

Part E_Terms of Engagement_

1.0_Services_

- 1.1_** The Designer will perform the services described in Part B in contemplation of the Project described in Part A ("Services") with the degree of skill, care and diligence reasonably expected of a professional consultant providing services similar to the Services and in accordance with the letter of engagement provided to the Client ("Letter of Engagement"). The Designer shall at all times comply with the Code of Ethics of Architectural Designers NZ Inc.
- 1.2_** If there is any conflict between the scope of Services in Part B and the Letter of Engagement the Letter of Engagement will prevail.

2.0_Client Responsibilities_

- 2.1_** The Client will provide all reasonable co-operation and assistance to enable the Designer to carry out the Services, including responding to any request for instructions or any designs relevant to the provision of the Services within a reasonable period.
- 2.2_** The Client shall provide to the Designer all information reasonably required to carry out the Services. All such information shall be provided within a reasonable time so as to minimise any delay in the provision of the Services. The Client warrants the accuracy of all information provided to the Designer. The Client will be responsible for payment of any increase in Fees for the Services due to inaccurate information being provided by the Client.

3.0_Authority_

- 3.1_** Prior to any Services being undertaken, the Client shall appoint an individual who has authority to give instructions to the Designer. The Client shall be bound by the instructions of the individual appointed.

4.0_Fees And Payment_

- 4.1_** The Designer may invoice the Client monthly or at other intervals specified in the Letter of Engagement or the Fee Schedule for the fees and other costs and expenses associated with the Services ("the Fees").
- 4.2_** The Designer may submit invoices as payment claims under the Construction Contracts Act 2002 ("Act") which will:
- a.** Identify the Services carried out for the relevant period;
 - b.** State the amount invoiced and indicate the manner in which the payment claim has been calculated, in

particular detailing any variations to the Services;

c. Confirm the due date for payment;

d. State that it is made under the Act;

e. Be accompanied by the information required by section 20(3) of the Act.

- 4.3_** If the Client disputes any aspect of any payment claim served, a payment schedule must be served by the Client within 5 working days of receipt of the payment claim and the Client must pay the undisputed portion on the due date for payment. Full details of the basis for the dispute and details of how the disputed portion has been calculated must be given to the Designer.

- 4.4_** All Fees and other costs will be exclusive of GST and shall be paid in New Zealand dollars. Fees will be as set out in the Letter of Engagement or (if Fees are not specified in the Letter of Engagement) otherwise in accordance with the Designer's standard charges.

- 4.5_** The Designer shall maintain records which clearly identify time and expenses incurred in the provision of the Services, including any incidental purchases of goods or services required.

- 4.6_** Payment of invoices or payment claims must be made by the Client within 10 working days of the date of the invoice or payment claim, without deduction or set-off, unless a valid payment schedule is provided by the Client.

- 4.7_** Interest shall be paid by the Client on overdue amounts at 1.5% per month or part month, computed on a daily basis from the due date until the actual date of payment, compounding monthly. The Client shall also meet any debt recovery costs incurred by the Designer.

- 4.8_** Where any part of a payment claim remains outstanding after the due date for payment and no payment schedule has been served (or a payment schedule has been served but the Client has not made payment of the undisputed portion of the claim), the Designer may suspend provision of the Services in accordance with the Act.

- 4.9_** The Designer will not be liable for any losses arising from a suspension of the Services. In the event of suspension, the Designer shall be entitled to withhold any design documentation until payment is made.

- 4.10_** Unless expressly stated otherwise in the Letter of Engagement, the Client shall be responsible for payment of all fees for any consent applications made by the Designer in association with the Project and the Services, including for example consents under the Building Act 2004 and Resource Management Act 1991 and any other third party charges relating to the Project.



5.0_Reporting_

- 5.1_ The Designer shall provide regular reporting to the Client on the progress of the Services, at intervals set out in the Letter of Engagement or as otherwise agreed between the parties.

6.0_Variations_

- 6.1_ These Terms may only be varied by agreement in writing signed by both parties.
- 6.2_ The Client may request a variation to the Services and the Designer shall use reasonable endeavours to incorporate such variation in the Services, subject to the parties agreeing any additional Fees payable for such variation. If the Designer is able to incorporate the requested variation in the Services, the parties shall agree in writing any additional Fees to be paid to the Designer for such variation provided that in absence of any written agreement the Designer's standard charges will apply.
- 6.3_ If the Designer considers any direction or instruction provided by the Client to be a variation, the Designer shall notify the Client in writing of this and shall advise the Client of the extra Fees associated with the variation.
- 6.4_ The Designer shall not be required to incorporate any variation in the Services unless the Client agrees to the additional Fees for that variation.

7.0_Construction Administration And Observation_

- 7.1_ This clause only applies if the scope of services in Part B includes construction administration and observation services.
- 7.2_ The Designer's services in respect of construction administration and or observation are limited to those matters set out in Part B. Except as specifically provided in Part B, the Designer's obligations will be limited to giving general advice to the contractor carrying out the works on the Project Site in respect of interpretation of the design, and the Designer shall have no liability for any non-compliance with the design by the contractor.
- 7.3_ Unless any variations to the design provided by the Designer are recorded in writing and signed by both parties, the design will be deemed not to have been altered in any way.
- 7.4_ Except as otherwise expressly agreed in writing by the parties, the Designer shall not issue any instructions to vary the building works on the Project Site, and shall not be the agent of the Client in respect of administering the contract with the building contractor.

8.0_Intellectual Property_

- 8.1_ In this clause:

"New Intellectual Property" means all intellectual property rights collated, collected, prepared or created by the Designer (or persons acting on behalf of the Designer) in providing the Services (including in all drawings, designed and other materials – documents including in electronic form) but excluding Client's Pre-Existing Intellectual Property and Designer's Pre-Existing Intellectual Property.

"Designer's Pre-Existing Intellectual Property" means all Intellectual Property rights owned by the Designer, prior to these Terms, and required, provided or used by the Designer in providing the Services.

"Client's Pre-Existing Intellectual Property" means Intellectual Property rights owned by the Client and provided to the Designer for the purposes of providing the Services.

8.2_ Ownership

- a. All New Intellectual Property held in any medium, whether electronic or otherwise, and forming part of the Services supplied under these Terms, shall be owned by the Designer. The Designer retains the right to commercialise or use in any manner the New Intellectual Property that it owns.
- b. The Designer's Pre-Existing Intellectual Property remains the property of the Designer. The Designer retains the right to commercialise any of the Designer's Pre-existing Intellectual Property.
- c. The Client's Pre-Existing Intellectual Property remains the property of the Client.

8.3_ Client's Pre-Existing Intellectual Property

- a. The Client grants to the Designer a non-exclusive, non-transferable royalty-free licence to use and copy the Client's Pre-Existing Intellectual Property to the extent reasonably required to enable the Designer to provide the Services.
- b. The Client confirms that the Client's Pre-Existing Intellectual Property will not infringe any intellectual property or other rights of any third party.

8.4_ Designer's Pre-Existing Intellectual Property

- a. The Designer grants the Client a royalty-free, non-transferable licence to use and copy the Designer's Pre-Existing Intellectual Property to the extent reasonably required to enable the Client to make use of the Services or the Project or the New Intellectual Property.
- b. The Client shall not be entitled to make use of any of the Designer's Pre-Existing Intellectual Property or New Intellectual Property for replication or commercialisation



purposes, however the Designer grants the Client a royalty-free, non-transferable licence to use the New Intellectual Property, solely for the purposes of a rebuild or repair of the Project on the site referred to in the Letter of Engagement ("Project Site").

8.5_ New Intellectual Property

a. The Designer grants the Client a non-exclusive, non-transferable licence to use the new Intellectual Property, subject to the Client complying with all of its obligations under these Terms, including those in respect of payment of Fees and other expenses.

b. Upon termination or completion of the Services and subject to payment of any Fees, the Designer will provide the Client with one copy of any plans or drawing prepared as part of the services, in hard copy or non-editable (e.g. PDF) electronic format. The Designer will not be required to provide the plans or drawings in an editable electronic format.

c. If the Services are terminated prior to their completion, the Client shall only be entitled to use the new Intellectual Property that has been created as at the time of termination.

d. Where the Client wishes to use the New Intellectual Property for additions or alterations to be provided by someone other than the Designer, the Client must obtain the Designer's prior written consent, which shall not be unreasonably withheld.

e. Any re-use of the New Intellectual Property (for example to reproduce the Project on a different site) requires the prior written consent of the Designer (in its sole discretion), who may request a royalty for such re-use, at a rate to be agreed.

9.0_Promotions_

9.1_ The Client must credit the Designer or its representative in any form of promotional material relating to the Services or the Project.

9.2_ The Designer may display a promotional sign on or near the Project Site during the building process and, with the Client's written consent (which may not be unreasonably withheld), use its designs, drawings and photographic images of the Project for the Designer's professional and promotional purposes.

9.3_ The Designer shall be entitled to use its designs, drawings and photographic images of the Project for the purposes of industry award entries and promotion.

10.0_Liability_

10.1_ The Designer shall only be liable for direct damage resulting from a breach of its obligations under these Terms. The Designer will not in any circumstances be liable for the Client's loss of profit or any indirect, consequential or special losses. Any liability of the Designer will be reduced in proportion to the extent that the Client (or any third party) has contributed to the claim, liability, damage, loss or expense, regardless of whether the contribution arises in contract, tort or otherwise.

10.2_ The Client acknowledges that the Designer's employees, directors, officers and agents have no personal liability to the Client in relation to these Terms or the provision of the Services.

10.3_ The maximum aggregate liability of the Designer in respect of the Services (whether in contract, tort (including negligence) or otherwise), shall be limited to five times the Fee (exclusive of GST and disbursements), with a maximum limit of \$NZ250,000.00.

10.4_ In the event that the Services are reduced, varied or otherwise altered, or the Services are terminated or suspended prior to completion, any liability of the Designer will apply only in respect of the Services actually completed, and only to the extent that the reduction or variation of the Services has not compromised or denied the Designer the chance to properly provide the Services, or amend or finalise any designs forming part of the completed Services, or otherwise mitigate any loss to the Client.

10.5_ Where any changes are made by the Client or any other third party to the Service Documentation or the Project or any relevant consents without the Designer's prior written consent, the Designer will not be liable for any damage, loss, expense incurred by the Client as a result of such change.

10.6_ The Client indemnifies the Designer against all claims including, without limitation, claims in negligence or by third parties which arise out of or have a connection with these Terms and which are made after the expiry of the period of liability referred to above.

11.0_Notice of Defects_

11.1_ The Client must notify the Designer in writing no later than 30 working days after the Client becomes aware of any defects or faults in relation to the Services. A failure to notify the Designer within this timeframe means that the Client waives any claim it might have against the Designer (whether in contract, tort or otherwise), in relation to the defects or faults.

12.0_Insurance_

- 12.1_** The Designer holds Professional Indemnity [and Public Liability] insurance cover from an authorised, reputable insurer, for a sum not less than \$250,000.
- 12.2_** The Designer shall use all reasonable endeavours to maintain such cover for a period of six (6) years from the date of completion of the Services or termination of the Designer's engagement, whichever is the later.
- 12.3_** If requested, the Designer shall produce evidence of such insurance cover. If the Client requests that the Designer's professional indemnity cover be increased and the Designer agrees to increase the cover, the Client shall be responsible for meeting the costs of the additional premium and any other fees relating to the increase.

13.0_Separate Contractors_

- 13.1_** The Client may engage other consultants, including those set out in the schedule of separate and sub-contractors (Separate Contractors). The Designer shall co-operate with the Separate Contractors and afford reasonable opportunities for the execution of their works. The Client shall ensure that in carrying out any such work, any Separate Contractor shall not interfere or impede the Designer's work. If the Designer suffers any delay in completing the Services or incurs any additional cost arising from the activity of any Separate Contractors, the Designer may charge those extra costs to the Client.
- 13.2_** The Designer shall not be responsible for any Services provided by any Separate Contractors engaged by the Client.

14.0_Subcontracting_

- 14.1_** The Designer may, with the consent of the Client (not to be unreasonably withheld) subcontract part of the Services. If the Designer subcontracts any part of the Services under this clause, the Designer remains responsible to the Client for any obligation under these Terms.

15.0_Suspension and Termination_

- 15.1_** Either party may terminate these Terms if the other party:
- a.** materially breaches any of its obligations and does not remedy that breach within 5 working days of receiving written notice from the non-breaching party; or
 - b.** commits any act of bankruptcy, makes any assignment or composition with its creditors, goes into liquidation or has a receiver, statutory manager or similar appointed.

- 15.2_** The Client may, by written notice to the Designer,

suspend or terminate the Services for any reason. Upon giving notice, the Client must immediately pay all accounts rendered and all of the Designer's fees and expenses up to the date of suspension or termination. The Client will also be required to pay any costs committed to by the Designer prior to notice being given under this clause and any other reasonable costs the Director incurs due to the suspension or termination of the Services, as well as any loss of profits resulting from the non-completion of the Services.

- 15.3_** If at any time the Client is in breach of any of its obligations under these Terms, and without prejudice to any other remedies, the Designer may suspend the supply of Services until the breach is remedied and any date for completion (if specified) shall be delayed by the period of suspension. Where the suspension period exceeds three working days the Designer may give notice reasonably delaying any date for completion (if specified) for a longer period, including where the Designer has taken on other work during the period of suspension.

16.0_Health And Safety_

- 16.1_** Unless otherwise agreed between the parties in writing, the Designer shall have no authority to direct any person on the Project Site other than its own employees or any other person at the Project Site at the request of the Designer. The Designer's role on the Site (if any), shall be limited to that of an observer/advisor to the Client.
- 16.2_** The Client shall, if required by the Designer, require any Person Conducting a Business or Undertaking (as defined in the Health and Safety at Work Act 2015), in relation to the Site (including any separate contractors) to consult, co-operate with and co-ordinate activities with any activities of the Designer and its staff or contractors (if any) on the Site.
- 16.3_** Where the Designer or any of its employees are required to attend the Site for any reason, at the request of the Designer, the Client must identify and advise the Designer of all hazards and risks on the Site which may affect the health and safety of any person on the Site. The Client must, as far as reasonably practicable, eliminate or (if elimination is not practicable), minimise those risks. The Designer may suspend the Services until the Client has complied with this clause.
- 16.4_** The Client agrees that it will provide access to the Site to the Designer (including after completion of the Services), to allow the Designer to comply with any duties it may have under the Health and Safety at Work Act 2015. The Designer shall comply with all health and safety requirements and policies of the Client in relation to the Site.



16.5_ The Client agrees that it shall comply with all guidelines and requirements specified by the Designer in relation to the operation, maintenance, cleaning, repair or other use of any structure or other item designed by the Designer in relation to the Project or Site and shall provide such guidelines or manuals to any other relevant third parties.

17.0_Dispute Resolution_

17.1_ The parties agree to attempt to resolve any disputes in good faith between themselves in the first instance. If such dispute cannot be resolved by way of negotiation within 10 working days of the dispute arising, the parties shall refer the dispute to arbitration in accordance with the Arbitration Act 1996.

17.2_ In the event of a dispute, the Designer may, by notice in writing to the Client, suspend its obligations in respect of the provision of the Services under these Terms. Where this occurs, the Designer will not be liable to the Client or any other party for losses arising from such suspension.

17.3_ Where any dispute arises and until it is resolved, the Client shall not be entitled to use any Service Documentation.

18.0_Privacy_

18.1_ The Client authorises the Designer to:

- a.** Collect, retain and use information about the Client from any person for the purpose of assessing the Client's credit worthiness;
- b.** Disclose information about the Client to such persons as may be necessary or desirable to enable the Designer to exercise any power or enforce or attempt to enforce any of the Designer's rights, remedies and powers under these Terms.

19.0_Confidential Information_

19.1_ The term "Confidential Information" shall mean any and all proprietary data, information, innovations and know-how necessarily or casually acquired, in writing or orally received, by either party from the other party, directly or through their employees or agents. Confidential Information includes all information of a commercial nature and any drawings, specimens, documents, prototypes and patentable concepts. It excludes:

- a.** Information that at the date of receipt by either of the parties is in the public domain or is already known to the other party;
- b.** Information that is received by one of the parties from a third party who is entitled to disclose it;

c. Information that is mutually agreed in writing as not being confidential.

19.2_ Each party will hold all Confidential Information in confidence for the benefit of the other without disclosing it to any third party.

19.3_ All reasonable steps will be taken to keep written and other records secure, and destroy or return such records and copies to the other party when no longer required.

20.0_General_

a. Force Majeure: Neither party is liable for any act, omission, or failure to fulfil its obligations under these Terms if such act, omission or failure arises from any cause reasonably beyond its reasonable control. The party unable to fulfil its obligations agrees immediately to notify the other in writing of the reasons for its failure to fulfil its obligations and the effect of such failure.

b. Assignment: Neither party has the right to assign or sub-license these Terms without the prior written consent of the other party, and in the case of subcontracting by the Designer in accordance with clause 14. The Client's consent may not be unreasonably withheld.

c. Entire Agreement: These Terms constitute the entire agreement between the parties in relation to the Services. No variation, modifications or amendments to these Terms shall be effective unless made in writing and signed by the parties to these Terms. However, the Designer may change these Terms at any time. A change applies from the date the Client is notified of that change.

d. No Reliance: The entire obligations of the Designer in relation to the Services comprising the subject matter of these Terms are set out in these Terms and the Client enters into these Terms entirely in reliance on the Client's own skill and judgment and not in reliance on any conduct, statement or warranty made by the Designer or any other party.

e. Severability: If any clause in these Terms is found by any court of law to be invalid or otherwise not binding on the parties, or if the parties between them agree that one or more clauses is no longer to have effect, the rest of the clauses in these Terms shall continue in full force and effect.

f. No Waiver: If either party delays or does not exercise any right or remedy under these Terms, it is not a waiver of that right or remedy.

g. Relationships: Nothing in these Terms shall be construed as creating a relationship of partnership, employer and employee or principal and agent between the Client and the Designer. No party has any authority to bind the other or act on its behalf except to the extent expressly provided for in these Terms.



h. Governing Law: These Terms and the Services contemplated by it are governed by the laws of New Zealand and each party submits to the jurisdiction of the New Zealand courts.

i. Notices: Any notice given pursuant to these Terms is sufficiently given if in writing and delivered or sent by prepaid post to the address most recently notified in writing by the other party for that purpose or, if no such address has been specified, then to the other party's registered office.

j. Survival: The obligations of the parties under the following clauses: Confidential Information, Intellectual Property and Termination survive expiry or termination of these Terms for whatever reason.

k. Further Assurances: Each party will make all applications, execute all documents and do or procure all other acts or things reasonable and necessary to implement and carry out its obligations under and the intention of these Terms.

l. Consumer Guarantees Act: The parties agree that where the Services are provided for the Client's business purposes, the Consumer Guarantees Act 1993 is not applicable to the Services.

m. Working days: Any reference to "working days" in these Terms has the same meaning as that term is given in the Act.

n. Headings: The headings in these Terms are inserted for convenience only and do not constitute a part of these Terms and cannot be referred to in its interpretation.