



## Conditions of Engagement:

### 1. Designer Providing Services

If the Designer provides any design services to the Client then, unless those services, together with such other incidental services as the Designer may consider necessary for the proper performance of such services (together called "the Works"), are documented as being "no-fee preliminary services", such services shall be chargeable to the Client at the rate endorsed on the foot of this document.

Acceptance by the Designer of any "no-fee preliminary service", identified as such by the Designer to the Client, shall be in consideration for the Client's agreement to the following terms and conditions:

- (a) on request by the Designer at any time after agreement by the Designer to provide "no-fee preliminary service", advise the Designer of the number of other Designers requested to supply such services. The Designer may, if the Client fails to answer the Designer's request or has engaged more than 2 Designers including the Designer and always in the Designer's discretion, elect to terminate the agreement to provide any "no-fee preliminary service" and such termination shall not give rise to any claims by the Client for any no-fee services performed or yet to be performed;
- (b) to accept such services on the basis that any copyright material will not in any way be disclosed to any competing Designer; and
- (c) to otherwise preserve the trade secrets of the Designer.

### 2. Standard of Skill, Care and Diligence

The Designer shall perform his services in accordance with the reasonable standard of skill, care and diligence generally exercised by the profession in New Zealand subject to any financial, physical, time or other restraints imposed by the Client or necessarily resulting from the nature of the engagement.

### 3. Inspection

#### 3.1. General Responsibilities

Where the Designer is required to inspect the work of others arising out of the Works then, unless otherwise agreed in writing, this service shall be limited to periodic visits to assist in interpreting the design and to observe whether such work is being carried out at a stage of completion in general accordance with the applicable contract documents. Unless specifically engaged in writing to do so the Designer is not engaged to project manage, survey quantities, determine or confirm quality, test or certify the works of others, ensure work place safety or ensure compliance with any law affecting any owner, occupier or contractor in relation to any interest in land or buildings.

#### 3.2. Designer not Responsible for Obligations of Contractor

Neither inspection nor the issuing of any certificate by the Designer to a Contractor under the terms of any contract between the Client and the Designer shall impose upon the Designer any responsibilities in respect of the obligations of the Contractor to carry out the Contractor's works.

### 4. This Agreement Shall Bind The Principal

#### 4.1. Owner of Works Bound if not Client

These terms and conditions shall be binding on the Owner of the Works or other party for whose ultimate benefit the services are to be performed (referred to as "the Principal") whether or not the Principal is the Client and the Client shall ensure that these terms and conditions are brought to the attention of the Principal.

### 4.2. Relationship of Client to Principal

Where the Client is an adviser to the Principal or some other representative of the Principal, then the adviser or other representative undertakes that he will contract with the Principal, for the benefit of the Designer and of the parties referred to in Clause 13, to the effect that these Conditions shall apply to the Principal as if the Principal were the Client, and the adviser or other representative shall be liable to the Designer and the parties referred to in Clause 13 for any failure to obtain the benefit of such a contract.

### 4.3. Effect of Inclusion of Principal as Party

Both the obligations imposed by this clause and the provisions of any contract with the Principal entered into in accordance with this clause, shall be enforceable at the suit of any such party.

### 5. Job-Related Costs

The Client shall pay the Designer for all other job-related costs, including disbursements and telecommunication, reproduction, illustration, model building, testing and travelling expenses. The Designer may add a service charge of ten per cent of invoiced costs where payment to others has been made on behalf of the Client.

The term "job related costs" does not include the supply of product or the services of others unrelated to a process of design or supplied as part of creating a derivative work such costs being "job costs". If the Designer orders product or services charged to the Designer's account or paid by the Designer to be on charged to the Client, the Client is on notice that, unless otherwise agreed in writing, the Designer may be acting, in supplying such product and services, as a commission agent of the original supplier. The Designer shall not be required to account to the Client for any commissions received when so acting as a commission agent and the property in such commissions shall be the Designers.

### 6. Unpaid Fees and Job Costs – Client to Indemnify Designer

The Client shall be responsible for payment of all fees and job costs and undertakes to indemnify the Designer for any unpaid fees or job costs of persons other than the Designer, whether or not the Client is to be reimbursed for such fees by the Principal.

### 7. Payments of Fees, Job Related Costs and Job Costs

The Designer shall be entitled to progress payments of fees and other job related costs in the following manner:

- (a) payment of invoices for job costs (as against fees or job related costs) on presentation without deduction or setoff;
- (b) payment of invoices rendered on completion of stages for fees and job related costs, but only as defined in writing, within 7 days of delivery of invoice unless other terms are agreed;
- (c) all other invoices or other accounts shall be due on the 20th of the month following presentation;
- (d) where payment is made on or before the due date (excepting invoices for job costs), the Client shall be entitled to a discount of 5% on the invoice value exclusive of GST and job related costs; and
- (e) for any invoice not due if the Client is issued with proceedings for any recovery of any debt owed by the Client immediately on demand by the Designer.

It is an implied term of any invoice of the Designer that ownership of any product, goods or derivative works (called "the assets") shall remain with the Designer until payment in full has been received by the Designer. The Client shall until payment is made in full for the assets, keep the assets apart, hold the assets as agent for the Designer, not part with possession of the assets and, if requested, if payment is overdue, deliver the assets up to the Designer or the Designer's nominee for sale or if possession has been parted with, recover possession of the assets. The Designer may enter on to the Client's premises to recover or take possession (to the exclusion of the Client) of the assets.

The Client shall not be entitled by virtue of the provisions of this clause to return the assets and where the assets are recovered or the Designer takes possession of the assets the Client remains responsible for the cost of storage or the cost of the premises in which the assets are situated. The risk in any asset passes to the Client on delivery by the Designer. If any asset is or is to be delivered by others then the risk is the Client's.

## 8. License to Client

All intellectual property rights, including the copyright in all documents, and in the Works executed from them and any moral rights remains the property of the Designer.

The Designer does not accept commissions to create copyright works. The Client shall be entitled, on payment of all fees and other job costs due to the Designer, to a license to use the documents for the specific purpose for which they were prepared, but for no other purpose. Unless the right to reproduce or to create derivative works is otherwise set out in writing, the right of the Client shall be to use the licensed works to create one derivative work only and to make such copies of the copyright material as are necessary for completion of that derivative work and any statutory compliance associated with it.

The license to use comes into effect on the first payment by the Client to the Designer and remains in force so long as all payments required from the Client are made on time. The Designer may suspend or revoke the license if the Client fails to make any payment and such suspension or revocation shall cause the suspension of the derivative works if uncompleted.

Any reference to the works of the Designer shall be accompanied by full attribution to the Designer in a form to be approved by the Designer.

## 9. Duties of Designer to be Accurately Described

The Client shall not enter into any contract with, nor make any representations to, any third party which describes the Designer's duties and responsibilities in a manner inconsistent with these terms and conditions.

## 10. Designer not Liable for Losses

Except as provided for in the Consumers Guarantees Act 1993 for any work for a consumer as defined in that Act, the Designer shall not be liable for:

- (a) the commercial performance of the Works;
- (b) any loss or damage arising by reason of any delay in completion of the Works;
- (c) any loss of profits; or
- (d) any indirect or consequential loss of whatever nature.

## 11. Liability of Designer Limited

Except as provided for in the Consumers Guarantees Act 1993 for any work for a consumer as defined in that Act, if the Designer or any sub-consultant shall be found liable to the Client (whether under the express or implied terms of this Agreement, in negligence, or otherwise at common law) for any costs, loss or damage suffered by the Client, however caused and of whatever nature, arising out of or connected with the performance or failure of performance of services by the Designer or any sub-consultant, then the maximum amount of liability for all such claims against the Designer and any sub-consultant shall be \$200,000.

## 12. Mitigation of Designer's Liability

The liability of the Designer or a sub-consultant to the Client against loss or damage as aforesaid shall be reduced proportionately to the extent that any act or omission of the Client (whether amounting to a breach of these terms and conditions or not) has contributed towards any such loss or damage.

## 13. Supply for Business Purposes

Where the services of the Designer are supplied to the Client for business purposes the Consumers Guarantees Act 1993 shall not apply.

## 14. Designer and Sub-Consultant includes their Employees

For the purposes of Clauses 10, 11 and 12 of these terms and conditions:

- (a) the expression "Designer" shall include all employees of the Designer; and

- (b) the expression "sub-consultant" shall include every party engaged by the Designer or by any other subconsultant to perform any part of the services and all employees of any sub-consultant.

The terms of Clauses 10, 11 and 12 shall be construed as conferring a benefit on, and being enforceable at the suit of, every person referred to in this clause.

## 15. Agreements may be Postponed or Terminated on Notice

Any agreement between the Designer and the Client for services pursuant to these terms and conditions, unless otherwise set out in writing, may be postponed or terminated by either party, on the expiration of reasonable notice given in writing.

## 16. Action Taken by Designer upon Receipt of Notice

Upon receipt of such notice from the Client, the Designer shall take immediate steps to bring the services to a close and to reduce expenditure to a minimum.

## 17. Entitlement to Payment upon Postponement or Termination

Upon postponement or termination of the services, the Designer shall be entitled to payment of fees and other job costs up to the effective date of postponement or termination and further fees and costs incidental to the orderly termination of the services.

## 18. Arbitration – Single Arbitrator

### 18.1. All Disputes to Arbitration

All disputes and differences between the parties shall be referred to arbitration in accordance with the Arbitration Act 1996.

### 18.2. Commencement of Arbitration

The arbitration shall be commenced by either party giving to the other notice in writing stating the subject matter, details of the dispute or difference and that party's desire to have the matter referred to arbitration.

### 18.3. Agreement on Arbitrator

The arbitration shall be by one arbitrator to be agreed upon by the parties and, failing agreement within one month of the notice given pursuant to Clause 18.2, to be nominated by the Chairperson or President for the time being of the Designers Institute of New Zealand Inc.

### 18.4. Awards to be Final

The award in the arbitration shall be final and binding on the parties.

## 19. Access to Finished Projects

The Client will on the reasonable request of the Designer for a period of 6 months from completion permit the Designer to come onto the Client's premises for the following purposes:

- (a) photographing or filming the Works created from the designs for the purpose of publicising the services of the Designer; and
- (b) inspection of the Works for the purpose of any professional award or requirement to submit work for review on application to the Designers Institute of New Zealand Inc. for any category of membership.

The Designer shall:

- (i) prior to exercising such right first obtain the agreement of the Client to such visit which shall not be unreasonably withheld; and
- (ii) observe and obey any reasonable terms and conditions the Client may set for such a visit including without limitation any limit on the number of persons that may come onto the premises.

## 20. Special Conditions