



Appendix 1

Ministry of Education's Amendments to the Short Form Model Conditions of Engagement (February 2019)

These conditions amend and supplement the Short Form Model Conditions of Engagement (the Conditions). Clause numbers in these conditions refer to clause numbers in the Conditions.

Clause 3: The following is added at the end of clause 3:

"and shall comply with all applicable statutes, regulations and codes applicable to the Services, including but not limited to compliance with the Health and Safety at Work Act 2015."

Clause 4: The first sentence is deleted and replaced with:

"The Client shall use reasonable endeavours to provide to the Consultant, free of cost, as soon as practicable following any request for information, all relevant information in its power to obtain which may relate to the Services."

Clause 5: The words "as soon as reasonably practicable" are inserted in the first sentence of clause 5 after the word "must".

Clause 6: Clause 6 is deleted entirely and replaced with:

"The Client may order variations to the Services in writing or may request the Consultant to submit proposals for variations to the Services. No work pursuant to a variation may commence until the scope of Services and the fees and expenses (or basis for their calculation) for the variation are approved in writing by the Client."

Clause 7: The second sentence is deleted.

Clause 8: Clause 8 is deleted entirely and replaced with:

"All amounts payable by the Client and not in dispute shall be paid within 20 working days of receipt of the relevant invoice. The Client shall pay default interest on overdue amounts from the date payment falls due to the date of payment at the rate of 2% per annum above the New Zealand 90 day bank bill buy rate."

Clause 11: The second sentence is deleted and replaced with:

"Neither Party will be liable to the other Party for the other Party's indirect, consequential or special loss, or loss of profit, however arising, whether under contract, in tort or otherwise."

Clause 12: Clause 12 is deleted entirely and replaced with:

"The maximum aggregate amount payable, whether in contract, tort or otherwise, in relation to claims, damages, liabilities, losses or expenses, shall be five times the fee (exclusive of GST and disbursements) with a maximum limit of \$NZ500,000 except in respect to weather tightness claims where the maximum aggregate amount payable shall be five times the fee with a maximum limit of \$250,000."

Clause 15: The following words are added at the end of clause 15:

"For the avoidance of any doubt the Consultant is responsible to the Client for the services of any subconsultant, and where the Client is the claiming Party a "third party" for the purposes of this clause 15 will not include any subconsultant or any other person or entity for whom the Consultant is responsible."

Clause 16: is deleted and replaced with:

"Pre-existing Intellectual Property means the intellectual property rights owned by the Consultant or any third party and provided or used by the Consultant in carrying out the Services. The Consultant hereby grants to the Client, or agrees to procure the grant to the Client of, an unrestricted royalty-free licence to use and copy Pre-existing Intellectual Property to the extent reasonably required to enable the Client to make use of the Services or use, adapt, update or amend any physical work relating to the Services. Intellectual property prepared or created by the Consultant in carrying out the Services ("New Intellectual Property") shall be jointly owned by the Client and the Consultant. The Client and Consultant hereby grant to the other an unrestricted royalty-free license in perpetuity to copy or use New Intellectual Property. Intellectual property owned by a Party prior to commencement of this Agreement and intellectual property created by a Party independently of this Agreement remains the property of that Party. The Ownership of data and factual information collected by the Consultant and paid for by the Client shall, after payment by the Client (such payment being part of the fee), lie with the Client. The Consultant does not warrant the suitability of New Intellectual Property or Pre-existing Intellectual Property for any purpose other than the

Services or for any other use stated in the Agreement.”

Clause 19: Clause 19 is deleted entirely and replaced with:

“The Parties shall attempt to resolve any dispute between them in relation to this Agreement, or any matter arising from it, by way of good faith discussions in the first instance. If the dispute has not been resolved within 10 working days of the dispute being notified by one Party to the other, then the dispute will, should a Party wish to pursue the dispute, be determined by mediation. If the Parties then fail to resolve the dispute by way of mediation within a reasonable period, then either Party may refer the dispute to arbitration in accordance with the following:

- (a) *the arbitration will be conducted by a sole arbitrator in accordance with the Arbitration Act 1996 and will not be an international arbitration as defined by that Act;*
- (b) *the sole arbitrator is to be appointed by a panel of two representatives acting unanimously, one each appointed by the Client and the Consultant;*
- (c) *in the event that such representatives have not agreed upon an arbitrator within 10 working days of the dispute being referred to arbitration the arbitrator will be appointed by the then President of the New Zealand Law Society or his or her nominee; and*
- (d) *the seat and location of the arbitration will be at a location in New Zealand determined by the Client.*

Nothing in this clause prejudices either Party's right to institute court proceedings to seek injunctive or urgent declaratory relief in respect of any dispute, and the Consultant will not suspend the Services during any dispute (but subject to clause 18).”

Clause 20: The words “subject to clause 19” are added after the words “the New Zealand courts have jurisdiction in respect of this Agreement”, and the words “(non-exclusive)” are added after the words “the New Zealand courts have”.

The following additional clauses are added to the Conditions:

21. *“Unless the contrary is expressed in writing to the Consultant, the Consultant shall take out and maintain for the duration of the Services a policy of Public Liability insurance to cover damage to property and personal injury for at least \$2,000,000 per occurrence. The Client and its officers and employees will be named under such policy as additional insureds in respect of their vicarious liability for the Consultant’s negligence in relation to the performance of this Agreement.*
22. *“The Consultant agrees to hold all information received from or about the Client that is not already in the public domain in confidence and not disclose such information to any third party or use it in any way without the Client’s prior written consent, except to the extent necessary to fulfil its obligations under this Agreement or to comply with statutory obligations.”*
23. *“The Client’s Representative has authority to give the Consultant instructions on the Client’s behalf; and may monitor, review, approve, accept, reject or confirm any part, or all, of the Services. If the Client changes the Client’s Representative, the Client shall first inform the Consultant in writing.”*
24. *“The Consultant’s Representative has authority to receive instructions on behalf of the Consultant and for co-ordinating and providing the Services as agreed on a day-to-day basis, and must communicate with the Client’s Representative when required.”*
25. *“On completion of the Services, as well as promptly following any request from the Client from time to time, the Consultant must deliver to the Client all Documents in respect of the Services. Documents means, to the extent applicable to the Services, drawings, including statutory compliance documentation, CAD drawings, specifications, reports, project specific manuals, plans, results, studies, calculations, data and any other design documents or design information whether in physical or electronic form), prepared by the Consultant for or on behalf of the Client in respect of the Services. Any other documents or information required by the Client will be as described in the Scope of Services. Following delivery of any Documents, the Consultant will not be liable for any re-use of, or any changes to those Documents by the Client or any other person without the Consultant’s prior written approval.”*
26. *“The Consultant must not assign, transfer or subcontract all or part of its rights or obligations under this Agreement without the Client’s prior written approval.”*
27. *“The Consultant acknowledges and accepts that, for the purposes of the Contract and Commercial Law Act 2017, the rights and benefits conferred on the Client by this Agreement are also for the benefit of, and enforceable by, the Sovereign in right of New Zealand acting by and through the Secretary for Education. For the avoidance of doubt, there will be no double recovery from the Consultant in respect of the same matter as a result of the Secretary for Education enforcing his or her rights as beneficiary under that Act.”*

SHORT FORM MODEL CONDITIONS OF ENGAGEMENT

1. The Consultant shall perform the Services as described in the attached documents.
2. The Client and the Consultant agree that where all or any of, the Services are acquired for the purposes of a business the provisions of the Consumer Guarantees Act 1993 are excluded in relation to those Services. However, nothing in this Agreement shall restrict, negate, modify or limit any of the Client's rights under the Consumer Guarantees Act 1993 where the Services acquired are of a kind ordinarily acquired for personal, domestic or household use or consumption and the Client is not acquiring the Services for the purpose of a business.
3. In providing the Services, the Consultant must use the degree of skill, care and diligence reasonably expected of a professional consultant providing services similar to the Services.
4. The Client shall provide to the Consultant, free of cost, as soon as practicable following any request for information, all information in the Client's power to obtain which may relate to the Services. The Consultant shall not, without the Client's prior consent, use information provided by the Client for purposes unrelated to the Services. In providing the information to the Consultant, the Client shall ensure compliance with the Copyright Act 1994 and shall identify any proprietary rights that any other person may have in any information provided.
5. As soon as either Party becomes aware of anything that will materially affect the scope or timing of the Services, the Party must notify the other Party in writing and where the Consultant considers a direction from the Client or any other circumstance is a variation the Consultant shall notify the Client accordingly.
6. The Client may order variations to the Services in writing or may request the Consultant to submit proposals for variations to the Services.
7. The Client shall pay the Consultant for the Services the fees and expenses at the times and in the manner set out in the attached documents. Where this Agreement has been entered by an agent (or a person purporting to act as agent) on behalf of the Client, the agent and Client shall be jointly and severally liable for payment of all fees and expenses due to the Consultant under this Agreement.
8. All amounts payable by the Client shall be due on the 20th of the month following the month of issue of each GST Invoice or at such other timing as stated elsewhere in this Agreement. If the Client fails to make the payment that is due and payable and that default continues for 14 days, the Consultant may provide written notice to the Client specifying the default and requiring payment within 7 days from the date of the notice. Unless payment has been made by the Client in full, the Consultant may suspend performance of the Services any time after expiration of the notice period. The Consultant must promptly lift the suspension after the Client has made the payment. Regardless of whether or not the Consultant suspends the performance of the Services in accordance with this clause, the Consultant may charge interest on overdue amounts from the date payment falls due to the date of payment at the rate of the Consultant's overdraft rate plus 2% and in addition the costs of any actions taken by the Consultant to recover the debt.
9. Where the nature of the Services is such that it is covered by the Construction Contracts Act 2002 (CCA) and the Consultant has issued a payment claim in accordance with the CCA, the provisions of the CCA shall apply. In all other cases, if the Client, acting reasonably, disputes an invoice, or part of an invoice, the Client must promptly give the reasons for withholding the disputed amount and pay any undisputed amount in accordance with clause 8.
10. Where Services are carried out on a time charge basis, the Consultant may purchase such incidental goods and/or Services as are reasonably required for the Consultant to perform the Services. The cost of obtaining such incidental goods and/or Services shall be payable by the Client. The Consultant shall maintain records which clearly identify time and expenses incurred.
11. Where the Consultant breaches this Agreement, the Consultant is liable to the Client for reasonably foreseeable claims, damages, liabilities, losses or expenses caused directly by the breach. The Consultant shall not be liable to the Client under this Agreement for the Client's indirect, consequential or special loss, or loss of profit, however arising, whether under contract, in tort or otherwise.
12. The maximum aggregate amount payable, whether in contract, tort or otherwise, in relation to claims, damages, liabilities, losses or expenses, shall be five times the fee (exclusive of GST and disbursements) with a minimum of \$100,000 and a maximum limit of \$NZ500,000.
13. Without limiting any defences a Party may have under the Limitation Act 2010, neither Party shall be considered liable for any loss or damage resulting from any occurrence unless a claim is formally made on a Party within 6 years from completion of the Services.
14. The Consultant shall take out and maintain for the duration of the Services a policy of Professional Indemnity insurance for the amount of liability under clause 12. The Consultant undertakes to use all reasonable endeavours to maintain a similar policy of insurance for six years after the completion of the Services.
15. If either Party is found liable to the other (whether in contract, tort or otherwise), and the claiming Party and/or a Third Party has contributed to the loss or damage, the liable Party shall only be liable to the proportional extent of its own contribution.
16. Intellectual property prepared or created by the Consultant in carrying out the Services, and provided to the Client as a deliverable, ("New Intellectual Property") shall be jointly owned by the Client and the Consultant. The Client and Consultant hereby grant to the other an unrestricted royalty-free license in perpetuity to copy or use New Intellectual Property. The Clients' rights in relation to this New Intellectual Property are conditional upon the Client having paid all amounts due and owing to the Consultant in accordance with clauses 7 and 8. Intellectual property owned by a Party prior to the commencement of this Agreement (Pre-existing Intellectual Property) and intellectual property created by a Party independently of this Agreement remains the property of that Party. The Consultant accepts no liability for the use of New Intellectual Property or Pre-existing Intellectual Property other than to the extent reasonably required for the intended purposes.
17. The Consultant has not and will not assume any duty imposed on the Client pursuant to the Health and Safety at Work Act 2015 ("the Act") in connection with the Agreement.
18. The Client may suspend all or part of the Services by notice to the Consultant who shall immediately make arrangements to stop the Services and minimise further expenditure. The Client and the Consultant may (in the event the other Party is in material default that has not been remedied within 14 days of receiving the other Party's notice of breach) either suspend or terminate the Agreement by notice to the other Party. If the suspension has not been lifted after 2 months the Consultant has the right to terminate the Agreement and claim reasonable costs as a result of the suspension. Suspension or termination shall not prejudice or affect the accrued rights or claims and liabilities of the Parties.
19. The Parties shall attempt in good faith to settle any dispute by mediation.
20. This Agreement is governed by the New Zealand law, the New Zealand courts have jurisdiction in respect of this Agreement, and all amounts are payable in New Zealand dollars.