

GOOD CONTRACTING

Principles & Guidance

July 2024



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Good Contracting Project Overview

Master Builders, alongside our members, are constantly looking for ways we can improve our sector to build a better New Zealand.

Our Vertical Construction Leaders Group and Commercial Working Group identified the need for greater education and support around procurement and contracting for the sector to ensure risk is allocated appropriately and fairly.

Master Builders has been working with our Commercial Working Group and Hazelton Law on a Good Contracting project, looking at improving value for money while ensuring a more productive sector.

The Good Contracting project consists of:

- Principles of Good Contracting
- Risk Guidance for NZS 3910:2023
- A Pre-Construction Services Agreement.

The Good Contracting project has also started what will be a series of shorter information sheets/resources to be prepared as required, starting with:

- Termination for Convenience Clauses
- Extension of Time Principles and Float
- Clause 9.2 Special Conditions for NZS 3910:2023.

Principles of Good Contracting

Good contracting produces good outcomes for all parties to a contract. The Principles of Good Contracting intends to set out simple principles for Principals and Contractors to engage pre-contract with confidence in their roles, and confidence in what parties can reasonably expect of each other.

The Principles also provides a model for assessing special conditions so that parties can consider the possible consequences. These Principles are intended to assist parties in pre-project planning, tender-preparation stage, Early Contractor Involvement/Pre-Contract Services stages and during contract negotiations.

Information Sheets

Termination for Convenience Clauses

Termination for convenience clauses in construction contracts allow one party to end the contract without cause or consequence, often leaving the other party without compensation for investments made based on the original contract. The ability to exit a contract without consequence is not the norm and can often take the other party by surprise.

This guidance provides information on termination for convenience clauses. It describes what they are, what they do and the consequences for a Contractor if the Principal uses this clause.



Extension of Time Principles and Float

Assessing an Extension of Time (EOT) is challenging, due to the complexity of demonstrating float accurately and understanding its impact on project schedules. Changes in critical path dynamics further complicate assessments, requiring clear documentation to substantiate EOT claims and resolve disputes over delay attribution.

This guidance looks to provide certainty for assessing EOT regarding the issue of programme float. The use, or otherwise, of float is a common area of inconsistency in assessing an EOT.

The suggested EOT Principles remove doubt in some circumstances (such as which programme to use in assessing EOT), and in other circumstances address issues which give rise to inconsistency (such as the use of a float in assessing EOT). There is no need for such uncertainty when it is open to the parties:

- To agree in the Contract what float is; **and**
- To agree in the contract how float is to be used.

This document provides examples of the inconsistencies with float and suggested EOT Principles on Float.

Clause 9.2 Special Conditions for NZS 3910:2023

Clauses 9.2.2 and 9.2.3 of NZS 3910:2023 are concerning, as the notices claiming Variations are not required to be copied to the Independent Certifier. In comparison, Clause 10.3.2 requires a claim for Extension of Time to be given to both the Contract Administrator and the Independent Certifier.

In addition, Clauses 9.2.4 and 9.2.5 of NZS 3910:2023 create substantial concerns for the Contractor for two reasons:

1. Contrary to other provisions in the Contract, these clauses give the Contract Administrator the power to decide if the Contractor is entitled to a Variation.
2. The timeframes in these clauses mean the Contractor may have to wait for longer than 40 Working Days for a decision on its entitlement to a Variation.

This document explains these issues and provides a suggested solution.

Risk Guidance for NZS 3910:2023 – Conditions of contract for building and civil engineering construction

Risk in NZS 3910:2023

The Risk in NZS 3910 Guide has been developed to assist in identifying risk in the most used contract in New Zealand, and to identify the Contractor's rights and remedies for risk which is not the Contractor's risk.

NZS 3910:2023 does not have a risk allocation table. Risk is allocated in the General Conditions in a relatively simple way, by setting out whether circumstances entitle the Contractor to a Variation and/or an Extension of Time.

In this Guide, risk is addressed by identifying the outcome if a risk event occurs. For example, a Variation (**the outcome**) arises from conflicting design documents (**the risk event**) because the Principal is responsible for errors in its documents (**the risk**).

The Guide has three sections: Principal's Risk Items, Neutral Risk Items and Contractor's Risk Items.

The three sections (with tables) identify the relevant clauses in NZS 3910 for dealing with the risk. The tables provide a quick reference for a Contractor's claim on the occurrence of the risk event, including the requirements for the Claim and comments regarding common issues with each risk event.

The tables also provide the Contractor with a quick reference for assessing special conditions in proposed contracts, allowing a cross check as to whether the proposed special condition is:

1. Transferring risk by removing the Variation for Principal's Risk Item, or
2. Altering the risk profile by reducing the benefit of the Contractor's remedy (e.g. a Variation), by changing the test for claim to make it more difficult to obtain a variation.

Summary of Risk Allocation in Unamended NZS 3910:2023

This guidance provides a summary of whether the Contractor or the Principal bears the risk, and to what extent.

Summarising risk allocation in the unamended NZS 3910:2023 is important because it defines how risk is distributed between parties involved. Clear risk allocation promotes fairness, reduces disputes and enhances project management effectiveness by establishing clear expectations and accountability. Adhering to these allocations helps maintain contract integrity, manage project risks proactively and foster trust between stakeholders throughout the construction process.

Summary of Variation and Extension of Time in NZS 3910:2013 vs NZS 3910:2023

With the recent revision of NZS 3910, Contractors will want to know if there are any changes to established Variations and grounds for Extensions of Time. The short answer is no.

NZS 3910:2023 has some renumbering and minor amendments, but the Variations (and hence the risk allocation) has not changed from NZS 3910:2013 to NZS 3910:2023.

This document provides a summary of requirements for a Variation and the changes between the 2013 and 2023 versions, placing the Variations from the two versions side by side. It also provides a test for the Extension of Time and the changes between the 2013 and 2023 versions.

CONTRACT TEMPLATE

Pre-Construction Service Agreement

A Pre-Construction Services Agreement (PCSA) is a valuable tool in the construction industry, benefiting all parties involved by facilitating early engagement, thorough planning and effective risk management. PCSAs are often called Early Contract Involvement agreements, and there is no substantial difference between the two.

We recognise that most successful projects often begin with the Contractor being involved early with the client. While there are many PCS agreements out in the market, our Contractors have expressed concerns about the agreements which have developed over the years, often forcing Contractors to accept unfavourable terms and risk. Our aim was to create a standard form PCSA that enables Contractors to be involved early, while ensuring all parties have a clear understanding of their roles and responsibilities. Additionally, the agreement fosters collaborative relationships, building trust and alignment among stakeholders from the outset, ultimately laying a solid foundation for successful project execution and client satisfaction.

The PCSA template is designed to help contractors understand their responsibilities when providing pre-construction services to a potential client, and how risk is allocated across the project; particularly in areas such as **standards of performance, design, early works and long lead procurement**, and importantly when the parties should **formally enter into the Construction contract** from the **pre-construction phase**.



GUIDANCE 2

Principles of Good Contracting

Good Contracting produces good outcomes for all parties to a contract. These Principles of Good Contracting intend to set out simple principles for Principals and Contractors to engage pre-contract with confidence in their roles, and confidence in what the parties can reasonably expect of each other. The Principles also provides a model for assessing special conditions so the parties can consider the possible consequences.

The intention of the Principles of Good Contracting is assisting parties in pre-project planning, tender-preparation stage, Early Contractor Involvement stages and during contract negotiations.

Three Principles for Good Contracting

1. Parties should bear the risk of what they bring to the Contract. As examples, the principal should bear site, design and document risk, and the contractor should bear workmanship, supply chain and programming risk.
2. The terms of the Contract should be certain. For example, any special conditions and contractor's tags should be fully reconciled to remove conflicting terms, and the Contracts Documents should be those which were priced on (if Drawing Rev B was used for pricing, Drawing Rev B should be the baseline for any variations, so must be a Contract Document).
3. Design should be substantially complete before contracting. If design is not complete, the Principal should retain all risk from any design development.

Assessing Special Conditions at pre-contract stage

A Contractor's appetite to accept a special condition will have many considerations, but assessing the risk from the special condition is the starting point. Risk assessment looks at both the likelihood of an eventuality and the severity of the consequences from an eventuality.

The likelihood of an eventuality covered by a special condition arising is a contract specific question, **but the severity of the consequences can be generally assumed**. For example, the consequences of a missed time-bar for a claim can be assumed to be severe for a contractor.

To assess whether a special condition is acceptable, it's helpful to put them in four 'broad' categories as below. The table identifies the likely severity of consequences for the Contractor from the categories of special condition, ranging from negligible to moderate to severe:

Type of Special Condition			
	✓ Negligible	— Moderate	✗ Severe
Avoidance of doubt clauses. Common examples are a "warranty that the Contractor's price is sufficient", or "the Contractor is able to enter the Contract".	✓		
Clauses that alter the risk profile. Common examples are where a deemed Variation is deleted, or the test for the deemed Variation is changed to make it more difficult to get a Variation. Another example is the Contractor bearing all risk from concurrent delay.		—	✗
Clauses that change how the contract is administered. The most common examples are the creation of time-bars for claiming Variations and Extensions of Time.			✗
Clauses adding additional remedies for the Principal and eroding remedies for the Contractor. Examples are the Principal adding additional indemnities and grounds for termination, while excluding liability for loss of Contractor's profit for the Principal's breach of contract.		—	✗

Termination for convenience clauses

The guidance provides information on termination for convenience clauses. It describes what they are, what they do and the consequences for a Contractor if the Principal uses a termination for convenience clause during a Contract.

Overview

It is very important for Contractors entering a Contract with a termination for convenience clause to do so with their “eyes open”. A Principal can use a termination for convenience clause at any time during the Contract. If the Principal does so, **the Contract ends with no compensation for the Contractor** other than what the termination for convenience clause provides.

What is a termination for convenience clause?

It is a clause that allows a Principal to terminate a contract on a “no fault” basis without the consequences that would usually follow for a breach of contract.

A termination for convenience clause is often also called a termination at election or termination at discretion clause.

Important note: the word cancellation is often used rather than termination, and it makes no difference which is used in the context of termination for convenience.

How do you recognise a termination for convenience clause?

A termination for convenience clause is not a standard clause in contracts such as NZS 3910:2023 or NZIA SCC 2018. Therefore, they are easily identified as a special condition.

A termination for convenience clause is also recognisable from the words which are used. The termination for convenience clause will use words such as:

- The Principal may at its election terminate the Contract.
- The Principal may in its absolute discretion terminate the Contract.
- The Principal may terminate the Contract for its convenience.

Are termination for convenience clauses common?

While they are not standard, termination for convenience clauses are relatively common in contracts such as:

- Public procurement contracts, including contracts with Government Departments, large infrastructure contracts, and contracts with Crown Entities such as Kāinga Ora.
- Large commercial construction contracts dependent on financing.
- Contracts and subcontracts for large projects, such as Transmission Gully and City Rail Link.

What happens if the Principal uses the termination for convenience clause during the Contract?

The consequences of a termination for convenience clause depend on the wording of the Contract, but in general the consequences are:

- a. The Principal terminates the Contract without consequences which normally follow unilaterally ending a partially performed contract, e.g., liability for loss of profit, etc.
- b. There is usually a wash-up process to determine the final payment to the Contractor, and allow for an orderly demobilisation from the site.
- c. The parties retain their existing rights at the time of the termination for convenience. For example, the Contractor retains the right to any Variations which accrued before the termination for convenience.

What can the Principal not do?

In the normal course, a Principal cannot use a termination for convenience clause to replace the Contractor.

However, this may not be the case depending on the wording of the termination for convenience clause. Some termination for convenience clauses are included in Contracts to permit the replacement of the Contractor.

What is often missing from a termination for convenience clause?

Where a termination for convenience clause is added as a special condition to NZS 3910, the special condition usually **does not** deal with issues such as:

- a. When the Contractor's Bond is released; and
- b. When the retention money is paid.

This is an issue because the termination for convenience usually means Practical Completion will never be achieved, leaving Contractor's Bond release and retention money payments in limbo. This **must** be addressed before finalising the Contract.

Contracts and subcontracts for large projects, such as Transmission Gully and City Rail Link, which have a termination for convenience clause will usually have a comprehensive termination for convenience clause. This means they will deal with matters such as releasing bonds and paying retention money.

Extension of Time Principles & Float

This guidance provides information on the role of float in assessing Extensions of Time. The document's core message is that there are no pre-determined rules on the role of float, meaning contracting parties can, and should, agree the rules on the role of float that apply to their contract.

Overview

The role of float in assessing Extensions of Time is a common area of inconsistency which need not arise. The many definitions of float and wide range of alleged pre-determined rules on the use of float illustrate how the inconsistency arises. By agreeing a simple set of principles on the role of float, contracting parties give themselves certainty.

What is float?

There is no single definition of float. This illustrates one reason for inconsistency on the role of float in assessing Extensions of Time. A suggested definition of float is:

Float is the amount of time by which an activity or group of activities may be shifted in time without causing Delay to Completion. [Society of Construction Law delay and disruption protocol]

What is the Contract Programme?

The Contract Programme is the programme the Contractor is required to submit and maintain in accordance with the Contract. In NZS 3910:2023, the Contract Programme is the programme submitted and updated under clause 5.13. In NZIA SCC 2018, the Contract Programme is the programme submitted and updated under clause 11.3, called the construction programme. **Unless a contract says otherwise, tender programmes, tracking programmes and such will not be the Contract Programme.**

The Contract Programme is used to track progress and assess Extensions of Time. This illustrates the crucial importance of the Contractor keeping the Contract Programme up to date.

Can float accrue or build up?

There is no rule that float accrues or builds up just because a Contractor may be ahead of programme. Despite this, it is not uncommon for so-called programme experts or contract decision makers (Engineer, Architect or Independent Certifier) to assert this is the case.

What does “ownership” of the float mean?

“Ownership” of the float is a shorthand to describe **how** float is accounted for in the assessment of an Extension of Time, explained as follows:

- Where the Contractor “owns” the float, the float is only used up (and eventually exhausted) for the Contractor’s delay.
- Where the Principal “owns” the float, the float is only used up (and eventually exhausted) for the delay events which would otherwise give rise to an Extension of Time.
- Where the Contract “owns” the float, the float is used up (and eventually exhausted) on a first come first serve basis irrespective of the cause of the delay event.

What do the common New Zealand contracts say about float?

There are three different positions regarding float in the common New Zealand contracts:

- NZS 3910:2013 is silent on whether float is accounted for in assessing Extensions of Time.
- NZIA SCC:2018 provides that float **is not accounted for** in assessing Extensions of Time (see clause 11.5.4(a)).
- NZS 3910:2023 provides that float **is accounted for** in assessing Extensions of Time (clause 10.3.6(a)).

So NZS 3910:2023 has all the answers?

It does not. While NZS 3910:2023 requires that float is used up before an Extension of Time can be granted, it does not deal with matters such as:

- Whether float must be shown on the Contract Programme.
- Whether Contractor delay and/or extension of time delay events use up float.
- Whether float can accrue or build-up.

Suggested Extension of Time Principles regarding float

No principles about the use of float are inherently right or inherently wrong. The Contractor and the Principal are free to agree principles about the use of float as the different positions in NZIA SCC:2018 and NZS 3910:2023 illustrate.

The suggested principles below are not the only answer to inconsistency regarding the use of float, but they are suggested as being balanced and fair to Contractor and Principal.

- To avoid doubt, agree that Extensions of Time are assessed against the Contract Programme.
- The Contract Programme means the most recent submitted and approved programme under the Contract (e.g. clause 5.13 of NZS 3910:2023).
- If the Contract is silent on whether float is accounted for in assessing Extensions of Time (e.g. NZS 3910:2013), agree whether float **is or is not** accounted for in assessing Extensions of Time.
- If float is accounted for in assessing Extensions of Time, further agree:
 - Float means the float shown in the Contract Programme; and
 - Float is used on a “first come first served” basis, so that float is “owned” by the Contract.
- Agree that float does not accrue or build-up due to Contractor progress **unless** it is shown in an updated Contract Programme.

Conclusion

Taking time, pre-contract, to agree and record the Contract provisions on float is a simple step to providing certainty in the Contract regarding Extensions of Time. It is also a valuable dispute avoidance step, as the Contractor and the Principal are on the same page for a very important element of the Contract.

Clause 9.2

Special Conditions

for NZS 3910:2023

Concerns

Clauses 9.2.2 and 9.2.3 of NZS 3910:2023 are concerning, as the notices claiming Variations are not required to be copied to the Independent Certifier. This is likely an oversight in the drafting. In comparison, Clause 10.3.2 requires a claim for an Extension of Time to be given to **both** the Contract Administrator and the Independent Certifier.

Clauses 9.2.4 and 9.2.5 of NZS 3910:2023 create substantial concerns for the Contractor for two reasons.

First, contrary to other provisions in the Contract, Clauses 9.2.4 and 9.2.5 give the Contract Administrator the power to decide if the Contractor is entitled to a Variation. This is because [presumably] where the Contractor and Contract Administrator do not reach agreement as to whether “the Instruction or matter involves a Variation”, both Clauses 9.2.4 and 9.2.5 say:

...the Contract Administrator shall by notice in writing either confirm that the Instruction or matter involves a Variation or disallow a Variation, giving reasons for doing so.

Plainly the Contract Administrator is deciding on entitlement to a Variation. Permitting the Contract Administrator to decide whether the Contractor is entitled to a Variation is contrary to Clause 6.2.2(c), which says:

The Independent Certifier acts fairly, impartially, and independently of either contracting party in making Decisions on all matters between the parties that are entrusted to the Independent Certifier, including:

...

(c) Deciding the Contractor’s entitlement to and valuing Variations;...

Finally, it is noteworthy the Contract Administrator is **not** required to act “fairly, impartially, and independently of either contracting party”. Therefore, the person empowered to make likely the most important decisions

under the Contract (entitlement to a Variation) has no obligation to make those decisions “fairly, impartially, and independently”. That cannot be acceptable.

Second, the timeframes in Clauses 9.2.4 and 9.2.5 mean the Contractor may have to wait for longer than 40 Working Days for a decision on its entitlement to a Variation. As the Variation valuation provisions are not triggered until entitlement to a Variation is decided (see Clause 9.3.2), it is conceivable a Contractor may be waiting many months (possibly over three months) from claiming a Variation to finally being paid for the Variation.

The 40 Working Days for a decision on the Contractor’s entitlement to a Variation arises as follows:

- a. Under Clause 9.2.4, the Contract Administrator has 20 Working Days to “confirm that the Instruction or matter involves a Variation or disallow a Variation, giving reasons for doing so”.
- b. Under Clause 9.2.5, if the Contract Administrator fails to give a notice with 20 Working Days, the Contractor can do no more than notify the Contract Administrator of the failure. This **starts afresh** the 20 Working Days timeframe for the Contract Administrator to “either confirm that the Instruction or matter involves a Variation or disallow the Variation and give a reason for doing so”.

Even if the Contract Administrator does not meet the required 20 Working Days in Clause 9.2.5, there is no consequence. NZS 3910:2023 has no equivalent of the last sentence in Clause 9.2.4 of NZS 3910:2013, which said:

Unless within that time the Engineer issues a notice in writing disallowing a Variation, the instruction or matter shall be treated as a Variation.

The provisions of Clauses 9.2.4 and 9.2.5 create a risk for the Contractor of decisions on entitlement to a Variation taking an unreasonable amount of time.

Suggested solutions

The suggestion to address these concerns is to amend Clauses 9.2.2 to 9.2.5 inclusive. The suggested amendments should not be controversial.

To address the concerns regarding Clauses 9.2.2 and 9.2.3, we suggest adding a requirement that the notice claiming a Variation is also given to the Independent Certifier. The special condition could read as follows:

In 9.2.2 and 9.2.3 add the words “and the Independent Certifier” before the words “to that effect”, so 9.2.2 and 9.2.3 read as follows

- 9.2.2 Where an Instruction is given by the Contract Administrator and is not expressly stated to be a Variation, and the Contractor considers that the Instruction involves a Variation, the Contractor shall within 20 Working Days or as soon as practicable thereafter give written notice to the Contract Administrator and the Independent Certifier to that effect.
- 9.2.3 Where the Contractor considers any matter which is not described in 9.1 should be treated as a Variation, the Contractor shall within 20 Working Days of becoming aware of the matter or as soon as practicable thereafter give written notice to the Contract Administrator and the Independent Certifier to that effect.

To address the concerns with Clauses 9.2.4 and 9.2.5 we suggest they are replaced so they align with Clauses 10.3.4 and 10.3.5, which are provisions pertaining to claims for Extension of Time, as follows:

Delete 9.2.4 and 9.2.5 and replace with:

- 9.2.4 Following receipt of notice under 9.2.2 and 9.2.3, the Contractor and the Contract Administrator shall endeavour to agree if the Instruction or matter involves a Variation. Upon request by either the Contractor, the Contract Administrator, or the Independent Certifier, the Contractor and the Contract Administrator shall meet to discuss any matter relating to the claimed Variation.
- The Contract Administrator shall by notice in writing confirm that the Instruction or matter involves a Variation, within 10 Working Days of any agreement being reached.
- 9.2.5 Failing agreement between the Contractor and the Contract Administrator as to the Contractor's entitlement to any claimed Variation, the Independent Certifier shall Decide whether or not the Contractor is fairly entitled to the claimed Variation. Either party may, before reaching agreement under 9.2.4, request the Independent Certifier to make such Decision. The Independent Certifier shall make such Decision within 20 Working Days or as soon as practicable thereafter of a request. The Independent Certifier shall notify the parties of their Decision, including reasons.

Risk in NZS 3910:2023

NZS 3910 does not have a risk allocation table. Risk is allocated in the General Conditions in a relatively simple way, explained in the three steps below:

1. **Principal's Risk Items** in NZS 3910 are identified by what are commonly called "deemed" Variations. All Variations can give rise to an Extension of Time under Clause 10.3.1(a). Under Clause 10.3.7, only extensions under Clause 10.3.1(a) and Clause 10.3.1(g) give extensions of time costs. In summary, Principal's Risk Items can give the Contractor **Cost and Time compensation**.
2. **Neutral Risk Items** in NZS 3910 are identified in the time only Extensions of Time at Clauses 10.3.1(b) to 10.3.1(f) of NZS 3910. These are Neutral Risk Items which are "no-one's fault", so only entitle the Contractor to an Extension of Time. In summary, Neutral Risk Items only give the Contractor **Time compensation, not Cost**.
3. **Contractor's Risk Items** in NZS 3910 are all remaining risks, whether expressly stated or implied.

How to use this guide

The purpose of this Guide is to assist in identifying risk in the most used contract in New Zealand, and to identify the Contractor's rights and remedies for risk which is not the Contractor's risk. In this Guide, risk is addressed by identifying the outcome if a risk event occurs. For example, a Variation (**the outcome**) arises from conflicting design documents (**the risk event**) because the Principal is responsible for errors in its documents (**the risk**).

The tables in the three Sections Principal's Risk Items, Neutral Risk Items and Contractor's Risk Items identify the relevant clauses in NZS 3910 dealing with the risk. The tables provide a quick reference for a Contractor's claim on the occurrence of a risk event, including the requirements for the Claim and comments regarding common issues with each risk event.

The tables also provide the Contractor with a quick reference for assessing special conditions in proposed contracts, allowing a cross check as to whether the proposed special condition is:

1. Transferring risk by removing the Variation for Principal's Risk Item, or
2. Altering the risk profile by reducing the benefit of the Contractor's remedy (e.g. a Variation), by changing the test for claim to make it more difficult to obtain a Variation.

Principal's Risk Items in NZS 3910:2023

While a Variation is a ground for an Extension of Time under Clause 10.3.1(a), not all Variations lead to an Extension of Time, which is why the table below refers to “possible Extension of Time”.

Clause	Risk/event	Requirements for a Variation	Comment
2.2.4 (pg 8)	Principal's documents risk	If there is a significant discrepancy by any inconsistency between the Schedule of Prices and the Drawings or Specifications, or any omission or inaccuracy in the quantities included in the Contract.	There is no Variation if the discrepancy is the Contractor's fault, e.g. the Contractor prepared the quantities in the Schedule of Prices.
2.3.2 (pg 9)	Principal's documents risk	An item of work has clearly been omitted by error from the Schedule of Prices.	Clause 2.3.2 deems the Contractor to have checked the Schedule of Prices, so the Contractor must overcome this to meet the test for the remedy.
2.3.4 (pg 9)	Principal's documents risk	The actual quantity of any single item differs from that given in the Schedule of Prices and makes the scheduled price for that or any other item unreasonable .	Clause 2.3.2 deems that quantities given are for evaluating tenders and are taken to be a reasonable assessment of the quantities involved.
2.8.6 (pg 14)	Principal's documents risk	Contractor suffers delay or additional Cost by late issue of any Instructions, documents, Drawings or Specifications.	
2.8.7 (pg 14)	Principal's documents risk	The Contractor has requested explanations or supplementary Instructions under 2.8.3, AND suffers delay and/or additional Cost, which could not have been reasonably foreseen by the Contractor when tendering.	
2.8.7 (pg 14)	Principal's documents risk	The Contract Administrator clarifies the Contract Works by issuing Instructions under 2.8.4, AND the Contractor suffers delay and/or additional cost, which could not have been reasonably foreseen by the Contractor when tendering.	
2.8.7 (pg 14)	Principal's documents risk	The Contractor has reasonably requested further Instructions under 2.8.5, AND suffers delay and/or additional Cost, which could not have been reasonably foreseen by the Contractor when tendering.	
4.2.6 (pg 19)	Nominated Subcontractor risk	The Nominated Subcontractor fails to enter a subcontract OR the Contractor is entitled to terminate the Nominated Subcontractor's subcontract AND this leads to delay and/or additional cost.	Nominated Subcontractor risk protection is limited, but is important nonetheless because the Principal imposes the Nominated Subcontractor on the Contractor.

Clause	Risk/event	Requirements for a Variation	Comment
5.5.6 (pg 22)	Adjoining Property risk	Damage to adjoining property arises from: <ul style="list-style-type: none"> The permanent use of land/Principal carrying out the Contract Works. Damage to property which was an unavoidable result of carrying out the Contract Works. Excepted risks under 5.7.6. 	Where the requirements for a Variation are not met, the Contractor bears the risk of damage to adjoining property.
5.6.2 (pg 23)	Separate Contractors risk	The Separate Contractors' activity leads to delay and/or additional cost.	
5.7.5(c) (pg 23)	Excepted risks	The loss or damage arises from an excepted risk, defined in 5.7.6.	This does not apply when the loss or damage terminates the Contract by frustration.
5.11.5 (pg 27)	Principal's Setting-out Information Risk	The error arises out of incorrect information supplied by the Principal or Contract Administrator and was not known by the Contractor to be incorrect.	
5.14.6 (pg 31)	Consents risk	Consents for which the Principal is responsible, and compliance with the Contractor Administrator's instructions regarding consents and conditions, causes delay or additional cost which was not reasonably foreseeable by the Contractor when tendering.	
5.14.9 (pg 32)	Legislation risk	The creation of any law or imposition of any fee, after the closing of tenders, which increases the cost to the Contractor, and is not otherwise provided for in the Contract.	Legislation has a broad meaning in the Contract.
5.16.4 (pg 33)	Utilities location risk	A utility is not indicated in the Contract or substantially not in the position indicated in the Contract, and results in extra work.	The Principal does not warrant the information or records provided under 5.16.1 is accurate.
5.17.2 (pg 33)	Discovery risk	The discovery of remains of geological or archaeological interest leads to protection or instructions by the Contractor Administrator, causing delay and/or additional cost.	
5.19.2 (pg 34)	Principal supply risk	The Principal is late in delivering any materials, services, or work.	
5.21.2 (pg 35)	Environmental risk	Where there is an act or omission that is likely to result in any consequences described in 5.21.1, and there is no fault on either the Contractor or any Subcontract.	

Clause	Risk/event	Requirements for a Variation	Comment
6.3.3 (pg 37)	Contract Administrator & Independent Certifier risk	The Contract Administrator or the Independent Certifier fails or is unable to carry out their duties described in the Contract, resulting in additional cost and/or delay to the Contractor.	
6.5.2 (pg 40)	Sample & Testing risk	The Contract Administrator orders any samples or tests that are not specified in the Contract.	There is no Variation where the additional sampling or testing demonstrates a non-compliance with the Contract.
6.5.4 (pg 40)	Contractor Administrator Fails to Inspect	The Contract Administrator fails to complete inspection, measurement, recording and testing within a reasonable time and this leads to a delay and/or additional cost.	
6.5.7 (pg 41)	Opening up of the Contract Works	The Contractor complies with instructions by the Contract Administrator and opens up the Contract Work, and the work complies with the Contract.	This does not apply where the Contractor has covered up work which has been specified by the Contract to require inspection.
6.7.4 (pg 42)	Independent Certifier Delay	The Independent Certifier fails to issue the Practical Completion Certificate or Final Completion Certificate within the specified time in the Contract, and this leads to a delay and/or additional costs.	
6.8.3 (pg 43)	Suspension of Works	The suspension is not due to the Contractor's default.	
6.8.4 (pg 43)	Suspension of Works	There has been a suspension in effect for more than 3 months, and the Contractor has requested the Works to be continued, and the Contract Administrator does not instruct continuation within 1 month of the request.	
9.5.4 (pg 62)	Unforeseen Physical Conditions	The Contractor has issued a notice under 9.5.2, and the conditions notified will substantially increase Costs , and could not have been reasonably foreseen by an experienced contractor.	
10.7.4 (pg 72)	Principal Occupancy risk	The Principal has occupied the Works under 10.7.1 or 10.7.2 and this causes the Contractor to suffer delay and/or additional Cost, which is not provided for in the Contract.	

Neutral Risk Items in NZS 3910:2023

Under clause 10.3.8, Extensions of Time for Neutral Risk Items **do not** entitle the Contractor to Extension of Time costs.

Clause	Risk/event	Requirements for a Variation	Comment
10.3.1 (b) (pg 67)	Weather	The weather must be sufficiently inclement to interfere with the progress of the works.	This is the Contractor's only remedy for weather risk from "ordinary" weather. Further to this, an unforeseen physical condition does not include Site conditions due to weather.
10.3.1 (c) (pg 67)	Industrial action	The existence of a strike, lockout or industrial action.	
10.3.1 (d) (pg 67)	Damage to the Contract Works	Loss or damage to the Contract Works or Materials.	Unamended, the Contractor is entitled to an extension of time even if the loss or damage was the Contractor's fault.
10.3.1 (e) (pg 67)	Flood, volcanic or seismic events	The existence of a flood, volcanic or seismic events.	
10.3.1 (f) (pg 68)	Circumstances not reasonably foreseeable	Circumstances which were not foreseeable at the time of contracting and not the Contractor's fault.	This clause affords a contractor largely the same protection as a Force Majeure clause. This is because Force Majeure clauses generally do not get a Contractor anything extra but provide protection on the occurrence of the Force Majeure event. The same is true of Clause 14.1, Frustration, which operates if the Contract is possible to complete.

Contractor's Risk usually implied by law

Construction contract litigation has long recognised the Principal **gives no warranty, implied or otherwise**, that the Contract Works can be carried out according to the specifications or that Contract Works are capable of being built. The caselaw on this goes back to the UK 1800's case of *Thorn v Mayor and Commonalty of London*. The principle in *Thorn* has been adopted in New Zealand in two cases: *Wilkins and Davies v Geraldine Borough* and *R M Turton & Co Limited (In Liquidation) v Kerslake & Partners*.

The flipside of the *Thorn* principle is two very well-established terms which will be implied into a Contract:

1. First, the inclusive price principal provides that the contract price is inclusive of all works incidentally necessary to achieve completion of the Works. **The Contractor bears the risk of their pricing being sufficient.** As an example, Contract Drawings and Specifications do not have to show or specify every detail required to complete the Contract Works, as an experienced Contractor should be able to fill obvious gaps in the Contract Drawings or Specifications.
2. Secondly, the buildability warranty, that a Contractor who expressly or impliedly undertakes to complete the work or project according to the contract drawings and design, thereby impliedly warrants their ability to do so. **The Contractor bears the risk of their ability to complete the works.** Buildability is concerned with the "How" of construction not the "What", and the Contractor's implied warranty regarding buildability is largely captured in Clause 5.1.3 of NZS 3910:2013 where the Contractor is responsible for, among other things, the "method of construction".

Contractor's Risk in NZS 3910:2023

Clause	Risk	Comment
2.2.3 (pg 8)	Price Difference	The Contractor must get the Contract Administrator to agree on price if the scheduled price differs from the Contract Price. If they cannot agree, the price is decided by the Independent Certifier.
2.3.5 (pg 9)	Contractor's Accuracy	Errors in extension of unit rates shall be adjusted by agreement between the Contractor and Contract Administrator. If they cannot agree, the price is decided by the Independent Certifier.
2.4.2 (pg 10)	Contractor's Efficiency Risk	The Contractor is not reimbursed for costs which is not objectively reasonable, due to default of the Contractor, or in preparing a claim against the Principal.
2.4.4 (pg 10)	Contractor's Estimate Risk	The Contractor submits an indicative estimate of the Contract Price, which is likely subject to the common law rules on estimates.
2.9.1 (pg 14)	Contractor's Documents Risk	The Contractor must meet all obligations under the Contract for its documents.
4.1.3 (pg 18)	Subcontractor Risk	The Contractor is responsible for all work done, and plant and materials supplied by any subcontractor or supplier.
5.1.3 (pg 20)	Method of Work Risk	As method of work is Contractor's Risk, the fact a Contractor must change how they carry out the works will not give rise to a Variation of itself.
5.2.1 (pg 20)	Contractor's Design Risk	The Contractor is responsible for the design of any parts of the Contract Works stated in the Specific Conditions.

Clause	Risk	Comment
5.2.3 (pg 21)	Temporary Works Design Risk	The Contractor is always responsible for damage to Temporary Works.
5.5.6 (pg 22)	Adjoining Property Risk	The Contractor is to make good any damage at the Contractor's expense unless it arises from any Clause 7.1.2 matters.
5.7.5 (pg 23)	Care of the Works Risk	The Contractor, at its cost, must repair any damage to the Contract Works, even if the damage is not the Contractor's fault. The repairing of damage is not at the Contractor's cost where it is due to an excepted risk or is covered by Clause 7.1.3.
5.11.5 (pg 27)	Setting out Risk	The Contractor is responsible to correctly apply the setting out information that has been supplied by the Principal.
5.12.2 (pg 27)	Materials & Workmanship Risk	The Contractor is always responsible for ensuring that the materials and workmanship comply with the Contract. This is the case even where a material or item of plant is specified. However, the Contractor is not responsible for a specified material or item of plant being fit for its intended purpose.
5.21.2 (pg 35)	Protection of the Environment	If there is an act or omission that is likely to result in any of the consequences under 5.21.1 and the Contractor is at fault, it will not give rise to a Variation.
6.5.2 (pg 40)	Inspection	The Contractor is responsible for providing samples and testing if the work or Materials are not in accordance with the Contract.
6.5.5 (pg 41)	Inspection	The Contractor, at its cost, must open up if work has been covered without consent.
6.5.6 (pg 41)	Inspection	The Contractor is responsible for correctly notifying when the work is ready for inspection.
6.5.7 (pg 41)	Inspection	The Contractor is responsible, at its cost, to reconstruct work which has been opened up for inspection but does not comply with the Contract.
6.6.1 (pg 41)	Repair	The Contractor must make good, at its cost, any work in respect of workmanship or materials that does not comply with the Contract.
6.6.2 (pg 41)	Repair	If the Contractor does not make good any work under Clause 6.6.1 within the time stated or a reasonable time, it becomes responsible for the cost of commissioning others to do the work.
6.6.5 (pg 42)	Materials or work does not comply with Contract	The Contractor is responsible for ensuring that materials and works comply with the Contract. Where it does not and is instructed that it can remain, this will almost certainly result in a negative reduction in the Contract Price.
6.8.3 (pg 43)	Suspension	The Contractor is responsible for suspensions that it has caused by any default.
6.9.3 (pg 44)	Urgent Work	The Contractor is responsible for the reasonable cost of any urgent work commissioned out, if it was part of its obligations under the Contract.
6.10.3 (pg 44)	Contractor's Notification	As soon as the Contractor becomes aware of any matter under 6.10.1, it must notify the others.
9.5.1 (pg 61)	Physical conditions	The Contractor is responsible for weather conditions or conditions due to weather, distinguished from the Principal's risk for severe weather for cyclones, etc.

GUIDANCE 7

Summary of Risk Allocation in Unamended NZS 3910:2023

Risk	Who bears the risk and to what extent?	
	Contractor	Principal
1 Adequacy of design		Bears all design risk except where Contract provides for elements of design by the Contractor.
2 Quality of construction, buildability, workmanship, suitability of materials	Bears all risk except where a specified material is not fit for purpose.	
3 Adequacy of Contract Price	Bears all risk except for Principal required Provisional Sums or Prime Cost Sums.	
4 Adequacy of On-Site Overheads/P&G allowance	Bears all risk, subject to variations and extensions of time.	
5 Adequacy of Provisional Sums & Prime Cost Sums required by Principal		Bears all risk.
6 Damage to the Contract Works	Bears all risk, except for damage from Excepted Risks.	Bears risk for damage from Excepted Risks.
7 Injury to persons on the Site	Bears all risk, except where the Principal has failed to notify a hazard.	Bears risk from a failure to notify the Contractor of a hazard.
8 Damage to property other than the Contract Works	Bears all risk, except for damage from Excepted Risks and unavoidable consequences of carrying out the Contract Works.	Bears all risk from Excepted Risks and unavoidable consequences of carrying out the Contract Works.
9 Competence & suitability of design		Bears all design risk, except where Contract provides for elements of design by the Contractor.
10 Unforeseen physical conditions including rock, poor ground, demolition material or archaeology		Bears all risk, except for physical conditions due to weather, or physical conditions that were reasonably foreseeable.

Risk	Who bears the risk and to what extent?	
	Contractor	Principal
11 Changes to legislative requirements in respect of the Contract Works		Bears all risk, except where the change is provided for in the Contract.
12 Testing required by the Contract.	Bears all risk.	
13 Additional testing required by the Contract Administrator		Bears all risk, except where testing shows the works or materials do not comply with the Contract.
14 Inclement weather	Bears cost risk.	Bears time risk.
15 Industrial action	Bears cost risk.	Bears time risk.
16 Circumstances not reasonably foreseeable to an experienced contractor	Bears cost risk.	Bears time risk.
17 Delay caused by the Principal, or any other person controlled by them		Bears all risk, except where Contract provides for the matter.
18 Suspension of the Contract Works		Bears all risk, except where suspension is due to default of the Contractor.
19 Errors or omissions in the Principal's design or design documentation		Bears all risk, except where error or omission was reasonably foreseeable.
20 Non-performance or late performance of work by Separate Contractors		Bears all risk, except where provided for in the Contract.
21 Practical Completion of the Contract Works and any Separable Portions by the Due Date for Completion	Bears all risk, subject to extension of time provisions.	
22 Delay in obtaining any building consents and engineering plan approval		Bears all risk.
23 Delay or default by Subcontractors	Bears all risk, except for limited relief regarding Nominated Subcontractors.	
24 Earthquake or other natural disaster, riot, civil commotion and war		Bears all risk.

GUIDANCE 8

Summary of Variation and Extensions of Time in NZS 3910:2013 vs NZS 3910:2023

2013 clause	2023 clause	Requirements for a Variation	Changes in 2023
2.2.5 (pg 10)	2.2.4 (pg 8)	If there is a significant discrepancy by any inconsistency between the Schedule of Prices and the Drawings or Specifications, or any omission or inaccuracy in the quantities included in the Contract.	The former Clause 2.2.5 merged with Clause 2.2.4. No change to the requirements for a Variation.
2.3.2 (pg 11)	2.3.2 (pg 9)	An item of work has clearly been omitted by error from the Schedule of Prices.	No change to the requirements for a Variation.
2.3.4 (pg 11)	2.3.4 (pg 9)	The actual quantity of any single item differs from that given in the Schedule of Prices and makes the scheduled price for that or any other item unreasonable .	No change to the requirements for a Variation.
2.7.4 (pg 14)	2.8.7 (pg 14)	Contractor suffers delay or additional cost due to ambiguous or unclear Contract Documents and the delay or additional cost was not reasonably foreseeable by the Contractor.	Issuing explanations to resolve the ambiguity is in Clause 2.8.3, but the Variation from this has been moved to Clause 2.8.7.
2.7.6 (pg 15)	2.8.7 (pg 14)	Contractor suffers delay or additional cost after reasonably requiring further information at any time, and the delay or additional cost was not reasonably foreseeable by the Contractor.	The request for information is issued by the Contractor under Clause 2.8.5. This is a new Variation, as Clause 2.7.6 in 2013 did not lead to a Variation.
2.7.7 (pg 15)	2.8.6 (pg 14)	Contractor suffers delay or additional cost by late issue of a Contract Document.	Clause 2.7.7 in 2013 had two Variations which have been separated. This is the first of the two Variations. No change to the requirements for a Variation.
2.7.7 (pg 15)	2.8.7 (pg 14)	Contractor suffers delay or additional cost from the Contract Administrator issuing clarifications, and the delay or additional cost was not reasonably foreseeable by the Contractor.	Clause 2.7.7 in 2013 had two Variations which have been separated. This is the second of the two Variations. The Clarification is issued under Clause 2.8.4. No change to the requirements for a Variation.

2013 clause	2023 clause	Requirements for a Variation	Changes in 2023
4.2.6 (pg 21)	4.2.6 (pg 19)	The Nominated Subcontractor fails to enter a subcontract OR the Contractor is entitled to terminate the Nominated Subcontractor's subcontract AND this leads to delay and/or additional cost.	No change to the requirements for a Variation.
5.4.6 (pg 24)	5.5.6 (pg 22)	Damage to adjoining property arises from: <ul style="list-style-type: none"> The permanent use of land/Principal carrying out the Contract Works. Damage to property which was unavoidable result of carrying out the Contract Works. Excepted risks under 5.7.6. 	Change in numbering. No change to the requirements for a Variation.
5.5.2 (pg 24)	5.6.2 (pg 23)	The Separate Contractors' activity leads to delay and/or additional cost and was not provided for in the Contract.	Change in numbering. No change to the requirements for a Variation.
5.6.5(c) (pg 25)	5.7.5(c) (pg 23)	The loss or damage arises from an excepted risk, defined in 5.7.6.	Change in numbering. No change to the requirements for a Variation.
5.8.5 (pg 28)	5.11.5 (pg 27)	The error arises out of incorrect information supplied by the Principal or Contract Administrator and was not known by the Contractor to be incorrect.	Change in numbering, and substitute in Contract Administrator for Engineer. No change to the requirements for a Variation.
5.11.7 (pg 31)	5.14.6 (pg 31)	Compliance with the Contractor Administrator's instructions regarding consents and conditions causes delay or additional cost which was not reasonably foreseeable by the Contractor.	Change in numbering, and substitute in Contract Administrator for Engineer. No change to the requirements for a Variation.
5.11.10 (pg 32)	5.14.9 (pg 32)	The creation of any law or imposition of any fee, after the closing of tenders, which increases the cost to the Contractor and is not provided for in the Contract.	Change in numbering. The original clause has been split up into subclauses and omits "regulation" for "secondary legislation" and "instrument" to broaden the scope of legislation changes. Otherwise, no change to the requirements for a Variation.
5.13.4 (pg 33)	5.16.4 (pg 33)	A utility is not indicated in the Contract or substantially not in the position indicated in the Contract, and results in extra work.	Change in numbering. "The Principal does not warrant the accuracy of the information or records provided" was added to this clause. Otherwise, no change to the requirements for a Variation.
5.14.2 (pg 33)	5.17.2 (pg 33)	The discovery of remains of geological or archaeological interest leads to protection or instructions by the Contractor Administrator, causing delay and/or additional cost.	Change in numbering, and substitute in Contract Administrator for Engineer. No change to the requirements for a Variation.

2013 clause	2023 clause	Requirements for a Variation	Changes in 2023
5.16 (pg 34)	5.19.2 (pg 34)	The Principal is late in delivering any materials, services, or work.	Change in numbering. No change to the requirements for a Variation.
	5.21.2 (pg 35)	The environmental situation arose without fault on the part of the Contractor.	This is a new Variation.
6.2.4 (pg 39)	6.3.3 (pg 37)	The Contract Administrator or Independent Certifier fails or is unable to carry out their duties described in the Contract, resulting in additional cost and/or delay to the Contractor.	Change in numbering and substitute in Contract Administrator and Independent Certifier for Engineer. No change to the requirements for a Variation.
6.4.2 (pg 40)	6.5.2 (pg 40)	The Contract Administrator orders any samples or tests that are not specified in the Contract, except where the work or Materials is found not to comply with the Contract.	Change in numbering and substitute in Contract Administrator for Engineer. No change to the requirements for a Variation.
6.4.4 (pg 40)	6.5.4 (pg 40)	The Contract Administrator fails to complete inspection, measurement, recording and testing within a reasonable time and this leads to a delay and/or additional cost.	Change in numbering and substitute in Contract Administrator for Engineer. No change to the requirements for a Variation.
6.4.7 (pg 41)	6.5.7 (pg 41)	The Contractor complies with instructions by the Contract Administrator and opens up the Contract Works, and the work complies with the Contract.	Change in numbering and substitute in Contract Administrator for Engineer. No change to the requirements for a Variation.
	6.6.5 (pg 42)	The supply of any materials or work carried out by the Contractor that is not in accordance with the Contract can be used or remain, if instructed to do so by the Contract Administrator.	This is a new Variation. The wording is like Clause 6.5.5 in 2013, but that did not include a Variation. This will be to allow for a reduction to the Contract Price where non-compliant work is permitted to remain in place.
6.6.4 (pg 42)	6.7.4 (pg 42)	The Independent Certifier fails to issue the Practical Completion Certificate or Final Completion Certificate within the specified time in the Contract, and this leads to a delay and/or additional costs.	Change in numbering and substitute in Independent Certifier for Engineer. No change to the requirements for a Variation.
6.7.3 (pg 43)	6.8.3 (pg 43)	The suspension is not due to the Contractor's default.	Change in numbering. No change to the requirements for a Variation.
6.7.4 (pg 43)	6.8.4 (pg 43)	The suspension is in effect for more than 3 months, and the Contractor has requested the Works to be continued, and the Contract Administrator does not instruct continuation within 1 month of the request.	Change in numbering and substitute in Contract Administrator for Engineer. No change to the requirements for a Variation.

2013 clause	2023 clause	Requirements for a Variation	Changes in 2023
9.5.4 (pg 59)	9.5.4 (pg 59)	The Contractor has issued a notice under 9.5.2, and the conditions notified will substantially increase Costs, and could not have been reasonably foreseen by an experienced contractor.	Removed “in the Engineer’s opinion”. Otherwise, no change to the requirements for a Variation.
10.7.4 (pg 64)	10.7.4 (pg 72)	The Principal has occupied the Works under 10.7.1 or 10.7.2, and this causes the Contractor to suffer delay and/or additional Cost which is not provided for in the Contract.	No change to the requirements for a Variation.

Extension of Time Items in NZS 3910:2023

Under Clause 10.3.8, Extensions of Time for Neutral Risk Items **do not** entitle the Contractor to Extension of Time costs.

2013 clause	2023 clause	Test for the Extension of Time	Changes in 2023
10.3.1 (a)	10.3.1 (a)	There has been a Variation.	No change.
10.3.1 (b)	10.3.1 (b)	The weather must be sufficiently inclement to interfere with the progress of the works.	No change.
10.3.1 (c)	10.3.1 (c)	The existence of a strike, lockout or industrial action.	No change.
10.3.1 (d)	10.3.1 (d)	Loss or damage to the Contract Works or Materials.	No change.
10.3.1 (e)	10.3.1 (e)	The existence of a flood, volcanic or seismic events.	No change.
10.3.1 (f)	10.3.1 (f)	Circumstances which were not foreseeable at the time of contracting and not the Contractor’s fault.	Added the consequences of a war or pandemic.
10.3.1 (g)	10.3.1 (g)	There has been default by the Principal or a person the Principal is responsible for.	No change.

Pre-Construction Services Agreement

In New Zealand, Pre-Construction Services, widely known as Early Contractor Involvement (ECI), have proven advantageous. However, challenges persist, particularly regarding the equitable distribution of risk and responsibility among parties involved.

To address these issues, it is essential to have a clear and comprehensive Pre-Construction Services Agreement (PCSA) that clarifies roles, responsibilities, and risk allocations. The development of this PCSA aims to provide a standard form that assists contractors understand their responsibilities when delivering pre-construction services to prospective clients. It clarifies responsibilities and how risk is allocated across the project, particularly in areas such as performance standards, design, early works, long-lead procurement, and the critical transition from the pre-construction phase to the formal construction contract.

This standard form is designed to enable meaningful and effective early contractor involvement to deliver better pre-construction outcomes and value for all parties. This agreement promotes collaborative relationships and aligns stakeholders from the outset, ultimately laying an enduring foundation for successful project execution and client satisfaction. By setting clear expectations and fostering collaboration, this template aims to mitigate risks and enhance the overall success of construction projects, benefiting clients, contractors, and all stakeholders.

Contract Agreement

Agreement dated this

Parties

Party (Client)

Party (Construction Consultant)

Background

- a. The Client is undertaking the Project.
- b. The Client wishes to engage the Construction Consultant to provide the Pre-Construction Services.
- c. The Construction Consultant has represented that it has the necessary expertise, skills, and resources to provide the Pre-Construction Services.
- d. The Client and Construction Consultant wish to record the basis on which the Construction Consultant will provide the Pre-Construction Services, and how payment will be paid for the Pre-Construction Services, of which is recorded in this Agreement.

Terms of the agreement

1. The Construction Consultant will perform the Pre-Construction Services in accordance with the Agreement.
2. The Client will pay the Construction Consultant the Fee in accordance with the Agreement.
3. The Parties agree to perform their obligations under the Agreement.
4. The following documents form the Agreement in order of precedence:
 - a. The Contract Agreement.
 - b. The General Conditions.
 - c. Appendix A.
 - d. Appendix B.
 - e. (other documents as agreed between the parties).

SIGNED by and on behalf of

The Client

SIGNED by and on behalf of

The Construction Consultant

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General Conditions

1. Interpretation

1.1 Definitions

- 1.1.1 For the purposes of this Agreement, the following definitions apply:

Agreement: means the contract for provision of the Pre-Construction Services between the Construction Consultant and the Client. The documents forming the contract are listed in the Contract Agreement.

CCA: means the Construction Contracts Act 2002.

Client's Representative: is the person named as the Client's Representative in Appendix A.

Commencement Date: means the date recorded in Appendix A, if no date is recorded in Appendix A it means the date of the Agreement.

Confidential Information: means:

- all professional advice or other information of a sensitive nature, including commercially sensitive nature; and
- all information about the Parties, or their businesses, or their clients, gained during the currency of this Agreement that is not already in the public domain; and
- any other information which a reasonable person would consider to be of a confidential nature.

However, information that is public knowledge (otherwise than through a breach of confidentiality obligations by either Party) shall not be considered as Confidential Information.

Construction Consultant: is the Party named as the Construction Consultant in the Contract Agreement.

Construction Consultant's Representative: is the person named as the Construction Consultant's Representative in Appendix A.

Construction Contract: means the contract (if awarded) to be entered by the Client and Construction Consultant.

Design Coordination Consultant: means the Other Consultant engaged by the Client to coordinate the design of the Project, recorded in Appendix A.

Early Works: works carried out in anticipation of, and for the benefit of, the Project before Parties enter the Construction Contract.

Fee: means the amount payable by the Client to the Construction Consultant for performing the Pre-Construction Services, and its obligations under the Agreement. This amount is set out in Appendix A and may be adjusted under this Agreement.

HSWA: is the Health and Safety at Work Act 2015.

Intellectual Property:

New Intellectual Property: means all intellectual property rights, including (but not limited to) copyright, in all concepts, designs, drawings, specifications, plans, studies, reports, models, software and documentation collated, prepared, or created in any medium by the Construction Consultant (or persons on behalf of the Construction Consultant) in carrying out the Pre-Construction Services and provided.

Pre-existing Intellectual Property: means all intellectual property rights owned by the Construction Consultant or any third party and provided or used by the Construction Consultant in carrying out the Pre-Construction Services.

Client's Intellectual Property: means all intellectual property rights owned by the Client and provided to the Construction Consultant for the purposes of carrying out the Pre-Construction Services.

Insolvency Event: means, in respect of the applicable entity:

- being placed into bankruptcy, liquidation, administration, receivership or statutory management or having an official assignee, liquidator, receiver, trustee manager, administrator, statutory manager, or similar appoint in respect of it or all or any of its business or property;
- being unable, or presumed at law unable, to pay its debts as they fall due; or
- being subject to a resolution or any proceeding for the winding up or liquidation of that entity (whether on a voluntary or involuntary basis) other than for a bona fide solvent restructuring and other than where such resolution or proceeding is formally discharged or dismissed in full within 10 Working Days of the initiation thereof.

Long Lead Procurement: procurement of plant or materials in anticipation of, and for the benefit of, the Project before Parties enter the Construction Contract.

Other Consultant: means a person or entity the Client engages to carry out other consulting or advisory services related to the Project, including but not limited to engineers, architects, quantity surveyors, and project managers.

Party: means the Client or Construction Consultant; "Parties" means the Client and the Construction Consultant, and "Third Party" means any other person or entity as the context requires.

PCBU: means a person conducting a business or undertaking as defined in the HSWA.

Pre-Construction Services: means the services listed in Appendix B.

Project: is the Client's planned work as stated in Appendix A.

Sub Consultant: means a person or entity engaged by the Construction Consultant to assist in the provision of the Pre-Construction Services.

Variation: means a change in the provision of the Pre-Construction Services, including the scope, time or supply, or scale.

Working Day: is a calendar day other than a Saturday, Sunday, statutory or public holiday, or any day falling within the period from 24 December to 5 January both inclusive irrespective of the days on which work is actually carried out.

1.2 General

- 1.2.1 In these General Conditions, the singular shall include the plural, the masculine shall include the feminine, and vice versa where the context requires.
- 1.2.2 A reference to a Party includes their respective successors, executors, and administrators.
- 1.2.3 A reference to any legislation shall include all subsequent legislation in amendment of, or substitution for, the same.

1.3 Law, Language, and Currency

- 1.3.1 The Contract shall be governed by New Zealand law.
- 1.3.2 All prices and payments made under the Contract shall be in New Zealand currency and payable in New Zealand. All prices and rates are stated exclusive of goods and services tax (GST), which is to be added and paid where appropriate.
- 1.3.3 All communications between the Parties will be in English.

1.4 Computation of time

- 1.4.1 Where any period from a given day, act, or event is prescribed or allowed for any purpose, the period shall, unless a contrary intention appears, be determined as exclusive of that day or the day of that act or event.
- 1.4.2 Where an obligation or action is to be completed on a Working Day, that obligation or action must be completed by 5pm on the Working Day, failing which it will occur on the next subsequent Working Day.

2. General Obligations

2.1 Parties Representatives

- 2.1.1 The Parties respectively will appoint, and maintain the appointment of, a Client's Representative and Construction Consultant's Representative. The Client's Representative may be an Other Consultant, including the Design Coordination Consultant
- 2.1.2 The Parties' Representatives will be the principal points of contact for each Party.
- 2.1.3 Where a Party's Representative must be replaced, the other Party must be informed of the replacement as soon as practicable.

2.2 Provision of information by Client

- 2.2.1 The Client must ensure the Construction Consultant is provided with all Client information the Construction Consultant requires to perform the Pre-Construction Services.

- 2.2.2 The Client's Representative and Construction Consultant's Representative will meet promptly after the Commencement Date to agree on the Client information required by the Construction Consultant.

- 2.2.3 The Client's Representative must ensure the Construction Consultant is provided with up to date Client information. For example, if a drawing has been superseded, the Client's Representative must ensure the Construction Consultant is provided with the most up to date drawing.

- 2.2.4 In this section 2.2, Client information means information held by or prepared for the Client in relation to the Project, including but not limited to designs and programmes prepared by Other Consultants.

2.3 Sub Consultants

- 2.3.1 The Construction Consultant may appoint Sub Consultants at any time subject to prior approval by the Client, such approval not to be unreasonably withheld.
- 2.3.2 The Construction Consultant is responsible to the Client for the services of any Sub Consultant. The sub-contracting of any of the Pre-Construction Services shall not relieve the Construction Consultant from any liability or obligation under the Agreement.
- 2.3.3 If the Client decides for good reason that a Sub Consultant is unsuitable, the Client can require the Construction Consultant not to have that Sub Consultant perform the Pre-Construction Services. The Construction Consultant shall then replace that Sub Consultant.

2.4 Design Coordination Consultant

- 2.4.1 The Client will appoint a Design Coordination Consultant within 5 Working Days of this Agreement.
- 2.4.2 Where the Client replaces the Design Coordination Consultant, the Client must inform the Construction Consultant within 2 Working Days of the replacement.

2.5 Conflicts of interest

- 2.5.1 The Construction Consultant must take reasonable steps to ensure that conflicts of interest do not arise and notify the Client immediately in writing if it is thought that a conflict of interest may arise or has arisen.
 - 2.5.2 Where a conflict of interest is identified and the Client has given informed consent, the Construction Consultant must establish structures and practices which:
 - a. Ensure that the conflict is avoided in practice; or
 - b. If avoidance is not practicable, ensure that the effects of conflict are minimised.
 - 2.5.3 In either situation, the Construction Consultant must inform the Client of the structures and practises that have been established.
- ## 2.6 Health and safety – Construction Consultant obligations
- 2.6.1 The Construction Consultant must have in place a health and safety management plan that is appropriate for the Pre-Construction Services.
 - 2.6.2 The Construction Consultant is responsible for health and safety issues relating to the provision of the Pre-Construction Services including:
 - a. Being aware of and complying with any of the Construction Consultant's duties under the HSWA; and
 - b. So far as is reasonably practicable, (as defined in the HSWA) consulting, cooperating, and coordinating activities with the Client, Other Consultants, and other relevant parties.
- ## 2.7 Health and safety – Client obligations
- 2.7.1 The Client shall provide to the Construction Consultant a list of known identified risks to health and safety relevant to the Pre-Construction Services, and any safety risk register or health and safety management plan operated by the Client that is relevant to the Services.
 - 2.7.2 As a PCBU, the Client shall, so far as reasonably practicable, consult, cooperate with and coordinate activities with other PCBUs which have a duty in relation to the same matter.

2.8 Construction Consultant to give early warning

- 2.8.1 The Construction Consultant must notify the Client in writing as soon as the Construction Consultant becomes aware, or should reasonably have become aware, of any direction or other circumstance which could impact the provision of the Pre-Construction Services.

2.9 Client to give early warning

- 2.9.1 The Client must notify the Construction Consultant in writing as soon as the Client becomes aware, or should reasonably have been aware, of anything that will materially affect the scope or timing of the Pre-Construction Services.

3. The Pre-Construction Services

3.1 General

- 3.1.1 This section 3 is to be read with Appendix B, Scope of Pre-Construction Services.
- 3.1.2 The Construction Consultant must:
 - a. provide the Pre-Construction Services;
 - b. perform Pre-Construction Services in accordance with the timetable set out in Appendix A;
 - c. advise the Client promptly if additional briefing or information is required from the Client to avoid any delay to the provision of Pre-Construction Services; and
 - d. comply with all reasonable instructions issued by the Client in relation to the Agreement.

3.2 Standard of performance of Pre-Construction Services & no warranty on Client's objectives

- 3.2.1 In providing the Services, the Construction Consultant must use the degree of skill, care and diligence reasonably expected of a contractor providing services similar to the Pre-Construction Services.
- 3.2.2 The Construction Consultant will endeavour to perform the Pre-Construction Services to assist the Client to achieve its objectives in relation to the Project, but the Construction Consultant provides no warranty that such objectives will be achieved.

3.3 Design & Design Review in the Pre-Construction Services

Design

- 3.3.1 Where the Pre-Construction Services include the Construction Consultant preparing or procuring a design, the scope of this design element will be recorded in Appendix A.
- 3.3.2 Where the Construction Consultant prepares or procures a design under this Agreement, the Construction Consultant shall be responsible for carrying out such design with reasonable skill, care, and diligence.
- 3.3.3 Where there are no Construction Consultant's design obligations recorded in Appendix A or where the Client wishes for the Construction Consultant to carry out additional design to that which is recorded in Appendix A, that design will be carried out under a separate contract to the Agreement. Notwithstanding the preceding provision of this clause, the Construction Consultant may at its absolute discretion agree to carry out such design as a Variation.

Design Review

- 3.3.4 Except as recorded in Appendix A (as Construction Consultant's design obligations) or in a Variation for the Construction Consultant to carry out design, the Pre-Construction Services do not include, nor do they impose a design obligation or responsibility on the Construction Consultant.
- 3.3.5 Notwithstanding the Pre-Construction Services includes a design review element, the Client acknowledges:
 - a. The Construction Consultant's experience is in planning and delivering construction, therefore any design can only be a limited exercise in applying the Construction Consultant's experience.
 - b. The design review involves a desk top exercise of reviewing drawings, specifications and other materials provided to the Construction Consultant by the Client.
 - c. The Construction Consultant is not engaged as a designer and cannot warrant the completeness of all or part of the Client's design. For example, the Construction Consultant cannot warrant the completeness or correctness of the Client's structural engineering design.

- d. The Construction Consultant cannot warrant the design is fully coordinated.
- e. The Construction Consultant cannot warrant the design will meet the requirements of an application for a building consent.

4. Intellectual Property

4.1 Existing Intellectual Property

- 4.1.1 All Pre-existing Intellectual Property shall remain the property of the original owner. The Construction Consultant grants to the Client 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 Pre-Construction Services. The Client grants to the Construction Consultant, an unrestricted royalty-free licence to use and copy the Client's Intellectual Property provided to the Construction Consultant to the extent reasonably required to enable the Construction Consultant to provide the Pre-Construction Services.

4.2 New Intellectual Property

- 4.2.1 Subject to clause 4.3.1, all New Intellectual Property held in any medium, whether electronic or otherwise, shall be jointly owned by the Client and the Construction Consultant. The Client and the Construction Consultant grant to the other an unrestricted royalty-free licence in perpetuity to copy or use such New Intellectual Property and each Party is free to make whatever use they wish of the New Intellectual Property without any obligation to obtain the other's consent or to account for any future benefits.

4.3 General

- 4.3.1 The Client's rights in relation to New Intellectual Property or to any licence in respect of Pre-existing Intellectual Property are conditional upon, on each occasion, the Client having paid all amounts due and payable to the Construction Consultant under the Agreement.
- 4.3.2 The ownership of data and factual information collected by the Construction Consultant and paid for by the Client shall, after payment by the Client, lie with the Client.
- 4.3.3 The Construction Consultant accepts no liability for use of New Intellectual Property or Pre-existing Intellectual Property other than to the extent reasonably required for the intended purposes relating to the Pre-Construction Services and the Project.

4.4 Third Party Intellectual Property

- 4.4.1 The Parties warrant to each other that they own or have the right to use Confidential Information disclosed or provided to each other under this Agreement.
- 4.4.2 The Parties warrant to each other that New Intellectual Property, Existing Intellectual Property, any deliverables arising from the Pre-Construction Services and any other documents exchanged in furtherance of this Agreement will not infringe any intellectual property rights or other rights of any third party.
- 4.4.3 Where a Party infringes any warranty under this section 4.4, that Party indemnifies the other Party against any action, claim, costs, or other cost arising from any infringement of patents, registered designs, trademarks, copyright, or other protected right in respect of any design, method, or article supplied or specified by the Party. The indemnity shall not apply where either Party is aware of the infringement and does not notify the other Party.

5. Early Works & Long Lead Procurement

5.1 General

- 5.1.1 The Construction Consultant must endeavour to identify Long Lead Procurement opportunities which may be beneficial for the Project.
- 5.1.2 The Parties will collaborate to identify Early Works opportunities which may be beneficial for the Project.
- 5.1.3 If the Parties enter an Early Works contract or Long Lead Procurement contract, they agree the following will apply:
 - a. Contracts for Early Works or Long Lead Procurement will be separate contracts to this Agreement; and
 - b. If the Parties enter the Construction Contract, the contracts for Early Works or Long Lead Procurement will be incorporated into the Construction Contract, with the Construction Contract's contract price and programme appropriately allowing for the Early Works or Long Lead Procurement.
- 5.1.4 The preceding clauses 5.1.1 to 5.1.3 do not create a right or presumption that the Construction Consultant will be awarded any contract for Early Works or Long Lead Procurement.

- 5.1.5 Where the Client, either by itself or through a third party, carries out works or engages in procurement which may be beneficial for the Project, the following provisions apply:

- a. The Client may engage the Construction Consultant to manage the works or procurement. This engagement will be a Variation to this Agreement.
- b. The works or procured items will not be incorporated into the Construction Contract unless the Construction Consultant consents in writing, which consent the Construction Consultant has full discretion to withhold.
- c. Any contracts for the works or procurement will not be novated or otherwise transferred to the Construction Consultant unless the Construction Consultant consents in writing, which consent the Construction Consultant has full discretion to withhold.

5.2 Early Works

- 5.2.1 Where the Parties contract for Early Works, the terms of the Early Works contract will be:
 - a. The agreed terms for the Construction Contract if they have been agreed; or
 - b. Other reasonable terms.

5.3 Long Lead Procurement

- 5.3.1 Where the Parties contract for the Construction Consultant to procure long lead items, in addition to any purchase price, the Construction Consultant is entitled to be paid by the Client for the reasonable costs of delivery, storage, and insuring the long lead items.
- 5.3.2 Ownership in the long lead items will transfer to the Client when the Client pays all sums due to the Construction Consultant under the contract for the Construction Consultant to procure long lead items.
- 5.3.3 If the Parties do not enter the Construction Contract, the Construction Consultant will transport the long lead items to a location identified by the Client. The Client will reimburse the Construction Consultant for the reasonable cost of transporting the long lead items.

6. Confidentiality

6.1 Client obligations

6.1.1 The Client must:

- a. Keep all Confidential Information relating to the Construction Consultant confidential and only use it for the purposes it was made available; and
- b. Not disclose the Confidential Information relating to the Construction Consultant without the Construction Consultant's written approval, unless it is necessary for the purposes of the Pre-Construction Services to disclose it to any appropriate third party, or as required by law.

6.2 Construction Consultant obligations

6.2.1 The Construction Consultant must:

- a. Keep all Confidential Information relating to the Client or the Client's Project confidential and only use it for the purposes it was made available; and
- b. Not disclose any Confidential Information relating to the Client or the Client's Project or the Works without the Client's written approval, unless it is necessary for the purposes of the Pre-Construction Services to disclose it to any appropriate third party, or as required by law.

6.3 Exceptions

6.3.1 If the Client is subject to the Official Information Act 1982, the Local Government Official Information and Meetings Act 1987, or the Privacy Act 2020, then the Construction Consultant acknowledges that, pursuant to those Acts, the Client may be required to release information about the Pre-Construction Services, the Project, or this Agreement.

6.3.2 If either Party is legally bound to disclose Confidential Information, that Party must first advise the other Party what information will be provided and limit the information to that required by law.

6.3.3 The Construction Consultant's and any Sub Consultant's personnel may be required to disclose Confidential Information if required by their code of professional ethics. In such cases the Construction Consultant shall advise the Client of this requirement and limit the information disclosed to that necessary to comply with the applicable code of ethics.

7. Time for Completion

7.1 General

7.1.1 The Client acknowledges that due to the nature of the Pre-Construction Services, including reliance on engagement with the Client and Other Consultants, time for performance of the Pre-construction Services is not to a specified date, with the Agreement being a reasonable time contract.

7.2 Term

7.2.1 Subject always to the provisions of the Agreement, the term of the Agreement commences on the Commencement Date and ends at the time recorded in Appendix A.

7.2.2 The Parties may agree to extend the term of the Agreement to a time later than that recorded in Appendix A. An extension of the term of the Agreement will be on terms agreeable to both Parties.

7.3 Client's indicative timetable

7.3.1 The Client's indicative timetable for the steps in the Project are as set out in Appendix A.

7.3.2 The Client's indicative timetable for the steps in the Project is subject to change from time to time at the discretion of the Client.

7.3.3 Notwithstanding clause 7.1.1, the Construction Consultant will perform the Pre-Construction Services in a manner that is consistent with the Client's indicative timetable for the steps in the Project.

7.4 Delay

7.4.1 If at any time the Construction Consultant's performance falls behind the programme set out in Appendix A (as amended from time to time in accordance with the Agreement), then the Construction Consultant shall notify the Client and, where due to matters within the control of the Construction Consultant, shall take all practicable steps to remedy such delay.

8. Variation

8.1 Variations to the Pre-Construction Services

8.1.1 The Client may order a Variation to the Pre-Construction Services, in writing, or may ask the Construction Consultant to propose a Variation to the Pre-Construction Services, the impact of which on the cost and term shall be agreed in accordance with section 8.2.

8.1.2 Where the Construction Consultant believes a direction or circumstance involves additional or changed work from that in Appendix B, the Construction Consultant must give the Client's Representative notice setting out the basis of the Construction Consultant's belief. Within 10 Working Days of the Construction Consultant's notice, the Client's Representative and Construction Consultant's Representatives must attempt to agree whether a direction or circumstance should be treated as a Variation.

8.2 Agreement of impact of variation

8.2.1 Where practicable the value of the Variation and impact on the term for the Pre-Construction Services shall be agreed between the Parties prior to the Variation works progressing.

8.2.2 Where the value of the Variation cannot practicably be agreed between the Parties prior to the Variation works commencing, the Parties shall agree to a budget for the Variation works that shall not be exceeded without further agreement between the Parties.

8.3 Failure to agree

8.3.1 In the event the Parties are unable to reach an agreement on whether a direction or circumstance should be treated as a Variation, or on the value and impact on the term for the Pre-Construction Services, the matter shall be treated as a dispute and resolved in accordance with section 12.

9. Payment

9.1 The Fee

9.1.1 The Fee for the Pre-Construction Services is recorded in Appendix A.

9.1.2 If no Fee is recorded in Appendix A, the Construction Consultant will charge the Client based on the hourly rates recorded in Appendix A.

9.2 Right to progress payments

9.2.1 The Construction Consultant is entitled to progress payments monthly.

9.2.2 The Construction Consultant shall serve a payment claim in accordance with the CCA on the Client, no later than the last Working Day of the month. The payment claim must be served on the Client's Representative who is appointed the Client's agent for receiving payment claims.

9.2.3 If there is a dispute as to the amount of the payment claim, the Client is to serve a payment schedule in accordance with the CCA.

9.2.4 Payment and any payment schedule are due on the 20th day of the following month, or if the 20th day of the following month is not a Working Day, they are due on the following Working Day.

10. Construction Contract

10.1 Overarching principles

10.1.1 The Parties agree they will endeavour to enter the Construction Contract and will act reasonably and transparently in this endeavour.

10.1.2 Notwithstanding clause 10.1.1, the Parties acknowledge that neither is bound nor compelled to enter the Construction Contract.

10.2 Terms of the Construction Contract

10.2.1 Where the Parties agreed the terms of the Construction Contract prior to the commencement of the Agreement, the Parties will record this agreement and append the terms of the Construction Contract to the Agreement as a further Appendix.

10.2.2 Where the Parties agreed the terms of the Construction Contract prior to the commencement of the Agreement, the Parties further agree the terms of the Construction Contract may be amended before entering the Construction Contract where it is beneficial to the Project.

10.2.3 Where the Parties did not agree the terms of the Construction Contract prior to the commencement of the Agreement, the Parties will endeavour to agree the terms of the Construction Contract before the Client requests the Construction Consultant to provide a Price Proposal.

10.3 Pricing Proposal procedure

10.3.1 By the time recorded in Appendix A, or such other time as the Parties agree, the Client must:

- Inform the Construction Consultant that the Client does not want to enter the Construction Contract; or
- Request the Construction Consultant to submit a Pricing Proposal.

10.3.2 If the Client requests the Construction Consultant to submit a Pricing Proposal, the Construction Consultant must:

- a. Within 10 Working Days of the request, inform the Client that the Construction Consultant does not want to enter the Construction Contract and will not submit a Pricing Proposal; or
- b. Submit a Price Proposal within the time recorded in Appendix A, or such other time as the Parties agree.

10.3.3 The Pricing Proposal will be prepared in a type of contract price (e.g. lump sum contract price) and at a level of detail as agreed between the Parties. The Construction Consultant acknowledges the Client is under no obligation to accept the Pricing Proposal.

10.4 Entering the Construction Contract

10.4.1 The Client will assess the Pricing Proposal within the time recorded in Appendix A, or such other time as the Parties agree. After assessing the Pricing Proposal, the Client will:

- a. Inform the Construction Consultant that the Client does not want to enter the Construction Contract; or
- b. Inform the Construction Consultant that the Client accepts the Pricing Proposal and does want to enter the Construction Contract; or
- c. Enter negotiations with the Construction Consultant as to whether the Parties will enter the Construction Contract, in which case:
 - i. The Parties will negotiate in good faith to endeavour to enter the Construction Contract; however
 - i. At any time during negotiations either Party may inform the other Party that they do not want to enter the Construction Contract.

10.4.2 Where the Parties agree to enter the Construction Contract, they will execute the Construction Contract in accordance with the terms of the Construction Contract. This does not preclude the Parties binding themselves to enter the Construction Contract by exchanging letters of intent or similar.

10.5 No liability for not entering the Construction Contract

10.5.1 The Parties acknowledge that no Party will be liable to the other Party in any way where a Party has exercised a right under this Agreement to decline to enter the Construction Contract.

10.6 Consequences of entering the Construction Contract

10.6.1 This Agreement terminates immediately on the Parties entering the Construction Contract.

10.6.2 On entering the Construction Contract all Early Works and Long Lead Procurement is incorporated into the scope of work of the Construction Contract.

10.6.3 The Parties irrevocably acknowledge this Agreement, and the Construction Contract are separate contracts. The Parties further acknowledge:

- a. The Parties' respective rights and obligations under this Agreement are not altered or affected in any way by the Parties entering the Construction Contract; and
- b. The Parties' respective rights and obligations under this Agreement are not incorporated or subsumed in any way into the Construction Contract.

10.6.4 Unless expressly recorded otherwise in the Construction Contract, neither Parties' rights, obligations, undertakings, or warranties under the Construction Contract are altered or affected solely by reason of the existence of this Agreement.

11. Termination

11.1 General

11.1.1 Termination of this Agreement shall not prejudice or affect the accrued rights or claims and liabilities of the Parties.

11.2 Termination at election

11.2.1 Once the Client has requested the Construction Consultant to submit the Pricing Proposal, neither Party may exercise its right to terminate the Agreement at its election.

11.2.2 Subject to clause 11.2.1, a Party may terminate this Agreement at any time by written notice to the other Party. As soon as this notice is received, the Construction Consultant shall stop the Pre-Construction Services.

11.3 Deemed termination at election

- 11.3.1 Where a Party exercises its right under section 10 to not enter the Construction Contract, this Agreement is deemed terminated immediately by the Party exercising that right.

11.4 Termination at completion of the Pre-Construction Services or end of term of the Agreement

- 11.4.1 This Agreement automatically terminates at the earlier of completion of the Pre-Construction Services or end of term of the Agreement.

11.5 Termination by the Client for default

- 11.5.1 The Client may immediately terminate the Agreement by giving written notice to the Construction Consultant in the event of:
- The Construction Consultant subcontracting or purporting to subcontract the whole or substantially the whole of the Services without the consent in writing of the Client, or the Construction Consultant assigning, charging, or novating any part of its rights and/or obligations under the Agreement or purporting to do the same without the consent in writing of the Client; or
 - The Construction Consultant committing a substantial breach of the Agreement, and, if rectifiable, has failed to rectify the breach within 5 Working Days following a written request to do so from the Client.

11.6 Termination by the Construction Consultant for default

- 11.6.1 The Construction Consultant may immediately terminate the Agreement by giving written notice to the Client if the Client is in substantial breach of the Agreement and, if rectifiable, has failed to rectify the breach within 5 Working Days following a written request to do so by the Construction Consultant.

11.7 Termination by either Party for Insolvency Event

- 11.7.1 A Party may immediately terminate the Agreement by giving written notice to the other Party where an Insolvency Event occurs in respect of the other Party.

11.8 Consequences of termination of the Agreement

- 11.8.1 If the Client terminates the Agreement for reasons other than a default by the Construction Consultant, or if the Construction Consultant terminates the Agreement because of a default by the Client, the Client must immediately

pay the Construction Consultant for the Pre-Construction Services provided to the date of termination and pay any reasonable costs that the Construction Consultant incurs solely because of the early termination of the Agreement.

11.9 Return of property/equipment

- 11.9.1 On termination of the Agreement, the Construction Consultant must return to the Client any property, including the Client's Intellectual Property, or equipment of the Client which is in the Construction Consultant's possession or control.
- 11.9.2 Notwithstanding any other provision in this Agreement, the Construction Consultant shall be entitled to retain a copy of all documentation including Confidential Information, drawings, specifications, reports, correspondence, computer files and records of every description for its record keeping purposes only. Such documentation shall include all relevant New, Pre-existing and Client's Intellectual Property. The Construction Consultant shall treat all such documentation as Confidential Information and shall mark it confidential.

11.10 Payment on early termination

- 11.10.1 If the Client terminates this Agreement, or the Construction Consultant terminates this Agreement because the Client has breached it, then the Client must immediately pay the Construction Consultant for Services provided to the date of termination.
- 11.10.2 If the Client terminates this Agreement because of a material breach of the Agreement by the Construction Consultant, the Client shall not be obliged to pay for the Services that have caused the material breach.

12. Dispute Resolution**12.1 Process**

- 12.1.1 If there is a dispute between the Parties in relation to this Agreement, or any matter arising from it, the Parties will in good faith in the first instance use their best endeavours to resolve the dispute themselves.
- 12.1.2 If the dispute cannot be resolved by the Parties themselves within a reasonable time, then they must explore whether the dispute can be resolved by use of mediation or other alternative resolution technique.

12.1.3 If the dispute is not settled within a reasonable time, either Party may refer the dispute to arbitration by a sole arbitrator under the provisions of the Arbitration Act 1996. The arbitrator will be appointed by agreement between the Parties within 15 Working Days of written notice of referral by the referring party to the other or, failing agreement, by the President of the Arbitrators' and Mediators' Institute of New Zealand (AMINZ).

12.1.4 No dispute arising gives either Party the right to suspend their obligations under the Agreement.

12.1.5 Nothing in section 12 affects any Party's rights under the CCA.

13. Liability

13.1 General

13.1.1 Subject always to clause 13.2.1, where the Construction Consultant breaches this Agreement, the Construction Consultant is liable to the Client for reasonably foreseeable claims, damages, liabilities (including any liability of the Client to a third party), losses or expenses caused directly by the breach.

13.1.2 A Party shall not be liable to the other Party under this Agreement for the other Party's indirect, consequential, or special loss, or loss of profit, however arising, whether under contract, in tort or otherwise.

13.2 Limitation of liability

13.2.1 The Construction Consultant's maximum aggregate amount payable, whether in contract, tort or otherwise, in relation to claims, damages, liabilities, losses or expenses, is as specified in the Appendix A. Notwithstanding any provisions of this Agreement, the amount recorded for the limitation of liability includes GST if any.

13.3 Contributory conduct

13.3.1 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.

13.4 Duration of liability

13.4.1 Without limiting any defences, a Party may have under the Limitation Act 2010 or any other legislation, neither party shall be liable for any loss or damage occurring 6 years from the Commencement Date.

13.5 The Agreement and the Construction Contract are separate contracts

13.5.1 The Parties further acknowledge that liability under this Agreement is separate and distinct from any liability under the Construction Contract, and vice versa.

14. Insurance

14.1 General

14.1.1 The Construction Consultant shall take out and maintain for the duration of the Services:

- a. Professional indemnity insurance for the amount of liability under clause 13.2.1;
- b. Public liability insurance cover as set out in Appendix A;
- c. Other insurance as set out in Appendix A; and
- d. Provision for reasonable defence costs.

14.1.2 The Construction Consultant shall use all reasonable endeavours to maintain professional indemnity insurance for the duration of liability stated under clause 13.2.1. If at any time the Construction Consultant is unable to obtain or maintain professional indemnity cover as required by the Agreement, at commercially viable rates or if any material change to the terms and conditions of the cover occurs, the Construction Consultant shall, as soon as practicable, notify the Client in writing.

14.2 Proof of insurance

14.2.1 If the Client asks, the Construction Consultant must produce certificates evidencing the currency of such cover and proving that the professional indemnity and public liability insurance policies meet the requirements in section 14.1.

15. Miscellaneous

15.1 Events beyond control

15.1.1 Should any event occur which:

- a. Is beyond the control of either Party;
- b. Is neither directly or indirectly caused by either Party; and
- c. Prevents the performance of the Pre-Construction Services (in whole or in part) required under this Agreement,

then those Pre-Construction Services will be suspended until such time that it becomes practicable to recommence the Pre-Construction Services. This does not include events personal to either Party, such as ill-health, lack of funding or resources.

15.1.2 In the event there is a reasonable likelihood that the Pre-Construction Services are not able to be recommenced, then this Agreement may be terminated by the Client.

15.1.3 In circumstances where the Pre-Construction Services or part of the Pre-Construction Services must be suspended or delayed, the Construction Consultant will be allowed extra time to complete the Pre-Construction Services and such extra time should be reasonable in the circumstances.

15.1.4 In the event the suspension continues for greater than 3 months, then this Agreement may be terminated by the Construction Consultant.

15.2 Reporting

15.2.1 The Client and the Construction Consultant shall review and discuss the progress of the Pre-Construction Services, as agreed from time to time, or as reasonably requested.

15.3 Notices

15.3.1 All demands, notices, requirements, and consents which this Agreement authorises or requires, or that relate to this Agreement, must be in writing and will take effect from receipt at any one of the addresses shown in Appendix A. These may be delivered:

- a. By hand to the Party's Representative; or
- b. By email, in which case receipt will take effect upon receipt by the sender of the email message indicating that the email has been opened at the recipient's terminal, provided that any communication received, or deemed received after 5pm, or on a day which is not a Working Day, shall be deemed not to have been received until the next Working Day.

15.3.2 Notwithstanding clause 15.3.1, a notice referring a dispute to arbitration must be served by hand.

15.4 Assignment

15.4.1 Neither Party shall assign its rights under this Agreement without the other Party's prior written approval, such approval shall not be unreasonably withheld.

15.4.2 For the avoidance of doubt, if either Party assigns its rights, the Party remains liable for the performance of its obligations under this Agreement.

15.4.3 No Party may transfer its obligations under this Agreement or novate this Agreement unless the other Party has consented to such transfer or novation. Such consent is at a Party's absolute discretion, must be in writing, and must be obtained after the Commencement Date.

15.5 No waiver

15.5.1 Any waiver given by either Party in connection with this Agreement is binding only if it is in writing, and strictly in accordance with the terms on which it is given.

15.5.2 Further, no waiver given by either Party for the purposes of this Agreement creates an expectation or precedent under the Agreement, nor does it amend the provisions of the Agreement.

15.6 Severability

15.6.1 Each term of this Agreement is separately valid and binding. If for any reason either Party cannot rely on any term, all other terms will remain valid and binding.

15.7 Entire Agreement

15.7.1 The Agreement constitutes the entire Agreement between the Client and the Construction Consultant for the performance of the Pre-Construction Services. The Agreement supersedes all previous negotiations, representations, and warranties except as may be expressly incorporated in the Agreement.

15.8 Counterparts

15.8.1 This Agreement may be executed in counterparts, each of which is an original and all of which, taken together, form one single document.

15.9 Amendments to the Agreement

15.9.1 No amendment to this Agreement shall be effective unless it is in writing and signed by both Parties.

Appendix A: Contract Details

Clause	Subject Matter	Specific Condition
1.1.1	Commencement Date	
1.1.1	Construction Consultant's Representative	
1.1.1	Design Coordination Consultant	
1.1.1	Fee	
1.1.1	Project	
3.1.2	Timetable for Pre-Construction Services	
3.3.1	Construction Consultant's design obligations	
7.2.1	Term	
7.3.1	Indicative timetable for steps in the Project	
7.4.1	Programme	
10.3.1	Time for Client to decide on Pricing Proposal	
10.3.2	Time to submit the Pricing Proposal	
10.4.1	Time to assess the Pricing Proposal	
13.2.1	Limitation of liability	
14.1.1(b)	Public Liability Insurance details	
14.1.1(c)	Other Insurance details	
15.3.1	Notices	

Appendix B: Scope of Pre-Construction Services

1 General

- 1.1 Promptly after the Commencement Date, the Parties will agree the process for provision of the Pre-Construction Services including:
 - a. The time and required attendees for the meeting between the Client's Representative and the Construction Consultant's Representative to identify Client information required by the Construction Consultant. The Design Coordination Consultant must attend this meeting.
 - b. The frequency of meetings.
 - c. The deliverables required from the Pre-Construction Services.
 - d. Reporting requirements for the Construction Consultant.
 - e. Method of communication, including specifying a document management system if required.
- 1.2 Promptly after the Commencement Date, the Client must provide the Construction Consultant the following information:
 - a. The name, discipline and contact details of all Other Consultants.
 - b. The areas of the Project for which each Other Consultant is responsible.
 - c. The deliverables for which each Other Consultant is responsible.
 - d. The manner in which the Client requires the Construction Consultant to communicate and engage with Other Consultants.
- 1.3 Where the Parties agree, the Construction Consultant will prepare a report on completion of an element of the Pre-Construction Services. For example, the Parties may agree the Construction Consultant will provide a design review report on completion of the design review element of the Pre-Construction Services.

- 1.4 A report under clause 1.2 will include as a minimum:
 - a. A record of the Client's information provided to the Construction Consultant.
 - b. The steps taken by the Construction Consultant in relation to the element of the Pre-Construction Services.
 - c. The Construction Consultant's conclusions and/or suggestions in relation to the element of the Pre-Construction Services

2 Design Review

- 2.1 The Construction Consultant must undertake the design review in consultation with the Design Coordination Consultant.
- 2.2 For the design review, the Construction Consultant will undertake a desk top review of the designs in the Client's information to:
 - a. If requested, provide input on design elements prepared by Other Consultants.
 - b. Identify the completeness of design elements.
 - c. Identify apparent issues of coordination between design disciplines.
 - d. Identify apparent omitted details or incorrect details on designs.
 - e. Suggest design alternatives which may be beneficial to the Project.

3 Buildability Review

- 3.1 For the buildability review, the Construction Consultant will undertake a desk top review of the relevant Client information and apply its own experience to:
 - a. Assess the ease of construction or otherwise.
 - b. Identify the likely construction methods and to explore alternative construction methods which may reduce cost.
 - c. Assess the likely availability of specified materials and specified systems.
 - d. Assess the likely availability of sub-trades including specialist sub-trades.

4 Logistics Planning

- 4.1 For logistics planning, the Construction Consultant will undertake a desk top review of the relevant Client information, assess the location of the Project, and apply its own experience to:
- Identify likely required encroachment licences such as airspace licences for crane overhang.
 - Identify the ease of access or otherwise for deliveries and site activities such as concrete placement.
 - Identify the availability or otherwise of locations for site facilities such as offices, storage, and ablution blocks.
 - Identify likely requirements for traffic management plans and for temporary site utilities.

5 Construction Planning

- 5.1 For construction planning, the Construction Consultant will undertake a desk top review of the relevant Client information, assess the location of the Project, and apply its own experience to:
- Review existing site information to suggest further investigations for the Client to undertake regarding the site.
 - Prepare a draft method of construction.
 - Prepare suggestions for alternative methods of construction including off-site manufacture and alternative materials that may benefit the Project.

6 Programming

- 6.1 For programming, the Construction Consultant will:
- Prepare and progressively update a draft construction programme.
 - Engage with the Client's Representative and the Design Coordination Consultant to integrate the draft construction programme with Client's indicative timetable for the Project.
 - Provide information on possible alternative programmes incorporating the Construction Consultant's suggestions on alternative materials and/or alternative methods of construction.

7 Procurement

- 7.1 For procurement, the Construction Consultant will:
- Provide advice on market conditions.
 - Prepare a procurement plan for subtrades.
 - Prepare a procurement schedule for procuring plant, materials, and substrates.
 - Prepare a report on the Construction Consultant's proposed method of procurement on a best for Project basis. For example, the Construction Consultant may propose open tender procurement or may propose negotiation with preferred suppliers.
 - Identify long-lead procurement items and a likely programme for procuring same.
 - Where requested by the Client, prepare a report on alternative models of contract price for the Construction Contract such as lump sum, target price, GMP will gain share/pain share, and fixed P&G and Margin.
 - Where requested produce an estimate.

8 Risk Management

- 8.1 For risk management, the Construction Consultant will:
- Attend risk workshops with the Client and the Other Consultants.
 - Provide suggestions for risk mitigation.
 - Engage with the Client on proposed risk allocation for the Construction Contract.





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