

Procurement Services Agreement

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Terms & Conditions

1 ENGAGEMENT

The Client engages the Designer to provide the Procurement Services, and the Designer accepts that engagement, on the following terms and conditions.

2 PERFORMANCE & DELIVERY

- (a) The Designer shall provide the Procurement Services in accordance with a reasonable standard of skill, care and diligence subject to any financial, physical, time or other constraints imposed by the Client or reasonably resulting from the nature of the engagement.
- (b) The Designer shall not make any material change to Goods and Services approved in writing by the Client except:
 - (i) With the Client's instruction or agreement; or
 - (ii) Where Site conditions or Project issues require the Designer to exercise urgent discretion, and the Client is promptly notified.
- (c) Any periods of time for delivery of Goods and Services are indicative estimates only, and any delay shall not entitle the Client to terminate this Agreement or claim remedies.
- (d) The Client agrees to:
 - (i) Provide the Designer with a full brief of the Project requirements and objectives, together with full information about the Site and any other information reasonably requested by the Designer; and
 - (ii) Work constructively and in good faith with the Designer in order to resolve any aspects of the Goods and Services or the Project, to enable the Procurement Services to be provided.

3 CLIENT – DESIGNER RELATIONSHIP

- (a) The Client appoints the Designer to be the Client's agent for the procurement of the Goods and Services. The Designer is authorised to provide the Procurement Services on behalf of the Client, including negotiating and signing contracts with suppliers of Goods and Services, on the terms of this Agreement.
- (b) The parties are not partners or joint venturers. Except as authorised by this Agreement, the Designer shall not hold itself out as agent of the Client.

4 DESIGNERS OBLIGATIONS

The Designer agrees with the Client that, throughout the duration of this Agreement:

- (a) Subject to receipt of payment (Clause 6), to promptly execute orders for the purchase of the Goods and Services confirmed by the Client from time to time;
- (b) In placing orders from overseas suppliers, to have regard to any export or currency restrictions of the countries within which the purchases are to be made and to obtain any licences or permissions necessary to enable importation;
- (c) To keep the Principal informed of the status of Goods and Services ordered;
- (d) In making purchases of Goods,
 - (i) to inform the seller of the purposes for which the Goods are intended to be used and of the fact that the Designer is acting as agent; and
 - (ii) to obtain such warranties as to the nature, quality and suitability of the Goods purchased as the Client may reasonably require;
- (e) To keep accurate accounts and records of:
 - (i) time spent by the Designer in undertaking the Procurement Services; and
 - (ii) the expenses incurred by the Designer in procuring Goods and Services and arranging delivery as required by the Client;

- (f) To pay for the Goods and Services purchased on behalf of the Client following receipt of payment from the Client.

5 CLIENT'S OBLIGATIONS

The Client agrees with the Designer throughout the duration of this Agreement:

- (a) Not to purchase the Goods and Services except through the Designer; and
- (b) To make payment to the Designer of all amounts required for Goods and Services, and otherwise due to the Designer, on the terms of this Agreement.

In addition, the Client agrees that it shall not, at any time after the commencement of this Agreement (including after termination for any reason), provide or display any Design Works to a supplier for quoting.

6 FEES AND PAYMENT

- (a) The Designer may periodically invoice the Client for Fees as the Project progresses and in the manner (if any) stipulated in the Project Details.
- (b) The Client shall pay the Designer's Fees within ten (10) days of invoice.
- (c) The Designer shall order Goods and Services (as agent for the Client) once the Client has paid the Designer in full for the Goods and Services.
- (d) Where this Agreement has been entered into by an agent (or person purporting to be an agent) on behalf of the Client, the agent and Client shall be jointly and severally liable for the payment of all Fees due to the Designer under this Agreement.
- (e) The Client shall pay for all disbursements and expenses actually and properly incurred by the Designer in the course of providing the Procurement Services.
- (f) The Client may not deduct, withhold or offset any sum from the amounts owed to the Designer under this Agreement.
- (g) The Client may not reduce or withhold payment to the Designer because a third party involved in the Project, or a supplier of Goods and Services, has not carried out their obligations to the Client.

7 TITLE AND RISK TO GOODS

- (a) During manufacture/fabrication, the risk and insurance of the Goods is the responsibility of the supplier.
- (b) Depending upon the supplier's terms of trade:
 - (iii) Ownership of the Goods may remain with the supplier until payment is made in full.
 - (iv) Once the Goods leave the supplier's factory the risk will pass to the Client, subject to any transit/delivery insurance cover held by the supplier.
- (c) It is the Client's sole obligation to ensure they are adequately insured for all Goods ordered. If the Client requires further information on the supplier's terms of trade or delivery insurance coverage (if any), this should be raised with the Designer.

8 SECURITY

- (a) The Client grants to the Designer a security interest in the Goods supplied and their proceeds to secure payment of the purchase price of the Goods, and to secure payment of all Fees and other amounts due from the Client to the Designer from time to time;
- (b) Nothing in sections 114(1) (a), 133 and 134 of the Personal Property Securities Act 1999 shall apply to this Agreement. The Client waives its rights pursuant to sections 121, 125, 129, 131 and 132 of that Act and its rights to receive any verification statement relating to the security interests in the Goods.

9 LATE PAYMENT

- (a) Any monies not paid in full in accordance with clause 7 may be charged with interest at a rate of 2% per month or part month overdue, and the Designer is, in addition, entitled to recover all debt collection costs and related legal expenses (on a solicitor/client basis).
- (b) In the event any monies due are not paid in full, the Designer reserves the right to immediately suspend further work for the Client. If Procurement Services are suspended, the Designer shall not be obliged to resume services until the amount owing, and any costs incurred in relation to the suspension, are paid in full and the Designer has adequate security for future Fees. The Designer will not be liable to the Client or any person for losses arising from suspension of the Procurement Services. Nothing in this clause prejudices or otherwise affects the Designer's rights under clause 13.
- (c) Any monies paid may be allocated by the Designer toward any amount owed by the Client.

10 DISPUTE RESOLUTION

- (a) Either party may raise a dispute by notice in writing to the other party. The parties agree to use their best efforts to resolve any dispute which may arise under this Agreement through good faith without-prejudice negotiations.
- (b) If the parties' nominated contact persons are unable to resolve the dispute within seven (7) Working Days following delivery of the dispute notice referred to in (a), the dispute shall be escalated to the Chief Executive Officer (or equivalent) of each party who shall conduct informal, off-the-record and without-prejudice discussions in good faith seeking to resolve the dispute.
- (c) If after five (5) Working Days the persons described in (b) have not reached an agreed outcome, they shall cease discussions for two (2) working days before resuming discussions.
- (d) If, after a further discussion period of two (2) Working Days, the parties remain unable to reach an agreed outcome, the dispute shall be referred to arbitration in accordance with the Arbitration Act 1996 (the "Act"). The decision of the arbitrator is final and binding on the parties.
- (e) Either party may refer a dispute to arbitration by giving written notice to the other party recording the details of the dispute and that party's desire to have the matter referred to arbitration.
- (f) The arbitration shall be heard and determined by one arbitrator, to be agreed upon by the Parties or, failing agreement within five (5) Working Days of the notice given pursuant to clause 10(g), to be nominated by the President for the time being of the New Zealand Law Society. The Arbitrator must have expertise in commercial law and the design industry.
- (g) The arbitrator shall adopt, wherever possible, a simplified and expedited procedure, and shall endeavour to complete the arbitration as quickly as possible and, in every case, within four (4) months of the notice given pursuant to clause 10(e).
- (h) The arbitrator may appoint experts under Article 26 of the First Schedule of the Act or may rely on the arbitrator's own expertise;
- (i) The arbitrator may adopt inquisitorial processes;
- (j) The arbitration shall take place in the city / town of the registered office of the Designer in New Zealand;
- (k) The arbitrator shall decide the dispute in accordance with the laws of New Zealand and the arbitration shall otherwise be conducted in accordance with the Act.

11 INDEMNITY

The Client undertakes to indemnify the Designer against any and all loss, damage, liability or expense (including costs on a solicitor-client basis):

- (i) Suffered or incurred as a result of any breach by the Client of the Agreement or in recovering any moneys due; and
- (ii) Arising out of a claim by a third party against the Designer alleging that any Design Works generated in the course of the Procurement Services (excluding original material developed solely by the Designer) infringes any third-party Intellectual Property Rights,

and such loss, damage, liability or expense shall be moneys due under the Agreement.

12 PRODUCT WARRANTIES

- (a) Where the Designer sources and orders Goods and Services it is acting as the agent of the Client. The Designer is not liable for any faults, defects or failures in the supply of Goods or Services (including non-supply).
- (b) The terms of trade of the suppliers will apply to all Goods and Services procured under this Agreement.

- (c) Any defects in Goods or Services must be promptly notified to the Designer, to enable it to notify the relevant supplier to rectify the defect.
- (d) In the event that a dispute with a third party supplier cannot be promptly resolved by the Designer, the Designer and Client shall confer on possible further action against the Supplier. The Designer shall provide reasonable support to the Client when enforcing the supply of Goods and Services (including any warranties), but shall not be obliged to take formal enforcement action or otherwise incur expense unless agreed in writing.

13 TERMINATION

13.1 Termination on Notice

The Client may terminate this Agreement at any time by giving four (4) weeks written notice and paying all costs owed. Upon receipt of such notice from the Client, the Designer must take all reasonable steps to bring the Procurement Services to a close.

13.2 Termination for Cause

Without prejudice to any other right or remedy it may have, whether under this Agreement, under statute or otherwise, either Party may immediately terminate this Agreement by written notice to the other Party if:

- (a) The other Party is in breach of any term of this Agreement and such breach is not remedied within ten (10) Working Days of notifying the other Party;
- (b) The other Party commits an act of bankruptcy or makes any assignment or composition with its creditors;
- (c) Liquidation or bankruptcy proceedings are commenced for the other Party; or
- (d) The other Party has a receiver or manager or statutory manager appointed.

13.3 Consequences of Termination

- (a) Upon postponement or termination of this Agreement, the Designer shall be entitled to payment of all Fees up to the effective date of postponement or termination (including fees, disbursements and costs incidental to the orderly termination of the Agreement).
- (b) If the Client terminates this Agreement, other than through breach by the Designer, the Client shall indemnify the Designer against any loss, costs (including costs on a solicitor-client basis), expenses, demands, or liability, suffered or incurred in relation to the Project.
- (c) Early termination of this Agreement will not prejudice or affect the accrued right or liabilities of each party to the other.

14 FORCE MAJEURE

The Designer shall not be liable for any loss or damage arising directly or indirectly due to an act of God, fire, armed conflict, labour disputes, civil commotion, intervention of a government, accidents, interruption to transportation, weather or any other cause outside the Designer's control.

15 CONSUMER GUARANTEES

- (a) The Consumer Guarantees Act 1993, or equivalent legislation, may apply to the Procurement Services provided by the Designer if the Client acquires the Goods and Services for personal, domestic or household use or consumption. If this Act applies, nothing in this Agreement will limit or exclude the Client's rights under that Act.
- (b) If the Client is acquiring the Goods and Services for business purposes, then the Client's rights are subject to this Agreement only and the Consumer Guarantees Act 1993 shall not apply.

16 DESIGNER NOT LIABLE FOR LOSSES

Subject to Clause 15, the Designer shall not be liable for:

- (a) any loss or damage arising by reason of any delay in the completion or delivery of the Procurement Services, or Goods and Services; or
- (b) any loss of profits; or
- (c) any indirect or consequential loss of whatever nature; or
- (d) any loss resulting from any errors or omissions arising from incorrect information provided by the Client, or failure by the Client to provide information, or an oversight or a misinterpretation of a Client's verbal instructions.

17 LIABILITY OF DESIGNER LIMITED

- (a) Subject to Clause 16, the Designer's liability to the Client for any and all costs, loss or damage suffered by the Client, however caused (including negligence), arising out of or connected with the performance or failure of performance of any Procurement Services supplied by the Designer, or otherwise arising under or in relation to this Agreement, shall not exceed the full value of the Fees paid by the Client under this Agreement.
- (b) The Designer is not responsible for the acquisition, or liable for the accuracy and validity, of any consents, licences, permits and

authorisations required to lawfully undertake the Project, unless otherwise agreed between the parties in writing.

18 COMMISSIONS

The Designer may accept and retain commissions from any suppliers of Goods and Services.

19 QUOTATIONS

- (a) Unless otherwise stated, and subject to (b), quotes obtained for Goods and Services are exclusive of GST and remain valid for a period of no more than 30 days from the date of quote.
- (b) In the event that the supply price for Goods and Services increases after quotation but before supply, the Designer reserves the right to adjust the price payable by the Client but shall take reasonable steps to notify the Client and obtain re-approval for the order.

20 ENTIRE AGREEMENT

The Project Details, together with these Terms & Conditions and all attachments, constitute the entire agreement ("Agreement") between the parties and supersedes all prior representations, agreements, statements and understandings, whether verbal or in writing, on the subject matter of this contract.

21. WAIVER OR VARIATION

- (a) No right or obligation under this Agreement shall be deemed to be waived except by notice in writing signed by each party.
- (b) The provisions of this Agreement shall not be varied, except by agreement in writing signed by the parties.

22 SURVIVAL OF AGREEMENT

The covenants, conditions and provisions of this Agreement which are capable of having effect after the expiration of the Agreement shall remain in full force and effect following the expiration of the Agreement.

23 SEVERABILITY

If any provision of this Agreement is held invalid, unenforceable or illegal for any reason, this Agreement shall remain otherwise in full force and effect apart from such provision.

24 INCIDENTAL DESIGN SERVICES

If the Designer creates works in which Intellectual Property Rights subsist, whether in the course of providing the Procurement Services under this Agreement or otherwise, those works shall be deemed to be "Design Works" and shall be the property of the Designer and licensed to the Client on the terms of the relevant Design Services Agreement (v.2012) published by the Designers Institute of New Zealand Inc at www.dinz.org.nz.

25 MISCELLANEOUS

- (a) This Agreement shall not be assigned or transferred without the prior written consent of the Designer.
- (b) This Agreement shall be construed in accordance with, and governed by, the laws of New Zealand and the Parties submit to the non-exclusive jurisdiction of the New Zealand courts in respect of all matters relating to this Agreement.
- (c) Currency amounts are in New Zealand dollars unless otherwise stated, and all communications between the parties must be in English.
- (d) Nothing in this Agreement shall be construed as evidence of a partnership between the parties or their successors or assigns, and no provision of this Agreement shall empower a party to act on behalf of the other in any way, or to incur any liability on behalf of the other.
- (e) If there is a conflict between the Project Details and any provisions of these Terms and Conditions, the Project Details shall take precedence.
- (f) Notices under the Agreement can be delivered in person, or by facsimile or email to the address notified in the Project Details (which may be updated from time to time by each party)

26 DEFINITIONS OF CAPITALISED WORDS

In these Terms and Conditions, words and phrases shall have the same meaning as provided in the Spatial Design Services Agreement (v.2012) published by the Designers Institute of New Zealand Inc at www.dinz.org.nz, provided however that the following meanings apply (and in the event of conflict, shall prevail):

"Agreement" has the meaning described in clause 20;

"Client" means the client listed in the Project Details;

"Designer" means the designer listed in the Project Details;

"Fees" means the fees payable by the Client in consideration for the Procurement Services, as detailed in this Agreement;

"Goods and Services" means the goods and services described in the Project Details to be procured by the Designer for the Client;

"Intellectual Property Rights" means any patents, copyright, designs, and any other right granted by the operation of law which confers protection on any written or artistic work created by intellectual effort and all associated intangible assets created as a by product.

"Procurement Services" means the services described as "Procurement Services" in the Project Details, to be provided by the Designer in the course of procuring the Goods and Services for the Client;

"Project" means the project described in the Project Details;

"Project Details" means the variable terms and conditions recorded under this heading at the outset of the Agreement;

"Working Days" means days other than Saturday, Sunday, public holidays, or days from 23 December – 6 January (inclusive);