

6.3 Except as set out in clauses 6.1 and 6.2, the Ministry will not obtain any Intellectual Property Rights in relation to any intellectual property that is developed by the Recipient in the course of the Project.

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

## 7. Confidentiality

7.1 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 7.

7.2 The obligations of confidentiality in clause 7.1 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 7 by the Recipient, or its employees or contractors, or was disclosed to a Party on a non-confidential basis by a third party.

7.3 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.

## 8 Liability

8.1 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.

8.2 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.

8.3 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 in Employment Act 1992 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 Injury Prevention, Rehabilitation and Compensation Act 2001.

8.4 The Recipient indemnifies the Ministry against:

- (a) any taxes, levies, penalties, damages or compensation which the Ministry may be liable to deduct, withhold or pay by reason of the Recipient, or any person used by the Recipient to carry out the Project, being held to be an employee of the Ministry or of the Chief Executive of the Ministry; and
- (b) any claim, liability, loss or expense (including legal fees on a solicitor own client basis) 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 misconduct of the Recipient, its employees or contractors.

8.5 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 the Details 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. Dispute Resolution

9.1 Any dispute arising under, or in connection with, this Agreement which cannot be resolved by the Parties within a reasonable period may be submitted by either Party to arbitration under the Arbitration Act 1996 before a sole arbitrator who will decide the dispute. The decision of the arbitrator will be final.

9.2 If the Parties cannot agree on an arbitrator, either Party may request the President of the New Zealand Law Society to appoint a suitably qualified independent arbitrator to hear and determine the dispute.

9.3 The Parties must continue to perform their obligations under this Agreement as far as possible as if no dispute had arisen pending the final settlement of any matter referred to arbitration.

9.4 Nothing in this clause shall preclude either Party from taking immediate steps to seek urgent relief before a New Zealand Court.

## 10 Force Majeure

- 10.1 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.
- 10.2 If by reason of a Force Majeure Event a Party has been unable to perform any material obligation under this Agreement for a period of one month, the other Party may give the first Party one month's notice terminating this Agreement.

## 11 General

- 11.1 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.
- 11.2 Assignment:
- (a) The rights and obligations of the Recipient under this Agreement are personal to the Recipient and may only be assigned, delegated or subcontracted with the prior approval in writing of the Ministry (which may be given, declined, or given subject to conditions, in the Ministry's sole discretion). The Recipient remains liable for performance of its obligations under this Agreement despite any approved assignment, subcontracting or delegation.
  - (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 11.2(a).
- 11.3 This Agreement may only be varied by agreement in writing signed by the Parties.
- 11.4 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.

- 11.5 Any notice to be given under this Agreement must be in writing and hand delivered or sent by facsimile or post to the Parties' respective addresses or facsimile numbers as set out in the Details. A notice is deemed to be received:
- (a) if personally delivered when delivered;
  - (b) if posted, three Business Days after posting; or
  - (c) if sent by facsimile, at the time of transmission specified in a transmission report by the machine from which the facsimile was sent which indicates the facsimile was sent in its entirety to the facsimile number of the recipient,

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.

- 11.6 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. This clause does not limit clause 5.2(b).
- 11.7 This Agreement may be signed in any number of counterparts (including facsimile 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.
- 11.8 This Agreement will be governed by and construed in accordance with the laws of New Zealand.