

Early Contractor Involvement Agreement

Insert Project Name

Contract No. insert

<<This page is to be deleted prior to documents being finalised for tender.>>

GUIDANCE NOTES

This proforma document provides the basis for the development of NZTA's early contractor involvement contracts. The purpose of the proforma is to provide consistency throughout NZTA's operations.

Format:

- **Black:** Black text is mandatory and may not be changed (including pre-tender and during tender negotiations) without prior approval by the NZTA Project Manager, who will consult with the relevant NZTA staff on all changes made including the NZTA Legal team. Please note no changes are to be made to the black text without engagement with the NZTA Legal team.
- **Red:** Red text is used for data which requires fields to be updated or at least considered for each contract. Text can be used as is (if options are specified), modified or replaced. All red text adjustments must have the NZTA Project Manager's approval. Red text must be converted to Black text, prior to tender document release.
- **Blue:** Blue text is used for optional clauses which can be included as is or deleted in full. Any blue text that is retained must be converted to Black text, prior to tender document release.
- **<<Guidance Notes>>:** Blue text with yellow highlighting are guidance notes. Guidance notes must be deleted prior to tender document release.

For any questions or assistance with preparing this template contract, contact the NZTA Legal team (legalcommercial@nzta.govt.nz).

Any changes to the insurance requirements require approval from the NZTA insurance team (insurance@nzta.govt.nz).

Early Contractor Involvement Agreement

Dated:

BETWEEN **New Zealand Transport Agency**, a Crown entity, established on 1 August 2008 by Section 93 of the Land Transport Management Act 2003 (**Principal**); and

AND **[Insert full legal name of Contractor] (Preferred Contractor)**

BACKGROUND

- A The Principal is undertaking [insert] at [insert], New Zealand (the **Project**). <<Guidance note: Update to include a summary of the project.>>
- B The Contract Works form part of the Project.
- C The Principal wishes to engage the Preferred Contractor to provide early contractor involvement services, advice and a Pricing Proposal for the Contract Works prior to the Principal awarding a Construction Contract for the Contract Works.
- D The Principal and the Preferred Contractor wish to record the basis on which the Preferred Contractor will provide the early contractor involvement services, deliverables, advice and a Pricing Proposal for the Contract Works, and have accordingly entered into the Agreement.

THE PARTIES AGREE AS FOLLOWS:

1. The Preferred Contractor agrees to perform the Services and provide the Deliverables in accordance with the Agreement.
2. The Principal will pay the Preferred Contractor for performing the Services and providing the Deliverables at the times and in the manner provided in the Agreement.
3. Each party will carry out and fulfil all other obligations imposed on that party by the Agreement.

EXECUTED as an agreement:

SIGNED for and on behalf of **New Zealand Transport Agency** by its delegate:

Signature of Authorised Signatory

Name of Authorised Signatory

SIGNED for and on behalf of **[Preferred Contractor]**:

Signature of Director/Authorised Signatory

Signature of Director/Authorised Signatory

Name of Director/Authorised Signatory

Name of Director/Authorised Signatory

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

Agreement means this agreement including all sections, schedules and attachments.

Anticipated Contract Value means the total of all amounts that would be payable if both parties were to continue to properly perform all obligations under the Agreement (including any agreed variations), and is not limited to amounts that have become due and payable. Where the Agreement is priced on a time writing or rates basis, the “anticipated contract value” is based on the then current total estimate of fees to complete all work under the Agreement.

Commencement Date means the date of the Agreement.

Completion Date means the date stated in **Schedule 1**.

Construction Contract means the contract for the construction (and design, if applicable) of the Contract Works based on the Principal’s template contract (current at the time that the contract is being entered into).

Contract Price means the price for the Contract Works agreed by the parties under the Agreement.

Contract Works has the meaning given to that term in the Construction Contract.

Data Breach means any incident involving facilities, systems, personnel, suppliers and/or subcontractors that:

- (a) involves (or gives rise to a real risk of) unauthorised or accidental access to, or use, disclosure, alteration, loss or destruction of, any of Personal Information; or
- (b) prevents the Principal from accessing Personal Information on either a temporary or permanent basis; or
- (c) would prompt a reasonable and prudent person in the Principal’s position to notify, or consider notifying, the incident to the Privacy Commissioner and/or one or more individuals under the Privacy Act 2020.

Deliverables means the relevant deliverables that are required to be prepared by the Preferred Contractor, as identified and further described in **Schedule 4**.

Deliverable Date means the dates nominated in **Schedule 4** for delivery of the Deliverables (as may be updated from time to time in accordance with this Agreement).

Dispute means any dispute or difference arising between the parties in connection with the Agreement.

Early Works has the meaning given to it in clause 10.1.1.

Fee has the meaning given to it in clause 8.1.1.

Good Industry Practice means without limiting or prejudicing any higher standards or higher requirements under the Agreement, the exercise of all reasonable care, skill and diligence as would be applied by a competent professional experienced in the provision of services and deliverables similar to the Services and Deliverables and compliance with proper professional principles applicable to the construction profession.

GST means goods and services tax charged in accordance with the Goods and Services Tax Act 1985.

GST Invoice means an invoice or statement that complies with the Goods and Services Tax Act 1985.

Indicative Programme means the dates and timeframes shown in **Schedule 5** as may be adjusted by the Principal under clause 5.1.2.

Insolvency Event means

- (a) going into liquidation, whether compulsorily or voluntarily (other than for the purpose of amalgamation or reconstruction whilst solvent);
- (b) entering into any arrangement with creditors;
- (c) becoming subject to external administration under the Companies Act 1993 including having a receiver or administrator appointed over all or part of the company's assets; or
- (d) anything analogous or having a substantially similar effect to the events specified in (a) to (c) above occurs in any jurisdiction.

Intellectual Property Rights means all rights in and relating to copyright, trademarks, patents, designs and any other similar rights, including rights to registration of such rights, and rights to protect confidential information, know how and trade secrets.

Joint Venture has the meaning given to it in clause 18.16.1.

Key Personnel means the key personnel for their corresponding functions stated in **Schedule 6**.

Liability Cap has the meaning given to it in clause 13.1.1.

Long Lead Items the materials, works, services goods or equipment identified by the Preferred Contractor and/or the Principal in accordance with clause 9.1.

Materials means the electronic and physical versions of plans, designs, drawings, specifications, inventions, improvements, discoveries, know-how, trade marks, data, reports and technical correspondence and every other matter or thing created, obtained or delivered under or in accordance with the Agreement as part of the Services or Deliverables, whether or not complete, by or on behalf of the Preferred Contractor.

OIA has the meaning given to it in clause 17.1.3.

Personal Information has the meaning given to it in the Privacy Act 2020.

Pre-existing Intellectual Property Rights means all pre-existing Intellectual Property Rights that are owned by the Preferred Contractor prior to the Commencement Date or subsequently brought into existence other than pursuant to the Agreement as part of the Services or the Deliverables.

Preferred Contractor's Representative means the person named in **Schedule 1**.

Pricing Proposal has the meaning given to it in clause 6.1.1.

Principal's Representative means the person named in **Schedule 1** or such other person as may be appointed by the Principal in substitution from time to time.

Project Material means all documentation and other information provided or produced by or on behalf of the Principal relating to the Contract Works or the Project and includes the Specifications.

Scheduled Amount has the meaning given to it in clause 8.2.2.

Services means the services set out in **Schedule 3** together with all other services, work, responsibilities and obligations to be performed by the Preferred Contractor under the Agreement.

Site means the land and other places on or over or under which the Contract Works are to be carried out.

Specifications means all of the Principal's requirements for the Contract Works as they are developed and adopted by the Principal during the Term and then carried forward to constitute the Specifications under the Construction Contract.

Statutory Functions has the meaning given to it in clause 2.2.1.

Subcontractor means a company or person engaged by the Preferred Contractor under a subcontract to perform part of the Services or Deliverables.

Term has the meaning given to it in clause 3.2.1.

Wilful Default means an intentional reckless act or omission carried out with disregard for harmful and avoidable consequences.

Working Day means any calendar day other than a Saturday, Sunday or public holiday in the city or region within which the Site is located.

1.2 Interpretation

1.2.1 In the Agreement, unless the context requires otherwise:

- (a) section, clause and paragraph headings, are not to be used to construe the Agreement;
- (b) words importing the singular number include the plural number and vice versa;
- (c) words of any gender include the other gender and bodies corporate;
- (d) a party includes its successors, permitted assignees and permitted novatees;
- (e) all references in the Agreement to "person" includes a reference to individuals, sole proprietorships, firms, trusts, bodies corporate, unincorporated associations, partnerships, an individual's executors or administrators, and public sector entities;
- (f) the words "include" or "including" will be deemed to be followed by "without limitation" or "but not limited to", whether or not they are followed by such phrases or words of like import;
- (g) references to a clause, clauses, Schedule or Schedules will, unless otherwise specified, be a reference to the corresponding clause, clauses, Schedule or Schedules in the Agreement; and
- (h) no rule of construction (including the contra proferentem rule) applies to the interpretation of the Agreement to the advantage or disadvantage of any one party on the basis that a party prepared the Agreement or any relevant part of it.

2. PRINCIPLES GOVERNING RELATIONSHIP

2.1 Partnering concept

2.1.1 The Principal and the Preferred Contractor adopt the partnering concept. The partnering concept is the principle that recognises and comprises all of the following principles and objectives:

- (a) the establishment of a relationship based on mutual trust and collaboration;
- (b) the shared intentions to achieve a maximising of each of their respective benefits;
- (c) openness, promptness, consistency, transparency and fairness in all dealings and communications; and
- (d) non adversarial dealings and constructive mutual steps both to avoid differences and to identify solutions.

2.1.2 The Principal and the Preferred Contractor must, and must procure that their representatives (which includes, without limitation, any Subcontractors), in their day-to-day interactions and in performing their obligations, act in a manner entirely consistent with the partnering concept.

2.2 Statutory Functions

2.2.1 The Preferred Contractor acknowledges that the Principal has certain statutory powers, functions and/or regulatory roles and is bound by particular statutory responsibilities (**Statutory Functions**). The Preferred Contractor acknowledges and agrees that the Agreement does not seek to derogate from such Statutory Functions and, accordingly:

- (a) nothing in this Agreement in any way influences or restricts the exercise of the Statutory Functions, or binds the Principal to make a particular decision in respect of any Statutory Function exercised by it;
- (b) if there is a conflict between an obligation under the Agreement, and a Statutory Function, the applicable Statutory Function prevails to the extent of the conflict; and
- (c) any decisions or actions by the Principal in undertaking its Statutory Function will not be treated as decisions or actions of the Principal as a party to the Agreement.

3. APPOINTMENT AND TERM

3.1 Appointment

3.1.1 The Principal appoints the Preferred Contractor, and the Preferred Contractor accepts the appointment:

- (a) to provide the Services and the Deliverables for the Principal during the Term; and
- (b) as preferred contractor for the Contract Works,

to the extent and on the basis set out in the Agreement.

3.2 Term

3.2.1 The Agreement will commence on the Commencement Date and will end on the Completion Date, subject to any extension or earlier termination under the Agreement (**Term**).

3.2.2 The Principal may, at its sole and absolute discretion, extend the term of the Agreement on written notice to the Preferred Contractor. The terms and conditions of such extension will be the terms and conditions set out in the Agreement, provided that the Preferred Contractor will be entitled to reasonable compensation associated with any such extension in a fully transparent manner (including in a fully 'open book' basis).

4. OBJECTIVES AND RESPONSIBILITIES

4.1 Principal's objectives

- 4.1.1 Without limiting the Preferred Contractor's specific services, deliverables, work, responsibilities and obligations set out in the Agreement, the Principal's primary objectives in entering into the early contractor involvement arrangements with the Preferred Contractor are set out in **Schedule 2**.

4.2 Preferred Contractor's responsibilities

- 4.2.1 The Preferred Contractor must:

- (a) perform the Services and develop the Deliverables:
 - (i) in accordance with the Agreement and Good Industry Practice;
 - (ii) in an open, consultative, co-operative and collaborative manner;
 - (iii) in accordance with all applicable laws and consents;
 - (iv) in accordance with the Indicative Programme;
 - (v) with due diligence and expedition and without delay; and
 - (vi) in accordance with any reasonable directions and instructions from the Principal, including in respect of health and safety,
- (b) utilise the services of appropriately skilled and qualified persons to carry out the relevant Services and develop the Deliverables;
- (c) submit the Deliverables in accordance with the respective Deliverable Date specified in **Schedule 4**;
- (d) obtain any consents, authorisations or licences required to perform the Services;
- (e) keep the Principal's Representative fully and regularly informed about all matters affecting and relating to the performance of the Services and the development of the Deliverables;
- (f) take all steps necessary to minimise the effect of any delay to the Services and the Deliverables, and comply with all reasonable instructions of the Principal in respect of the same;
- (g) consult, co-operate and collaborate with the Principal's project team as may be necessary in connection with the performance of the Services and providing the Deliverables;
- (h) commit the Key Personnel, and such other members of its personnel as may be necessary, to properly perform the Services and provide the Deliverables until those Key Personnel and other members of the Preferred Contractor's personnel have, in the reasonable opinion of the Principal's Representative, completed their roles in relation to the Services and Deliverables; and
- (i) perform all services, work, responsibilities and obligations reasonably incidental or ancillary to the specific services, work, responsibilities and obligations set out in the Agreement, having regard to the Principal's objectives (including those set out in **Schedule 2**).

- 4.2.2 The Preferred Contractor must promptly and in any event no later than five (5) Working Days after first becoming aware of any event or circumstance (or a combination of events and/or

circumstances) that could potentially delay the performance of the Services or any Deliverable, notify the Principal's Representative of such event or circumstance and thereafter keep the Principal's Representative regularly informed of any delays or potential delays to the performance of the Services or any Deliverable;

- 4.2.3 The Preferred Contractor will maintain the insurances specified in **Schedule 1**, for the limits stated in **Schedule 1** and for the duration stated in **Schedule 1**. The insurances will be with a well-established and resourced insurance office or underwriter of repute. The Preferred Contractor will promptly, following a request from the Principal from time to time, provide the Principal with evidence that any required insurances are in force and that the premiums have been paid.

4.3 Principal's responsibilities

- 4.3.1 Upon request by the Preferred Contractor, the Principal will provide to the Preferred Contractor, within a reasonable time of that request, such information as the Preferred Contractor may reasonably require from time to time for the performance of the Services or to provide the Deliverables, provided that such information is in the possession or control of the Principal.
- 4.3.2 The Principal will pay the Preferred Contractor the Fee in accordance with clause 8.

5. INDICATIVE PROGRAMME

- 5.1.1 The Principal's high level indicative timetable for the early contractor involvement and construction periods are as set out in the Indicative Programme.
- 5.1.2 All dates and timeframes shown in the Indicative Programme are indicative and are subject to adjustment by notice from time to time at the discretion of the Principal, provided that, to the extent that such adjustment is material and affects performance of the Services or the Deliverables, the Principal has consulted with the Preferred Contractor prior to issuing the notice.
- 5.1.3 The Preferred Contractor will perform the Services and provide the Deliverables in a manner that is consistent with the dates and timeframes shown in the Indicative Programme.

6. PRICING PROPOSAL

- 6.1.1 The Preferred Contractor must submit a pricing proposal for the Contract Works, along with its detailed programme and management plans in respect of the Contract Works as specified in **Schedule 3 (Pricing Proposal)**, by the date specified in the Indicative Programme. The Preferred Contractor must ensure that:
- (a) the Pricing Proposal includes a fixed price lump sum for all Preliminary and General (as defined in the Construction Contract) costs and Margin (as defined in the Construction Contract) for the performance and delivery of the Contract Works under the Construction Contract; and **[Drafting note: Project team to consider price format and update as required.]**
 - (b) the proposed Contract Price in the Pricing Proposal is broken down as reasonably required by the Principal.
- 6.1.2 Each Pricing Proposal must remain open for acceptance by the Principal for at least three (3) calendar months from the date it is made. Any negotiation of the Pricing Proposal does not constitute rejection by the Principal of the Pricing Proposal.

7. VARIATIONS

7.1 Proposed changes

- 7.1.1 The Principal may notify the Preferred Contractor in writing of any proposal to vary the Services or the Deliverables.
- 7.1.2 Within ten (10) Working Days (or such longer period as agreed between the Principal and the Preferred Contractor) after receipt of notification under clause 7.1.1, the Preferred Contractor must notify the Principal in writing of:
- (a) the effect (if any) the proposed variation would have on the timely performance by the Preferred Contractor of the Services, or the Deliverables (as applicable); and
 - (b) the cost of the proposed variation (if any).

For the avoidance of any doubt, the re-sequencing of any Services or Deliverables, will be deemed not to be a variation and accordingly will not have any effect on the timely performance by the Preferred Contractor nor will there be any cost associated with it.

7.2 Direction by Principal

- 7.2.1 Following receipt of the notice from the Preferred Contractor under clause 7.1.2, the Principal may within ten (10) Working Days or such longer period as required by the Principal:
- (a) give direction to the Preferred Contractor to carry out the varied services on the terms set out in the Preferred Contractor's notice or those other terms agreed between the Principal and the Preferred Contractor (where applicable, the Services or the Deliverables (as applicable) and the Fee will be deemed to have been adjusted to reflect any change to the Services or the Deliverables (as applicable) or price adjustment, respectively, and the dates and timeframes set out in Indicative Programme will also be deemed to have been adjusted where and as may be appropriate); or
 - (b) advise the Preferred Contractor not to proceed.
- 7.2.2 In the absence of a direction from the Principal under clause 7.2.1(a) or other written agreement between the parties at the time, the Preferred Contractor must not carry out the proposed variation and is not entitled to any payment for preliminary or pricing work in respect of that proposed variation.

8. FEE AND PAYMENT FOR THE SERVICES

8.1 Fee

- 8.1.1 In consideration of the Preferred Contractor performing the Services and providing the Deliverables in accordance with the Agreement, the Principal agrees to pay to the Preferred Contractor:
- (a) the fixed price lump sum fee specified at **Schedule 1**, and as may be adjusted in accordance with the Agreement, plus GST (where applicable); and
 - (b) the amounts (if any) payable for Long Lead Items as set out in clause 9.4,
- (together, the **Fee**).
- 8.1.2 The Fee is deemed to be full and final payment for the Preferred Contractor performing and delivering the Services and providing the Deliverables under the Agreement.

- 8.1.3 The Preferred Contractor acknowledges and agrees that:
- (a) the Fee is inclusive of all fees, costs, expenses, disbursements, charges, taxes (excluding GST), levies, duties, withholdings and other imposts of every kind and nature whatsoever that the Preferred Contractor may incur in performing the Services and providing the Deliverables; and
 - (b) the Fee will not be increased as a result of the Preferred Contractor's failure to adequately estimate in respect of the Services or the Deliverables (including any element of the Services or the Deliverables).

8.2 Payment

- 8.2.1 The Preferred Contractor is entitled to submit monthly payment claims on the last Working Day of each calendar month, in respect of all Services and Deliverables that have been performed or provided by the Preferred Contractor under the Agreement up until the date of the payment claim (less all amounts previously paid by the Principal). The payment claim must be accompanied by all supporting documentation as may be reasonably required by the Principal.
- 8.2.2 Not later than twelve (12) Working Days after the date of receipt by the Principal of the payment claim, the Principal will issue a payment schedule to the Preferred Contractor specifying the amount (the **Scheduled Amount**) of the payment proposed by the Principal to be made in respect of the payment claim, and the Preferred Contractor will then issue an invoice (which must constitute a GST Invoice, where applicable) to the Principal for the Scheduled Amount.
- 8.2.3 Within ten (10) Working Days of receiving an invoice issued in accordance with clause 8.2.2 for the Scheduled Amount, the Principal will pay the Scheduled Amount to the Preferred Contractor.
- 8.2.4 If any item or part of any item of a payment claim rendered by the Preferred Contractor is disputed or subject to question by the Principal, the Principal will pay the amount that is not disputed or in question pending resolution of the matter (including under clause 18.1, if applicable).
- 8.2.5 The Principal may, in addition to any rights or remedies it may have at law, deduct, withhold or set-off amounts from any payment due or amounts otherwise owing to the Preferred Contractor as the Principal reasonably determines in consequence of:
- (a) defective Services or Deliverables; and/or
 - (b) any amounts due and payable to the Principal by the Preferred Contractor, including (by way of refund) any earlier overpayment to the Preferred Contractor by the Principal.
- 8.2.6 Payment of any amount to the Preferred Contractor does not constitute acceptance of the Services performed or Deliverables provided by the Preferred Contractor.

9. PROCUREMENT OF LONG LEAD ITEMS

9.1 Identification of Long Lead Items

- 9.1.1 The Preferred Contractor will, as part of the Services and/or Deliverables, identify those materials, works, services, goods and equipment that have long lead times or that require the procurement process to commence prior to the commencement of the Construction Contract to enable Practical Completion (as defined in the Construction Contract) to be achieved by the Due Date for Completion for the whole of the Contract Works (as defined in the Construction Contract).
- 9.1.2 The Principal may, at its sole and absolute discretion and at any time, identify any other materials, goods and equipment that have long lead times or that require the procurement process to commence prior to the commencement of the Construction Contract to enable

Practical Completion (as defined in the Construction Contract) to be achieved by the Due Date for Completion for the whole of the Contract Works (as defined in the Construction Contract).

9.2 Supply agreements for the Long Lead Items

- 9.2.1 If required by the Principal's Representative, the Preferred Contractor will, as part of the Services and/or Deliverables enter into supply agreements with the respective suppliers for the Long Lead Items in accordance with clause 2.2 of **Schedule 7** (unless the Principal and the Preferred Contractor agree not to follow the process in **Schedule 7** in respect of a particular package(s)) and on terms approved in writing by the Principal's Representative.
- 9.2.2 Where the Preferred Contractor has entered into supply agreements in accordance with clause 9.2.1, the Preferred Contractor must promptly (and in any event within five (5) Working Days from the date the supply agreement is entered into) provide the Principal with a subcontractor continuity guarantee for the benefit of the Principal from each supplier in the form set out in **Schedule 8**, with each duly signed by the applicable supplier.
- 9.2.3 For the avoidance of any doubt the Principal may at its sole and absolute discretion and at any time procure any Long Lead Items itself or engage a third party to procure such Long Lead Items.

9.3 Long Lead Items form part of the Contract Works under the Construction Contract

- 9.3.1 The procurement of any Long Lead Items by the Preferred Contractor will be deemed to form part of the Contract Works under the Construction Contract (subject to the Preferred Contractor being awarded the Construction Contract). In particular, the procurement of such Long Lead Items will be regarded as "Prior Works" for the purposes of the Construction Contract.

9.4 Payment for Long Lead Items

- 9.4.1 Subject to 9.4.2 and clause 9.5.1, in consideration of the Preferred Contractor procuring any Long Lead Items pursuant to clause 9.2.1, the Principal agrees to pay to the Preferred Contractor:
 - (a) the amounts properly due and payable, including any advance payment, for any such Long Lead Item, under the relevant procurement contract; plus
 - (b) an allowance for all margin and overhead by applying the percentage specified in **Schedule 1** to the amount in clause 9.4.1(a).
- 9.4.2 The Preferred Contractor will only be entitled to:
 - (a) advance payments from the Principal in respect of any Long Lead Items if and when, an agreement for off-site materials in a form required by the Principal is provided to the Principal; and
 - (b) payment in respect of margin and overhead in respect of a Long Lead Item where the Principal is in receipt of the subcontractor warranty and continuity guarantee referred to in clause 9.2.2 that has been duly signed by both the Preferred Contractor and the applicable supplier.
- 9.4.3 Notwithstanding anything to the contrary, the Principal will not be liable to reimburse the Preferred Contractor for any amounts payable under the Long Lead Items procurement contracts that arise due to any breach or default by the Preferred Contractor, or any person or entity for whom it is responsible.

9.5 Construction Contract not entered into

- 9.5.1 If the parties do not enter into the Construction Contract, the Principal will reimburse the Preferred Contractor for amounts properly due and payable under the relevant contracts for the Long Lead Items actually procured pursuant to clause 9.2.1 as well as any reasonable cancellation charges payable for the Long Lead Items ordered but not procured, unless the failure to enter the Construction Contract was a result of a breach by the Preferred Contractor under this Agreement. The Preferred Contractor will use its best endeavours to minimise any applicable cancellation charges.
- 9.5.2 As a condition precedent to any payment contemplated by clause 9.5.1, the Preferred Contractor must (and in any event within five (5) Working Days from the date of any request from the Principal to do so):
- (a) to the extent required by the Principal and at no additional cost to the Principal, enter into such agreements with the Principal or its nominee as required by the Principal for the purpose of assigning or novating (as required by the Principal) the Preferred Contractor's rights and/or obligations (as the case may be) under agreements relating to the supply of the Long Lead Items to the Principal or its nominee; and
 - (b) to the extent required by the Principal, assign any parent company or corporate guarantee(s), any other security and any other warranties relating to any such Long Lead Item agreements to the Principal or its nominee.

10. EARLY WORKS

- 10.1.1 The Principal may and the Preferred Contractor will, as part of the Services and/or Deliverables, identify:
- (a) those services and works that require the construction process to commence prior to the commencement of the Construction Contract to enable Practical Completion (as defined in the Construction Contract) to be achieved by the Due Date for Completion (as defined in the Construction Contract);
 - (b) any services and works in respect of which, if the construction process was to commence prior to the commencement of the Construction Contract, would benefit the Project; and
 - (c) any services and works in respect of which it would be prudent for the construction process to commence prior to the commencement of the Construction Contract,
- (the **Early Works**).
- 10.1.2 The Principal may at its sole and absolute discretion engage the Preferred Contractor under a separate agreement to undertake any Early Works.

11. CONSTRUCTION CONTRACT

11.1 Intention to enter into a Construction Contract

- 11.1.1 Subject to:
- (a) the Principal being satisfied with the performance of the Preferred Contractor under the Agreement;
 - (b) a Contract Price being agreed by the parties for the Contract Works;
 - (c) the Principal being satisfied with all other aspects of the Pricing Proposal;

- (d) the parties agreeing the final terms of the Construction Contract; and
- (e) sufficient funding being made available for the Project and all necessary approvals or ratifications as are required (as determined by the Principal) being given or obtained (no representation is made and nor may it ever be assumed that the any such approval or ratification will be given),

it is intended that the Preferred Contractor will be awarded the Construction Contract for the completion of the Contract Works.

11.1.2 The parties have acknowledge that the Construction Contract is a draft only and during the Term, the parties will agree on the final terms of the Construction Contract.

11.1.3 The Construction Contract will not come into force and effect between the parties unless and until the Principal awards the Construction Contract to the Preferred Contractor under clause 11.2.1.

11.2 Award of the Construction Contract

11.2.1 Where:

- (a) the Principal is satisfied with the performance of the Preferred Contractor under the Agreement;
- (b) the Contract Price in the Pricing Proposal, subject to any adjustment through negotiation between the parties, has been accepted by the Principal;
- (c) the parties have agreed the final terms of the Construction Contract; and
- (d) the other aspects of the Pricing Proposal, subject to any adjustment through negotiation between the parties, have been accepted by the Principal,

the Principal may, at its sole and absolute discretion, award the Construction Contract to the Preferred Contractor by notice in writing to the Preferred Contractor.

11.2.2 Upon the date of any such award under clause 11.2.1, the parties will be deemed to have entered into a legally binding contract for the Contract Works on the terms and conditions set out in the Construction Contract for the Contract Price accepted by the Principal and incorporating the Specifications as at the date of such award.

11.3 No obligation to award the Construction Contract

11.3.1 The Preferred Contractor acknowledges and agrees that:

- (a) it cannot rely on or assume that it will be awarded the Construction Contract for the Contract Works; and
- (b) it is not entitled to make any claim, proceeding, action, cause of action, demand or suit (including by way of contribution or indemnity) against the Principal arising out of or in connection with the Principal:
 - (i) not proceeding with all or part of the construction phase of the Project;
 - (ii) not awarding the Construction Contract for all or part of the Contract Works to the Preferred Contractor; and/or
 - (iii) awarding a construction contract for all or part of the Contract Works to any other person or entity.

11.4 Formal signing and end of the Agreement

- 11.4.1 Where the Construction Contract is awarded to the Preferred Contractor under clause 11.2.1, then:
- (a) an execution set of the Construction Contract will be collated by the Principal and submitted to the Preferred Contractor for execution (the fact that the execution set has not been signed does not affect the legally binding contract formed under clause 11.2.2);
 - (b) once the execution set has been signed by the parties the Agreement will cease to continue to apply, and the Term will expire if it has not already expired.

12. SEVERANCE OF PREFERENTIAL STATUS

- 12.1.1 The Principal may, at its sole and absolute discretion and without cause, on not less than ten (10) Working Days prior notice in writing to the Preferred Contractor, give notice of severance of the Preferred Contractor's preferred contractor status.
- 12.1.2 The effect of a notice of severance of the Preferred Contractor's preferred contractor status is that from the date of the notice the Preferred Contractor has no preferred or any other type of preferential status to be awarded a construction contract for the Contract Works or any part thereof.
- 12.1.3 The Agreement will continue to apply following the issue of a notice of severance by the Principal (except for clauses 3.1.1(b), 11, and 12 which will no longer apply), subject to the expiry of the Term or the termination of the Agreement.
- 12.1.4 Where a notice of severance is given under clause 12.1.1, the Principal may proceed with the Contract Works in any way it sees fit including inviting tenders for the design and construction or construction of the Contract Works and/or entering into negotiations with any person or entity and the Principal may, at its sole and absolute discretion, include or exclude the Preferred Contractor in whole or in part from any such proceedings.
- 12.1.5 In the event of severance of the Preferred Contractor's preferred contractor status under the Agreement, the Preferred Contractor is not entitled to a variation nor is it entitled, in contract, tort or otherwise, to any compensation or additional payment whatsoever in respect of or in relation to or in connection with the severance (including any compensation or additional payment for loss of profit, loss of opportunity, or any other financial or economic type cost, expense, loss or damage). The Preferred Contractor will, for the avoidance of any doubt, be entitled to be paid the amount of the Fees payable under the Agreement for Services and Deliverables performed as at the date of the issue of a notice of severance by the Principal.

13. LIABILITY

- 13.1.1 The maximum aggregate liability of the Preferred Contractor for any claims, damages, liabilities, losses or expenses suffered or incurred whether in contract for breach of the Agreement, under indemnity, in tort including negligence, in equity, under any statute, or otherwise arising out of any act or omission by the Preferred Contractor done or not done in connection with the Agreement shall be limited to the maximum aggregate sum as specified in **Schedule 1 (Liability Cap)**. The Liability Cap shall not apply in the case of fraud or Wilful Default.
- 13.1.2 Neither party will be liable to the other party (whether based on contract, infringement, negligence, strict liability, tort or otherwise) for any loss of profit or revenue, loss of production or down time costs, loss of opportunity, loss of contract, loss of goodwill, or the cost of obtaining any new financing or maintaining any existing financing nor for any indirect or consequential loss or damage in relation to the Services, provided always that this clause 13.1.2 shall not prevent, limit or exclude a party's liability in the case of fraud or Wilful Default.

14. INTELLECTUAL PROPERTY

14.1 Materials

14.1.1 Ownership of all Intellectual Property Rights created in all Materials (excluding all Pre-existing Intellectual Property Rights) will vest in the Principal on creation.

14.1.2 To the extent that ownership of the Materials does not vest in the Principal as contemplated by clause 14.1.1 for any reason, the Preferred Contractor:

- (a) agrees, absolutely and unconditionally, to assign, transfer and convey to the Principal all Intellectual Property Rights in the Materials (excluding all Pre-existing Intellectual Property Rights); and
- (b) absolutely and unconditionally assigns, transfers and conveys to the Principal all future copyright in the Materials (excluding all Pre-existing Intellectual Property Rights) immediately upon its creation,

without the need for any further assurance. Where and to the extent that the Preferred Contractor cannot comply with the provisions of clauses 14.1.2(a) and 14.1.2(b), the Preferred Contractor will grant or otherwise procure for the Principal a non-exclusive, royalty-free, irrevocable licence to use the relevant Material for the purposes of the Agreement and the Project.

14.1.3 The Preferred Contractor grants to the Principal non-exclusive, royalty-free, irrevocable licence to use the Preferred Contractor's Pre-existing Intellectual Property Rights for the purposes of the Agreement and the Project.

14.1.4 The Preferred Contractor will ensure that it promptly secures all necessary licenses and other rights, agreements, acknowledgements and the like from its Subcontractors and any other persons in order to fully comply with its obligations under this clause 14 and to ensure that the Principal has all the rights and benefits envisaged under 14.1.1 and 14.1.2 vested absolutely in it.

14.1.5 The Preferred Contractor will promptly make available for inspection by the Principal all Materials as the Principal may from time to time require, and the Principal will be entitled to take copies of any and all such Materials.

14.2 Project Materials

14.2.1 As between the Principal and the Preferred Contractor, the property in the Project Material is and will always remain with the Principal. The Preferred Contractor will not use any Project Material for any purpose other than performance of the Services and the Deliverables.

14.2.2 At the end of the Term or upon the severance of preferred contractor status under clause 12.1.1 or upon the earlier termination of the Agreement, all Project Material, as well as all Materials that are subject to clause 14.1.1, held by or in the possession of the Preferred Contractor must promptly be delivered to the Principal if and to the extent requested by the Principal and in any event within ten (10) Working Days of the date of any such request. The Preferred Contractor will be entitled to retain a copy of the same for its records.

14.3 No infringement

14.3.1 The Preferred Contractor warrants to the Principal that all Deliverables and any other documents, including the Materials, provided by the Preferred Contractor in connection with the Agreement do not and will not infringe the Intellectual Property Rights of any person.

15. SUSPENSION

- 15.1.1 The Principal may at any time and from time to time by notice in writing to the Preferred Contractor require the Preferred Contractor to immediately suspend the performance of the Services and Deliverables. The Preferred Contractor will, for the avoidance of any doubt, be entitled to be paid the amount of the Fees payable under the Agreement for Services performed and Deliverables provided as at the date of suspension.
- 15.1.2 The Principal may, at any time after a suspension, by notice in writing to the Preferred Contractor, require the Preferred Contractor to resume its performance of the Services and Deliverables in which event the Preferred Contractor will resume such performance under the Agreement no later than five (5) Working Days after receipt of notice.
- 15.1.3 In the event that the Principal does not issue a notice under clause 15.1.2 within 90 days (or a longer period agreed by the Preferred Contractor) of the date of the suspension notice given under clause 15.1.1, the Preferred Contractor may give notice to terminate the Agreement under clause 16.3.1.
- 15.1.4 The Term will be extended by the length of any suspension(s) under clause 15.1.1.

16. TERMINATION

16.1 Termination for convenience

- 16.1.1 The Principal may, at any time and at its sole and absolute discretion, terminate the Agreement for convenience by giving at least five (5) Working Days written notice to the Preferred Contractor. If the Principal exercises its right under this clause 16.1.1 it shall not be obliged to give the Preferred Contractor any reason or justification for doing so.

16.2 Termination for Preferred Contractor's default

- 16.2.1 The Principal may terminate the Agreement immediately by giving notice in writing to the Preferred Contractor in the event of:
 - (a) the Preferred Contractor subcontracting or purporting to subcontract the whole or substantially the whole of the Services or the Deliverables without the consent in writing of the Principal, or the Preferred Contractor 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 Principal;
 - (b) the Preferred Contractor failing to submit a Pricing Proposal within the timeframes required by the Agreement, or failing to submit a Pricing Proposal that complies with the requirements set out in clause 6.1.1; and/or
 - (c) the Preferred Contractor committing any material breach of the Agreement, and, if rectifiable, the Preferred Contractor failing to rectify the breach within ten (10) Working Days following a written request to do so from the Principal.
- 16.2.2 The Principal may terminate the Agreement immediately by giving notice in writing to the Preferred Contractor in the event of an Insolvency Event occurring in respect of the Preferred Contractor.

16.3 Termination for default by the Principal

- 16.3.1 The Preferred Contractor may terminate the Agreement immediately by giving notice in writing to the Principal if the Principal is in breach of any material provision of the Agreement and, if

rectifiable, has failed to rectify the breach within twenty (20) Working Days following a written request to do so by the Preferred Contractor.

16.4 Consequences of termination or expiry

- 16.4.1 If the Agreement is terminated for any reason or the Term expires, the parties are not released from liability in respect of any breach, non-performance or non-observance of any covenant, provision, agreement, stipulation or obligation to be observed or performed pursuant to the Agreement before the date of termination or expiry.
- 16.4.2 If the Agreement is terminated for any reason, the Principal may proceed with the Contract Works in any way it sees fit (and the Preferred Contractor will have no claim against the Principal) including inviting tenders for the design and construction or construction of all or part of the Contract Works and/or entering into negotiations with any person or entity and the Principal may, at its sole and absolute discretion, include or exclude the Preferred Contractor in whole or in part from any such proceedings.
- 16.4.3 The Preferred Contractor is not entitled to a variation nor is it entitled, in contract, tort or otherwise, to any compensation or additional payment whatsoever in respect of or in relation to or in connection with any termination or expiry of the Agreement. The Preferred Contractor will, for the avoidance of any doubt, be entitled to be paid the amount of the Fees payable under the Agreement for Services performed and Deliverables provided as at the date of termination.

17. CONFIDENTIALITY AND PRIVACY

17.1 Confidential Information

- 17.1.1 The Preferred Contractor and the Principal will ensure that any information identified as confidential, or which should reasonably be recognisable as confidential, acquired by it as a result (either directly or indirectly) of its entering into the Agreement will be kept confidential subject to the following exceptions:
 - (a) information which is in the public domain or could have been legally acquired by a party had it not entered into the Agreement, will not be considered confidential;
 - (b) a party may disclose confidential information to its professional advisors and insurers;
 - (c) a party may disclose confidential information to the extent required by law or pursuant to the requirements of any stock exchange;
 - (d) disclosure by the Principal of confidential information to any ministry or other government agency performing a monitoring, oversight, or guidance role in relation to the Principal, or at the request of an officer of parliament, a parliamentary select committee, a royal commission, or a minister of the Crown (including for the purposes of a parliamentary question);
 - (e) a party may disclose specific items of confidential information to a third party in accordance with the terms of any prior written consent between the parties; and
 - (f) a party may disclose confidential information as reasonably necessary for the purposes of the Services or Deliverables provided that the party shall ensure that such recipient is required to maintain such information as confidential on the same terms.
- 17.1.2 The Preferred Contractor must ensure that its Subcontractors are bound by confidentiality undertakings equivalent to this clause 17.1.
- 17.1.3 The Preferred Contractor acknowledges that the Principal is subject to the Official Information Act 1982 (**OIA**) and the Preferred Contractor agrees to cooperate fully in providing the Principal

with any documents or other information that the Principal is required to provide in accordance with a request made under the OIA, or pursuant to questions raised in Parliament or in any select committee concerning the Agreement.

- 17.1.4 The Preferred Contractor will not make any statements to the media or others regarding the contents of the Agreement or the performance of the Services or Deliverables without the prior written approval of the Principal. Media requests for information relating to the Agreement, Services, Deliverables or the Principal's assets or its business will be immediately referred by the Preferred Contractor to the Principal.

17.2 Privacy obligations

- 17.2.1 The Preferred Contractor must comply at all times with the Privacy Act 2020 and not do anything with Personal Information that is likely to cause the Principal to breach the Privacy Act 2020.
- 17.2.2 The Preferred Contractor must comply at all times with *Privacy at Waka Kotahi the NZ Transport Agency – A Guide for Suppliers and Service Providers* (<https://www.nzta.govt.nz/about-us/about-this-site/privacy-guide-for-suppliers-and-service-providers/>).
- 17.2.3 The Preferred Contractor must not use or disclose Personal Information (including to any Subcontractors) except as strictly necessary to deliver the Services and comply with the Agreement. The Preferred Contractor must ensure that any Subcontractors to whom it discloses Personal Information are subject to contractual restrictions on the handling, use and disclosure of that information no less strict than those in the Agreement.
- 17.2.4 The Preferred Contractor must implement and maintain reasonable security safeguards to protect Personal Information, including from unauthorised access or disclosure.
- 17.2.5 Except as agreed in writing, the Preferred Contractor must not store or process (or permit the storage or processing of) Personal Information in any location outside New Zealand and Australia.
- 17.2.6 The Preferred Contractor must promptly return and/or irreversibly erase all Personal Information (at the Principal's option), once it is no longer required for the purposes of the delivery of the Services, and otherwise where directed by the Principal.
- 17.2.7 If the Preferred Contractor becomes aware of, or has reason to suspect the existence of, a Data Breach, the Preferred Contractor must as soon as practicable notify the Principal, take all practicable steps to mitigate the effects of the Data Breach, and co-operate with the Principal's investigation of the Data Breach as the Principal reasonably considers necessary to enable the Principal to meet its obligations under the Privacy Act 2020.
- 17.2.8 Unless required by law, the Preferred Contractor will not notify affected individuals or the Privacy Commissioner of any Data Breach except with the Principal's prior written agreement.
- 17.2.9 The Preferred Contractor will comply with any reasonable direction from the Principal, where the Principal reasonably considers that this is necessary to enable the Principal to comply with a notice or direction given to the Principal by the Privacy Commissioner.
- 17.2.10 The Preferred Contractor will not comment publicly, including to the media, about any Data Breach or any breach of this 17.2, without the written consent of the Principal.

18. GENERAL PROVISIONS

18.1 Dispute resolution

- 18.1.1 The parties will use their best endeavours to resolve any Dispute in good faith, in a constructive way and in a timely manner.

- 18.1.2 If the parties are unable to resolve any Dispute within ten (10) Working Days or a longer period as agreed by the parties, the Dispute will be escalated to a senior manager of each party who will attempt to resolve the Dispute.
- 18.1.3 If the parties are unable to resolve the dispute within thirty (30) Working Days of escalation to senior management or a longer period as agreed by the parties, either party may refer the Dispute to mediation or to be finally determined by arbitration before a single arbitrator under the Arbitration Act 1996.
- 18.1.4 If a Dispute has been referred to arbitration, unless otherwise determined by an arbitrator, each party shall meet its own costs in relation to the resolution of any Dispute.
- 18.1.5 Nothing in this clause will prevent a party from seeking urgent interlocutory relief.
- 18.1.6 While the Dispute remains unresolved, the parties shall continue to perform their obligations under the Agreement to the extent applicable, but without prejudice to their respective rights and remedies under the Agreement or at law.

18.2 Governing law

- 18.2.1 The Agreement is governed by New Zealand law and the parties irrevocably submit to the non-exclusive jurisdiction of the New Zealand courts in any proceedings relating to it.

18.3 Notices

- 18.3.1 All notices, demands, consents or other communication expressly contemplated to be given under the Agreement will be sent to the Principal or the Preferred Contractor, as the case may be, at the address set out in **Schedule 1** or such other address as may be notified from time to time by the party.
- 18.3.2 All notices to be given under the Agreement will be in writing, and sent by personal delivery, courier or email to the address of the relevant party referred to in clause 18.3.1, and, subject to clause 18.3.3:
- (a) any notice delivered personally will be deemed to have been served on the date of delivery;
 - (b) any notice sent by courier will be deemed to have been served at the time of actual receipt by the addressee; and
 - (c) any notice sent by email will be deemed to have been served when receipt of the email is acknowledged by the receiving party by return email or otherwise in writing, except that return emails generated automatically will not constitute an acknowledgment.
- 18.3.3 If a notice is delivered personally, by courier, sent by email or an electronic document management system after 5 pm on a day or on a day that is not a Working Day, the notice will be deemed to have been served on the next Working Day.

18.4 Assignment

- 18.4.1 The Preferred Contractor may not, except with the prior written consent of the Principal, assign, novate, charge or otherwise encumber the whole or any part of the Preferred Contractor's rights and/ or obligations arising under or pursuant to the Agreement.
- 18.4.2 The Principal may, without the consent of the Preferred Contractor, assign, charge or novate all or any part of its rights and/or obligations under the Agreement to any person or entity.

18.5 Subcontracting

- 18.5.1 The Preferred Contractor may not, except with the prior written consent of the Principal, subcontract the whole or any part of the Services or Deliverables.
- 18.5.2 The Preferred Contractor will be responsible for the acts, omissions and defaults of every Subcontractor, including their officers, employees and agents in relation to or in connection with the relevant services, as if they were the acts, omissions or defaults of the Preferred Contractor (notwithstanding that the identity of the subcontractor may have been prescribed or approved by the Principal).

18.6 Entire agreement

- 18.6.1 The Agreement constitutes the entire agreement between the Principal and the Preferred Contractor with respect to the subject matter of the Agreement and supersedes all prior communications, negotiations and agreements with respect to the subject matter of the Agreement. The parties will not be bound by or be liable for any statement, representation, promise, inducement or understanding of any kind or nature in respect of the subject matter of the Agreement not recorded in the Agreement.

18.7 Amendment

- 18.7.1 No amendment or other modification of the Agreement will be effective unless it is in writing, is dated and is signed by a duly authorised representative of each party.

18.8 Severability

- 18.8.1 If any one or more of the provisions contained in the Agreement is invalid, illegal or unenforceable in any respect under any applicable law, the validity, legality and enforceability of the remaining provisions contained in the Agreement will not in any way be affected or impaired.

18.9 No waiver

- 18.9.1 Subject to waiver under clause 18.9.2, no relaxation, forbearance, delay or indulgence by either party in enforcing any of the terms and/ or conditions of the Agreement or the granting of time by either Party to the other will prejudice, affect or restrict the rights of that Party under the Agreement.
- 18.9.2 Any waiver of a party's rights, powers or remedies under the Agreement must, to be effective, be in writing, be dated, expressly refer to this clause 18.9.2, and be signed by an authorised representative of the party granting such waiver, and must specify the right and the extent to which it is being waived.
- 18.9.3 Any waiver by a party of its rights, powers and/ or remedies under clause 18.9.2 will not operate as a waiver of its rights, powers and/ or remedies in respect of any subsequent or continuing breach of the Agreement.

18.10 Further assurances

- 18.10.1 Each party will do all acts and things including the execution of all relevant documents, as may be reasonable to implement and carry out its obligations and duties under, and contemplated by, the Agreement.

18.11 Independent contractor

- 18.11.1 The Preferred Contractor is an independent contractor performing the Agreement. Nothing in the Agreement will create, constitute or evidence any partnership, joint venture, agency, trust or

employer/ employee relationship between the parties, and no party may make, or allow to be made, any representation that any such relationship exists between the parties. No party will have the authority to act for, or incur any obligation on behalf of, the other party.

18.12 Counterparts

- 18.12.1 The Agreement may be executed in counterparts (including electronic copies of counterparts) and, provided that each party has duly executed a counterpart, the counterparts together will constitute a binding and enforceable agreement between the parties. A party shall be entitled to transmit an electronic copy of the Agreement by email (or other electronic means) to the other party.

18.13 Conflicts of interest

- 18.13.1 The Preferred Contractor must advise the Principal of any potential or actual conflicts of interest within its own organisation or with any individual or organisation engaged to complete any of the Services. This includes individuals and organisations engaged in any Subcontractor or other supply arrangement. The Preferred Contractor must advise the Principal the means that it intends to use to remove or mitigate such conflicts of interest.

18.14 Code of conduct

- 18.14.1 The Preferred Contractor must comply with the *New Zealand Government Procurement Code of Conduct* issued by the State Services Commission (see <https://www.procurement.govt.nz/assets/procurement-property/documents/supplier-code-of-conduct.pdf>), any relevant codes of conduct, probity guidelines and principles provided by the Principal from time to time, and must ensure that all Subcontractors do the same.

18.15 Survival

- 18.15.1 The provisions of any parts of the Agreement required in order to interpret or to give full intended effect to those provisions (for instance, clause 1), will survive termination or expiry for whatever reason of the Agreement.

18.16 Joint and several liability

- 18.16.1 To the extent that the Preferred Contractor is comprised of more than one person in joint venture, partnership, consortium or other unincorporated grouping of two or more persons (**Joint Venture**):
- (a) those persons will be jointly and severally liable to the Principal for all obligations, duties and liabilities of the Preferred Contractor under the Agreement;
 - (b) the Preferred Contractor will notify the Principal in writing as to which of those persons (if not each of them) will have authority to bind the Preferred Contractor and in the absence of such written notification each such person will be deemed to have the authority to bind the Preferred Contractor for all purposes (which cannot be retrospectively changed by the Preferred Contractor);
 - (c) the Preferred Contractor must ensure that the composition or legal status of the Joint Venture is not altered or changed in any way whatsoever without the prior written consent of the Principal; and
 - (d) all references to “Preferred Contractor” in the Agreement will be deemed to be a reference to each and every person comprising the Preferred Contractor, individually, as well as to all the persons comprising the Preferred Contractor, together.

Schedule 1: Details

Item	Details
Principal's Representative	<i>[insert]</i>
Preferred Contractor's Representative	<i>[insert]</i>
Completion Date	<i>[insert]</i> <<Guidance note: Insert the anticipated term of the agreement.>>
Professional indemnity insurance	<p>Cover: \$<i>[5,000,000 / \$2,000,000 / \$1,000,000]</i> per occurrence.</p> <p><<Guidance note: Select the appropriate level of insurance based on the total anticipated value over the life of the contract:</p> <ul style="list-style-type: none"> - Contract value >\$10m = select \$5m - Contract value \$10m - \$2m = select \$2m - Contract value <\$2m = select \$1m. <p>If the options provided are not appropriate, discuss with the NZTA insurance team (insurance@nzta.govt.nz).>></p> <p>Duration: From the Commencement Date up to the date that is 6 years after the end of the Agreement.</p>
Public liability insurance	<p>Cover: \$5,000,000.00 per occurrence.</p> <p>Duration: For the Term.</p>
Fixed price lump sum fee	<i>\$[insert]</i> plus GST (where applicable) <<Guidance note: Update to reflect the pricing structure for the Agreement.>>
Allowance for Margin and Preliminary & General for Long Lead Items	<i>[insert]</i> % <<Guidance note: Update to reflect the pricing structure for the Agreement.>>
Liability cap	<p>Two times the Anticipated Contract Value (exclusive of GST and disbursements) with a maximum limit of \$10,000,000.</p> <p><<Guidance note: Engagement with the NZTA Legal team (legalcommercial@nzta.govt.nz) on the liability cap is required where the anticipated contract value is >\$10m.>></p>
Notices:	<p><i>Principal:</i></p> <p>Address: <i>[insert]</i></p> <p>Email: <i>[insert]</i></p> <p>Attention: <i>[insert]</i></p> <hr/> <p><i>Preferred Contractor:</i></p> <p>Address: <i>[insert]</i></p> <p>Email: <i>[insert]</i></p> <p>Attention: <i>[insert]</i></p>

Schedule 2: Principal's objectives

<<Guidance note: Review and update as required.>>

- (a) **General:** To receive the benefit of the Preferred Contractor's specialist construction expertise and knowledge in the co-ordination of the design for the Contract Works, formulation of the Specifications and procurement of Long Lead Items. In essence the Preferred Contractor is to be a construction consultant and adviser to the Principal.
- (b) **Define the Specifications:** Obtaining an accurate and comprehensive definition of the Specifications. The Specifications are to be fully co-ordinated and consistent with the design and specifications and are to be without errors, omissions or discrepancies.
- (c) **Buildability:** Establishing and verifying the design for the Contract Works including undertaking a rigorous and informed process of testing of the design for buildability.
- (d) **Supply chain:** Obtaining a commitment (which, for the avoidance of any doubt, does not require the Preferred Contractor to enter into legally binding contracts with its supply chain) from the Preferred Contractor's supply chain for the Contract Works, including in terms of pricing and meeting the dates and timeframes shown in the Indicative Programme.
- (e) **Deliverables:** Obtaining Deliverables from the Preferred Contractor that comply with the Agreement.
- (f) **Risk identification and assessment:** Identifying and assessing the risks associated with the Contract Works and analysing those risks including any detrimental effects to the Contract Works of those risks and any available strategies to avoid, mitigate or manage the risks.
- (g) **Assessment of ground conditions:** Review of the Principal's geotechnical information by the Preferred Contractor, recommendations about further inquiries and investigations which the Preferred Contractor considers may assist in quantifying the risk of unanticipated conditions, identification of risks associated with ground conditions of sub-surface conditions (including any detrimental effects to the Contract Works) and any available strategies to avoid, mitigate or manage the risks.
- (h) **Mitigation of other effects:** Understanding by the Preferred Contractor of all elements of and impacts upon the Contract Works (including of other works to be undertaken in and around the Site) so that the Contract Works can be carried out in an informed, co-ordinated and efficient way with appropriate sequencing and staging.
- (i) **Savings and efficiency:** Identifying savings and efficiencies in terms of:
 - (i) design cost;
 - (ii) construction cost;
 - (iii) preliminary and general cost; and
 - (iv) ongoing maintenance and operational costs.
- (j) **Price:** Establishment of sub trade and final pricing leading to a Contract Price for the Contract Works, including following the process set out in **Schedule 7**.
- (k) **Programme:** Achieving programme certainty for the completion of the Contract Works.
- (l) **Team culture:** Establishing a strong, innovative and energetic team culture which is focused on meeting the objectives of the Principal while understanding what is important to the Principal.

Schedule 3: Scope of services

<<Guidance note: Insert. If there are multiple stages of work i.e. detailed business case, pre-implementation etc. then these should be described here.>>

Schedule 4: Deliverables

Deliverable	Deliverable Date
[Insert]	[Insert]
[Insert]	[Insert]
[Insert]	[Insert]
[Insert]	[Insert]
[Insert]	[Insert]

<<Guidance note: Update noting the table must include the date that NZTA requires the Pricing Proposal to be submitted.>>

Schedule 5: Principal's Indicative Timetable

Indicative key pre-construction and construction dates/timeframes	
Submission by the Preferred Contractor of its Pricing Proposal	[Insert]
Due Date for Completion for the purposes of the Construction Contract	[Insert]

<<Guidance note: Update.>>

Schedule 6: Key Personnel

Key Personnel	Name
Preferred Contractor's Representative	[insert]
[insert]	[insert]
[insert]	[insert]
[insert]	[insert]

<<Guidance note: Update.>>

Schedule 7: Open Book Competitive Tender Process for Pricing Proposal and Long Lead Items

1 Application

The Preferred Contractor must follow the process set out in this **Schedule 7** for the purposes of building up its pricing for the Pricing Proposal and to ensure there is total pricing transparency for the Principal.

2 Tender Process

2.1 The Preferred Contractor acknowledges and agrees that it must follow the process set out in this paragraph 2 even where the Preferred Contractor would like to perform the applicable work, service or supply package itself i.e. where the Preferred Contractor does not wish to subcontract the applicable work, service or supply package, unless the Principal advises in writing otherwise.

2.2 The Preferred Contractor must observe and comply with the following in respect of each work, service or supply package comprising the Contract Works unless the Principal advises in writing, or the parties agree otherwise (to be clear, the parties can mutually agree to identify a single subcontractor or supplier to be approached for a work, service or supply package, rather than the requirement for three different parties to be identified as described below):

- (a) the Preferred Contractor must notify the Principal's Representative in writing of:
 - (i) a description of the work, service or supply package together with a programme and a schedule of design documentation that defines the scope of the work for the work, service or supply package;
 - (ii) a list of those parties (to be, unless a lesser number is approved by the Principal's Representative, no less than three different and independent parties on each occasion) which the Preferred Contractor proposes are suitable to perform the work, service or supply package. The Preferred Contractor or a Related Company of the Preferred Contractor may be put forward by the Preferred Contractor as suitable to perform the work, service or supply package but will not be regarded as an independent party, with the effect that at least another three different and independent parties must also be put forward by the Preferred Contractor as being suitable to perform the work, service or supply package (**Related Company** has the meaning given in section 2(3) of the Companies Act 1993, read as if the expression "company" in that subsection included any body corporate, wherever incorporated); and
 - (iii) the Principal may reject any party put forward by the Preferred Contractor in accordance with paragraph 2.2(a)(ii) of this Schedule 7, in which case the Preferred Contractor must (unless agreed otherwise by the Principal) put forward a different party as being suitable to perform the work, service or supply package;
- (b) call for tenders for performance of the work, service or supply package and the tender list must include any persons suggested by the Principal's Representative. For the avoidance of any doubt, a party suggested by the Principal's Representative will not be a "Nominated Subcontractor" under the Construction Contract;
- (c) each invitation to tender must prescribe the form of subcontract (where applicable) which is to apply (the form of which will be subject to approval by the Principal);
- (d) forward to the Principal's Representative copies of all correspondence with tenderers;
- (e) copies of all tenders received must be promptly sent by the Preferred Contractor to the Principal's Representative by email;

- (f) the Preferred Contractor must review all tenders, clear all 'tags' with the tenderers and otherwise have the tenders amended so that they comply with the requirements of the Construction Contract, following which it will present the tenders to the Principal's Representative (in the format required by the Principal's Representative including enabling the Principal's Representative to compare the tenders on a like-for-like basis) noting its preferred tenderer and the reasons for its preference;
- (g) the Preferred Contractor will consult and liaise with the Principal's Representative over the selection of the tenderer and the Principal's Representative may instruct the Preferred Contractor to accept or reject any tender;
- (h) the Preferred Contractor will not appoint a tenderer without the prior written approval of the Principal's Representative to the identity of the tenderer and of the terms and conditions, including cost, of that engagement; and
- (i) any other requirements of the Principal notified, in writing, to the Preferred Contractor from time to time (which may be consistent or inconsistent with any of the foregoing).

2.3 The fact that the Principal's Representative may have approved of the identity of a subcontractor and of the terms and conditions, including price, of the subcontractor's proposed engagement, will in no way whatsoever relieve the Preferred Contractor from any of its obligations, duties or liabilities under the Construction Contract (should it be awarded the Construction Contract) or transfer any obligation, duty, liability or risk to the Principal.

3 **OPEN BOOK BASIS**

3.1 The Preferred Contractor must act in good faith and in a fully transparent manner (including on a fully 'open book' basis) in order to enable the Principal and the Principal's project team to scrutinise, assess and comment on, in detail, amounts tendered by proposed subcontractors (including, for the avoidance of any doubt, contractors, suppliers, vendors, manufacturers, trades and consultants) and the make-up of the pricing in the Pricing Proposal.

Schedule 8: Form of Subcontractor Continuity Guarantee

DATE:

PARTY

[Name of Subcontractor] (the **Subcontractor**)

BACKGROUND

- A The New Zealand Transport Agency (the **Principal**) has engaged [insert] (the Preferred Contractor) to provide certain services pursuant to an early contractor involvement agreement dated [●] (the **Agreement**).
- B The Preferred Contractor has, with the consent of the Principal, subcontracted a portion (or portions) of the Services under the Agreement to the Subcontractor (the **Subcontract Services**), as described in the contract between the Subcontractor and the Preferred Contractor dated [●] (the **Subcontract**), a copy of which is contained in the Schedule to this deed.
- C Pursuant to the provisions of the Agreement, it is a condition that the Preferred Contractor and Subcontractor enter into this deed in favour of the Principal.

IT IS AGREED as follows:

1 DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this deed, unless the context otherwise requires, words and expressions defined in the Agreement and not otherwise defined in this deed have the same meanings when used in this deed.

1.2 Interpretation

In this deed, unless the context otherwise requires:

- (a) covenants given in this deed by more than one person or entity bind each of them jointly and severally;
- (b) paragraph headings are not to be used to construe this deed;
- (c) words importing the singular number include the plural number and vice versa;
- (d) words of any gender include the other gender and bodies corporate;
- (e) a party includes its successors, permitted assigns and permitted novatees;
- (f) except where expressly provided to the contrary all references in this deed to “including”, “includes” or “include” are to be read as if that reference is followed by the words “without limitation”;
- (g) references to a clause, clauses, Schedule or Schedules will, unless otherwise specified, be a reference to the corresponding clause, clauses, Schedule or Schedules in this deed; and
- (h) the rule of construction known as *contra proferentem* will not apply to this deed.

2 CONTINUITY

The Subcontractor covenants that in the event of the Agreement being terminated for any reason whatsoever, the Subcontractor will, if required by the Principal, complete the Subcontract Services for the Principal under the same terms and conditions and for the same consideration as originally agreed between the Preferred Contractor and the Subcontractor, such terms and conditions being set out in the Subcontract annexed in the Schedule to this deed.

3 DISPUTE RESOLUTION

- 3.1 If any dispute or difference arises between the Subcontractor and the Preferred Contractor which is in any way connected with this deed or the Subcontract, the Subcontractor must promptly give notice in writing of that dispute or difference with details, to the Principal.
- 3.2 Any dispute or difference (a **Dispute**) between the Principal and the Subcontractor arising out of this deed will be referred to arbitration in accordance with the provisions of the Arbitration Act 1996 or any statutory re-enactment or modification thereof.
- 3.3 The Dispute will be referred to a sole arbitrator. If the Principal and the Subcontractor fail to agree upon a sole arbitrator within 15 days after receipt of the notice of Dispute, the arbitrator will be appointed by the then President of the Arbitrators' and Mediators' Institute of New Zealand (or by his or her nominee).
- 3.4 Notwithstanding clauses 3.2 and 3.3, if any dispute or difference arises under this deed which is related to a dispute or difference under the Agreement, the parties agree that, subject to any discretion to the contrary of a court, arbitrator or mediator, as the case may be, or unless otherwise required by the Principal, the dispute or difference is to be dealt with at the same time and in conjunction with the dispute or difference under the Agreement.

4 ASSIGNMENT AND NOVATION

- 4.1 The Subcontractor may not assign, charge or novate, whether in part or in whole, any of its rights, benefits or obligations under this deed without the prior written consent of the Principal (which it may or may not give at its discretion).
- 4.2 The Subcontractor acknowledges and agrees that the Principal may assign, charge or novate all or any part of its rights and/or obligations under this deed to any assignee, chargee or novatee of the Principal under the Agreement or to any other person without the Subcontractor's consent.
- 4.3 The Subcontractor must, if and when requested by the Principal, promptly do all things and execute all such documents reasonably necessary to give effect to any assignment, charge or novation by the Principal, including in the case of a novation, entering into a deed of novation with the Principal and the relevant Person nominated by the Principal in a form required by the Principal.

5 MISCELLANEOUS

5.1 Contracts and Commercial Law Act 2017

The Subcontractor acknowledges and agrees that, pursuant to section 12 of the Contracts and Commercial Law Act 2017, the rights and benefits under this deed will accrue to and be enforceable by not only the Principal but also any other assignee or novatee of the Principal's interest under this deed.

5.2 Governing law

This deed is governed by and will be construed in accordance with the laws of New Zealand, and without limitation or prejudice to clause 3 the Subcontractor irrevocably submits to the non-exclusive jurisdiction of the courts of New Zealand and any courts which have jurisdiction to hear appeals from any of those courts and waives any right to object to any proceedings being brought in those courts.

EXECUTION**Executed** as a deed**EXECUTED** by [●] as Subcontractor
by_____
Director_____
Director_____
Print name_____
Print name_____
Witness to both signatures_____
Print name_____
Occupation_____
Address**Address of the Subcontractor**

Physical address:

Postal address:

Facsimile:

Email:

Telephone:

Attention:

*NOTE: This document is to be executed as a deed. Accordingly:**- companies should sign by two directors, unless there is only one director of the company in which case that director should sign and his/her signature should be witnessed by another person (as well as signing, the witness should record his/her name, occupation and address); and**- where a party to this deed is an individual, that person should sign and his/her signature should be witnessed by another person (as well as signing, the witness should record his/her name, occupation and address).*