



## Collaborative Marketplace Agreement

### Part 2 – Channel Terms for Consultancy and Professional Services (C&PS Terms) (Construction Consultancy Services)

#### Channel Terms

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## 1. Introduction

- 1.1 These Channel Terms apply to Construction Consultancy Services within the Consultancy and Professional Services Channel (the **C&PS Channel**) of the Marketplace. They form part of the Collaborative Marketplace Agreement (**Marketplace Agreement**).
- 1.2 Clauses 5.2, 6.3, 8.1(b), 8.4, 10.1, 13.1, 15.5 and 16 of these Channel Terms are intended to benefit Participating Agencies and are enforceable by them under the Contract and Commercial Law Act 2017.

These are the Channel Terms for Construction Consultancy Services within the Professional Services Channel.

## 2. Definitions

- 2.1 These Channel Terms incorporate all definitions included in the General Terms of the Marketplace Agreement. In addition, for the purpose of these Channel Terms:

**Administration Fee** means the administration fee (a fixed amount or a percentage of the Charges) that is charged to Purchasing Agencies in respect of the Construction Consultancy Services Marketplace Catalogue, which contributes to the costs of providing and administering the Marketplace and the Government Procurement Reform Programme, as specified on marketplace.govt.nz and as may be updated from time to time;

**Broader Outcomes** means certain secondary benefits that may be generated due to the way goods, services or works are produced or delivered (including certain economic, environmental, social and cultural benefits) as specified from time to time on [www.procurement.govt.nz](http://www.procurement.govt.nz);

**Calculated Fees** means the fees calculated by reference to the Rates payable by a Purchasing Agency for the Construction Consultancy Services under an Agency Purchase Agreement;

**Charges** means the total amount payable for the Construction Consultancy Services by a Purchasing Agency to you under an Agency Purchase Agreement, and includes applicable Fees and Expenses, but excludes the Administration Fee;

**Commencement Date** means the date you become a Member of the C&PS Channel for Construction Consultancy Services;

**Construction Consultancy Services** means the construction consultancy services in respect of the which you have sought and obtained consent for Services Listings in the Marketplace, as more particularly described on [Marketplace: Construction Consultancy Services](#);

**Contract Quarter** means a period of three consecutive months commencing on 1 January, 1 April, 1 July or 1 October, provided that:

- (a) the first Contract Quarter will begin on the Commencement Date and end on 31 December, 31 March, 30 June or 30 September, whichever date occurs first; and
- (b) the final Contract Quarter will end on the effective date of expiry or termination of this Marketplace Agreement, this C&PS Channel or the Construction Consultancy Services Marketplace Catalogue;

**Contract Year** means a period of 12 consecutive months commencing on 1 June and ending on 31 May (inclusive, in each case), except that:

- (a) the first Contract Year will begin on the Commencement Date and end on 31 May; and
- (b) the final Contract Year will end on the effective date of expiry or termination of this Marketplace Agreement, this C&PS Channel or this Construction Consultancy Services Marketplace Catalogue;

**Expenses** means any actual and reasonable out-of-pocket costs incurred by you in the delivery of the Construction Consultancy Services and agreed to in any Agency Purchase Agreement;

**Fees** means the Standard Fees and the Calculated Fees;

**Launch Date** means date that the Construction Consultancy Services Marketplace Catalogue is launched as specified on [Marketplace: Construction Consultancy Services](#):

**Rates** means the rates (whether hourly, daily or weekly or some other time-related basis) set out in your Services Listing (as may be varied from time to time in accordance with clause 7);

**Standard Fees** means the fixed fees for certain deliverables set out in your Services Listing (as may be varied from time to time in accordance with clause 7);

**we, our** and **us** refer to the Ministry of Business, Innovation & Employment (**MBIE**);

**you** and **your** refer to any provider that applies to be a Member of the C&PS Channel to list Construction Consultancy Services;

**Term** means the period commencing on the Commencement Date and ending on the earlier of:

- (a) the Initial Term plus any Renewal Term and any Evergreen Term (as each is defined in clause 3); and
- (b) where:
  - (i) your membership of the Marketplace, the C&PS Channel, or the Construction Consultancy Services Marketplace Catalogue is terminated earlier in

accordance with the terms of this Marketplace Agreement; or

- (ii) you withdraw your membership of the Marketplace, the C&PS Channel or the Construction Consultancy Services Marketplace Catalogue earlier in accordance with the terms of this Marketplace Agreement,

the effective date of termination or withdrawal; and

**Value Add Services** means certain services that providers may offer Participating Agencies to supplement a Participating Agency's engagement with that provider including: training, seminars, access to the provider's templates, telephone/email hotline, strategic planning meetings, and use of provider's premises for meetings, training or seminars.

### 3. Term and renewal

3.1 This Construction Consultancy Services Marketplace Catalogue will commence on the Launch Date and will, subject to clauses 3.2, 3.3, and 3.5 below and clause 3 of the General Terms, continue for a term of two years (**Initial Term**).

3.2 The Initial Term may be extended for up to one further period of two years (the **Renewal Term**) if we give notice to that effect (the **Renewal Notice**) at least 3 months before the end of the Initial Term.

3.3 The Renewal Term may be extended for an indefinite term (the **Evergreen Term**) if we give notice to that effect (**Evergreen Notice**) at least 3 months before the end of the Renewal Term.

3.4 Therefore if you become a Member of the C&PS Channel for Construction Consultancy Services within:

- (a) two years of the Launch Date, these Channel Terms for Construction Consultancy Services will start on your Commencement Date and will, subject to clause 3 of the General Terms and clause 3.5 below, continue for the Initial Term and any subsequent terms;
- (b) two to four years of the Launch Date, these Channel Terms for Construction Consultancy Services will start on your Commencement Date and will, subject to clause 3 of the General Terms and clause 3.5 below, continue for the Renewal Term and (if applicable) the Evergreen Term; or
- (c) at least four years after the Launch Date, these Channel Terms for Construction Consultancy Services will start on your Commencement Date and will, subject to clause 3 of the General Terms and clause 3.5 below, continue for the Evergreen Term.

If you join the C&PS Channel for Construction Consultancy Services within 2 years of the Launch Date, these Channel Terms will continue for 2 years, unless terminated earlier. They may be renewed by MBIE for a further 2 years, and thereafter indefinitely.

If you join the C&PS Channel for Construction Consultancy Services at least 4 years after the Launch Date, these Channel Terms will continue indefinitely.

3.5 Notwithstanding clause 3.6(a) of the General Terms, you may withdraw your membership of this Construction Consultancy Services Marketplace Catalogue by giving us one month's prior notice by contacting us through the online 'Contact us' form referred to in clause 22.6 of the General Terms (your withdrawal will be effective at the end of that one month period).

#### 4. Ordering Construction Consultancy Services

4.1 If an Eligible Agency decides to purchase Construction Consultancy Services, it will select the relevant service(s) and provider(s) and, where relevant:

- (a) request from relevant provider(s) any additional information it may require;
- (b) have any discussions with provider(s) it may require; and
- (c) commence the process of completing or negotiating a contract with the relevant provider(s),

as may be further described in the applicable Ordering Process for the Construction Consultancy Services on marketplace.govt.nz.

#### 5. Form of contract

5.1 You and a Purchasing Agency shall use the Crown version of the Conditions of Contract for Consulting Services (**CCCS**), (available on the Ministry of Education's website) (as may be amended between the parties based on the complexity and risk of the project) for the sale and purchase of Construction Consultancy Services unless otherwise agreed between you and the Purchasing Agency.

5.2 To avoid doubt:

- (a) an agreement reached in accordance with clause 5.1 above (regardless of whether the Crown version of the CCCS or a different form of contract is used) constitutes an Agency Purchase Agreement under this Marketplace Agreement; and
- (b) to the extent any of the warranties in clause 10.1 of the General Terms refer to an Agency Purchase Agreement, such warranties will not have effect, in that respect, unless and until an Agency Purchase Agreement is entered into, and then only in respect of each such Agency Purchase Agreement.

5.3 Where MBIE has allowed a Participating Agency to procure your Services outside of the Marketplace, you shall use best endeavours to accommodate this, and all references in these terms to activities that happen in, through or via the Marketplace shall be read to taking place outside of the Marketplace to the extent possible.

#### 6. Charges

Agencies can compare competing Construction Consultancy Services on offer, and seek further information from you if required.

The Crown version of the CCCS will be used for the sale and purchase of Construction Consultancy Services unless otherwise agreed.

If MBIE permits a Participating Agency to procure your Services outside of Marketplace, you will accommodate this.

- 6.1 The Charges must not be based on fees or rates that are higher than the Standard Fees or Rates.
- 6.2 The Charges may be a fixed fee, a fee calculated by reference to the total cost of the associated construction project or a fee that is subject to a volume based discount.
- 6.3 The Charges and the Administration Fee comprise the total amount payable by a Purchasing Agency for your Construction Consultancy Services.

The Charges must not be based on fees or rates higher than the Standard Fees or Rates.

**7. Changing Rates and Standard Fees**

- 7.1 You may only increase your Standard Fees and Rates once in any calendar year, and any such increase must apply to the majority of your customers in New Zealand.
- 7.2 You may decrease your Standard Fees and Rates at any time.
- 7.3 Any Standard Fees or Rates increase or decrease will take effect from the date your updated Services Listing is published on the Marketplace.

You may only increase your Standard Fees and Rates once a year, and any increase must apply to the majority of your customers in NZ.

**8. Most favoured nations**

- 8.1 Subject to clause 8.2:
  - (a) you will ensure that the pricing you offer to any Non-Participating Agency for any services equivalent to your Construction Consultancy Services is not equal to, or less than:
    - (i) the Charges, based on, or derived from, the Standard Fees and/or the Rates; plus
    - (ii) the Administration Fee,
 that would be offered to Participating Agencies for those Construction Consultancy Services; and
  - (b) if you do offer more favourable pricing to a Non-Participating Agency, then the relevant Charges payable by all Purchasing Agencies under all of your Agency Purchase Agreements and your Standard Fees and Rates will immediately reduce to the level of the more favourable pricing offered.

The pricing (i.e. Charges + Administration Fee) you offer to Participating Agencies must be lower than the pricing you offer to Non-Participating Agencies for equivalent services.

If you instead offer lower pricing to a Non-Participating Agency, the relevant Charges payable by all Purchasing Agencies will reduce to the level of the lower pricing offered.

However, there are exceptions: e.g. where the Charges offered to a Participating Agency are based on a fixed fee, a volume based discount or a fee calculated by reference to the total cost of the associated construction project.

- 8.2 Clause 8.1 will not apply to any pricing offered by you to a Non-Participating Agency that is based on:
  - (a) a fixed fee;
  - (b) a volume based discount subject to clause 8.3;
  - (c) a fee calculated by reference to the total cost of the associated construction project; or
  - (d) fees and rates that you prove to our reasonable satisfaction:

- (i) are not profitably sustainable for you to offer to all Participating Agencies; or
- (ii) should not be offered across all Participating Agencies.

8.3 Any volume based discounts that you offer must be offered to all Participating Agencies that request a similar or equivalent volume of Construction Consultancy Services from you, and you will provide us with notice of all such volume based discount offers to any Eligible Agency at the time the offer is made.

8.4 Any change to the Charges required to maintain compliance with clause 8.1(b) will be reflected in your Services Listing and each of your Agency Purchase Agreements.

8.5 From time to time upon request, you will send us a certificate signed by your Chief Executive confirming that you have fulfilled your obligations under this clause 8.

8.6 For the purposes of this clause 8, a **Non-Participating Agency** is any Eligible Agency that is not a Participating Agency.

## 9. Administration Fee

9.1 Subject to clause 9.8 below, you are required to collect an Administration Fee from each Purchasing Agency on our behalf and pay it to us in accordance with this clause 9.

9.2 You will ensure that each invoice issued to a Purchasing Agency for the Charges includes, in addition to the Charges, an Administration Fee, to be described in the invoice as the administration fee.

9.3 Within 10 Business Days following the end of each Contract Quarter or such other period as may be agreed between us, you will report to us via the Marketplace on the aggregate Charges (excluding GST and Expenses) paid or payable for the Construction Consultancy Services delivered by you to each Purchasing Agency in that Contract Quarter (**Reference Amount**).

9.4 Within 10 Business Days following receipt of your report, we will:

- (a) examine the report to identify any manifest error; and
- (b) absent manifest error (which you will remedy by re-issuing the report within three Business Days following our notice) render an invoice to you for the Administration Fee plus GST.

9.5 You will pay our invoice on or before the 20th day of the month following the date that invoice was received.

9.6 If you, of your own volition or following resolution of a dispute, reduce the quantum of an invoice previously rendered to a Purchasing Agency (including writing it off) following payment of the Administration Fee in respect of that invoice, we will, on receipt of written evidence from you demonstrating the reduction of the invoice, credit to you an amount equal to the difference between the

You are required to collect an Administration Fee from Purchasing Agencies on our behalf and pay it to us on a quarterly basis.

You will be required to report to us via the Marketplace at the end of each quarter on the aggregate Charges paid or payable for the Construction Consultancy Services you deliver to Purchasing Agencies.

invoice included in the Reference Amount and the reduced value of the invoice (excluding GST) when we issue our next Administration Fee invoice to you.

9.7 We may, by giving at least 20 Business Days' notice to you, vary the then current applicable Administration Fee at any time during the Term, and you will correspondingly vary the Administration Fee payable under each Agency Purchase Agreement.

9.8 No Administration Fee is required to be collected or paid for 12 months following the date that the Construction Consultancy Services Marketplace Catalogue is launched in the Marketplace.

9.9 On written notice, we will advise you of the Administration Fee and the date from which you will be required to collect it from Participating Agencies and pay it to us in accordance with this clause 9.

No Administration Fee is required to be collected or paid for 12 months following the date that the Construction Consultancy Catalogue is launched in Marketplace.

## 10. Value Add Services and Broader Outcomes

10.1 You will list any Value Add Services and Broader Outcomes that you offer in your Services Listing and you will provide such Value Add Services and Broader Outcomes free of charge to Purchasing Agencies.

Any Value Added Services and Broader Outcomes offerings will be listed in your Services Listings and offered to Purchasing Agencies free of charge.

## 11. Representatives

11.1 You will appoint a relationship manager (**Representative**) as part of the On-boarding process to be our primary point of contact. You will ensure that the Representative's name and contact details are kept up to date from time to time.

## 12. MBIE's responsibilities

12.1 We are responsible for:

- (a) the admission of new providers and new Participating Agencies onto the Marketplace;
- (b) evaluating, sharing and publishing Marketplace Analytics;
- (c) supporting post-engagement feedback and performance monitoring through the Marketplace;
- (d) high level strategic provider relationship management; and
- (e) assisting Participating Agencies to manage ad-hoc issues with providers.

## 13. Relationship and performance management

13.1 Clause 7.1 of the General Terms is deleted and replaced with the following:

We may request meetings with you from time to time.

7.1 *Each party will:*



- (a) *in its interactions with each other and Participating Agencies, adopt a working approach that is collaborative, open, transparent, ethical and honest; and*
- (b) *comply with all applicable Law.*

13.2 We may, on reasonable notice to you, request a meeting (in person or by teleconference or videoconference) to:

- (a) discuss matters of importance to the strategic, commercial and operational relationship between us;
- (b) review your performance and compliance with your other obligations under this Marketplace Agreement and Agency Purchase Agreements using Marketplace Analytics and Purchasing Agency feedback;
- (c) discuss potential cost savings initiatives;
- (d) discuss your Value Add Services and Broader Outcomes offerings; and
- (e) set goals and objectives for the following Contract Year.

13.3 For each review meeting, we will:

- (a) prepare the agenda; and
- (b) record the minutes (and will send a copy of those minutes to you, promptly following the meeting for your review).

13.4 We may invite one or more representatives from Participating Agencies to attend each review meeting.

#### **14. Records**

14.1 You will, at all times, maintain, store and archive true, up to date, accurate and complete records of all invoices, Agency Purchase Agreements, advice, communications, documentation and reports that you provide to Participating Agencies and other records relating to your performance under this Marketplace Agreement and all Agency Purchase Agreements, and will ensure that each of your subcontractors (if any) does the same.

14.2 You will ensure that the records described in clause 14.1 above provide sufficient detail to enable us to reconcile those records with:

- (a) the contents of the feedback and reports you issue to us under clauses 9 and 15; and
- (b) the invoices that you render to Purchasing Agencies and Agency Purchase Agreements.

#### **15. Feedback, reporting and keeping each other informed**

You must keep accurate and complete records.

You will provide us with feedback on each engagement with a Purchasing Agency. The form, content and process of giving feedback will be discussed and agreed with members of the Sector Reference Groups that has supported the development of the Construction Consultancy Services solution.

- 15.1 You will collect and provide to us (via the Marketplace once the functionality is available) certain information in relation to each Agency Purchase Agreement and each variation to an Agency Purchase Agreement including: parties; project description; project site address; project site region; service category; sub-service discipline; key personnel; term of engagement; and value of engagement (i.e. maximum value of engagement as recorded in the Agency Purchase Agreement).
- 15.2 You will provide feedback on each engagement with a Purchasing Agency via the Marketplace once we notify you that the functionality is available. You acknowledge that we may share your feedback with Purchasing Agencies to inform better procurement processes and decision making.
- 15.3 You will provide any report reasonably requested by us from time to time in accordance with our reasonable instructions (as to content, format and timeliness).
- 15.4 You grant us a royalty-free, non-exclusive licence (including the right to sublicense) to use, reproduce, adapt and modify during the Term any Intellectual Property Rights in the any feedback and reports you provide to us in accordance with this clause 15.
- 15.5 Clause 9 of the General Terms is deleted and replaced with the following:

You will collect and provide us with certain information relating to each Agency Purchase Agreement.

We may request reports from time to time.

***Obligation to keep each other informed***

- 9.1 *MBIE will keep you informed, as early as practicable, of any material changes that it makes to the Marketplace platform or the Construction Consultancy Services Marketplace Catalogue.*
- 9.2 *You will keep us and all relevant Purchasing Agencies informed, as early as practicable, of material matters that will, or are likely to:*
- (a) adversely affect the provision or quality of Services or your ability to perform your obligations under this Marketplace Agreement or any Agency Purchase Agreement; or*
  - (b) generate negative media attention.*

**16. Warranties**

- 16.1 Clause 10.1(b) of the General Terms is deleted and replaced with the following:
- (b) you have, and will continue to have, all necessary consents, permissions, licences and rights to enter into and perform your obligations under this Marketplace Agreement and any Agency Purchase Agreement (other than a necessary consent, permission, licence or right otherwise held and*

*maintained by a Purchasing Agency or third party under an Agency Purchase Agreement which enables you to perform your obligations under that agreement).*

## **17. Services Listings**

17.1 MBIE will use its best endeavours, within its control as administrator of the Construction Consultancy Services Marketplace Catalogue, to keep safe, securely manage and maintain Services Listings in accordance with prudent business practice and all applicable Law.

## **18. IP Claims**

18.1 Clause 20.1(c) of the General Terms is deleted and replaced with the following:

*(c) you will not enter into any settlement or compromise in relation to the IP claim without the prior written consent of MBIE (which will not be unreasonably withheld), unless you have subrogated the IP claim to your insurer, in which case you will notify MBIE immediately of the details of the settlement or compromise.*

## **19. Dispute resolution**

19.1 **Negotiation:** The parties agree to use their best endeavours to resolve any dispute that may arise under this Marketplace Agreement and the following process will apply to such disputes:

- (a) a party will notify the other if it considers a matter is in dispute, outlining the matter in writing;
- (b) the parties' senior managers will attempt to resolve the dispute through negotiation; and
- (c) if the senior managers have not resolved the dispute within 10 Business Days, the parties shall refer the dispute to mediation.

19.2 **Mediation:** If a dispute is referred to mediation, the mediation will be conducted:

- (a) by a single mediator agreed by the parties or if they cannot agree, appointed by the Resolution Institute;
- (b) on the terms of the Resolution Institute Mediation Rules; and
- (c) at a fee to be agreed by the parties or, if they cannot agree, at a fee determined by the Resolution Institute.

19.3 **Costs:** Each party will pay its own costs of mediation under this clause 19.

19.4 **Effect of dispute:** If there is a dispute, each party will continue to perform its obligations under this Marketplace Agreement (and, to avoid any doubt, you will continue to perform your obligations under

each Agency Purchase Agreement) as far as practicable given the nature of the dispute.

- 19.5 **Taking court action:** Each party agrees not to start any court action in relation to a dispute until it has complied with the process described in clause 19.1, unless that party requires urgent relief from a court.