



**PROVINCIAL  
GROWTH  
FUND**

# **FUNDING AGREEMENT**

**BETWEEN**

**THE TREASURY**

**AND**

**KIWIRAIL HOLDINGS LIMITED**

**FOR**

**CENTRAL NORTH ISLAND REGIONAL GROWTH  
HUB**

## PART 1: KEY DETAILS

1	<b>Parties</b>	<p><b>TREASURY</b> The Sovereign in right of New Zealand, acting by and through The Treasury (<b>Treasury</b>)</p> <p><b>RECIPIENT</b> KiwiRail Holdings Limited company number 4045602, having its registered offices at Level 3, 8 - 14 Stanley Street, Parnell, Auckland 1010, New Zealand (<b>Recipient</b>)</p>
2	<b>Funding Start Date</b>	16 November 2018
3	<b>End Date</b>	<p><i>The earlier of:</i></p> <p>(a) The date of completion of all land acquisitions required in respect of the Project; and</p> <p>(b) <span style="border: 1px solid black; padding: 2px;">Commercial Information</span></p>
4	<b>Background</b>	<p>Through the Provincial Development Unit (<b>PDU</b>), the Ministry of Business, Innovation and Employment (<b>MBIE</b>) is responsible for administering the Provincial Growth Fund, which aims to lift productivity potential in New Zealand's provinces.</p> <p>The Recipient is a State enterprise under the State-Owned Enterprises Act 1986. It is responsible for railway operations in New Zealand.</p> <p>The Recipient wishes to secure and protect strategically-placed land in the Central North Island to –</p> <ul style="list-style-type: none"> <li>• enable it to develop a new Regional Growth Hub to sustain its capacity to meet increasing freight demands in the central North Island; and</li> <li>• ensure rail remains an integral part of New Zealand freight flows (<b>the Project</b>).</li> </ul> <p>The Recipient has sought a funding contribution from MBIE for the purposes of the Project described below. MBIE has agreed to contribute funding on the terms and conditions of this Agreement (<b>Agreement</b>).</p> <p>MBIE has transferred Provincial Growth Fund (<b>PGF</b>) funding to Vote Transport, and the funding contribution for this Project will be provided by the Ministry of Transport from this funding. However, Treasury will act as the contracting party under this funding agreement, but not to the exclusion of MBIE's role as administrator of the PGF or the Ministry of Transport's role in administering Vote Transport funding.</p> <p>Key details of this Agreement are set out in this <b>Part 1</b>. The full terms and conditions are set out in <b>Part 2</b>. Defined terms and rules of interpretation are set out in <b>Part 3</b>.</p>
5	<b>Project</b>	<p>The Project will comprise:</p> <p>(a) preparation of a master plan and concept design for a transport hub (including a rail enabled container transfer facility) in or near Palmerston North,</p>

	<p>(b) site/options analysis and site selection for the new hub site</p> <p>(c) securing a designation under s168 of the RMA prior to the potential purchase of land for a new site in or near Palmerston North.</p> <p>(d) acquisition of sufficient land in the identified location to develop a future-proofed Regional Growth Hub. An indicative site size of [redacted] ha. has been identified, based on preliminary design for an intermodal, operational rail and road transport interchange and hub and associated services.</p> <p>The Parties' common intention is that the Regional Growth Hub, once constructed, will be made available to prospective and actual users of the facility on fair commercial terms.</p> <p>For the avoidance of doubt the Project does not include any provision at this time for the eventual development or construction of the freight hub or any associated infrastructure, buildings or services.</p>																
<p><b>6 Project Milestones</b></p>	<p>The Recipient is to use its reasonable endeavours to complete the following Milestones by the following Completion Dates:</p> <table border="1" data-bbox="486 920 1465 1697"> <thead> <tr> <th data-bbox="486 920 975 987">Milestones</th> <th data-bbox="975 920 1465 987">Completion Dates</th> </tr> </thead> <tbody> <tr> <td data-bbox="486 987 975 1122">Hub Master Plan – transport hub design (including a rail served CT site) and concept</td> <td data-bbox="975 987 1465 1122">Commercial Information [redacted]</td> </tr> <tr> <td data-bbox="486 1122 975 1182">Multi-criteria analysis of options</td> <td data-bbox="975 1122 1465 1182">Commercial Information [redacted]</td> </tr> <tr> <td data-bbox="486 1182 975 1243">Selection of preferred site</td> <td data-bbox="975 1182 1465 1243">Commercial Information [redacted]</td> </tr> <tr> <td data-bbox="486 1243 975 1406">Preparation of RMA documents for designation: [redacted] and Assessment of Environmental Effects</td> <td data-bbox="975 1243 1465 1406">Commercial Information [redacted]</td> </tr> <tr> <td data-bbox="486 1406 975 1467">Lodgement of [redacted]</td> <td data-bbox="975 1406 1465 1467">Commercial Information [redacted]</td> </tr> <tr> <td data-bbox="486 1467 975 1570">[redacted] confirmed ( [redacted] )</td> <td data-bbox="975 1467 1465 1570">Commercial Information [redacted]</td> </tr> <tr> <td data-bbox="486 1570 975 1697">Completion of land acquisitions [redacted]</td> <td data-bbox="975 1570 1465 1697">Commercial Information [redacted]</td> </tr> </tbody> </table> <p>Completion Dates and Milestones will be reported against and updated as part of the Recipient's reporting under clause 4 of this Agreement.</p>	Milestones	Completion Dates	Hub Master Plan – transport hub design (including a rail served CT site) and concept	Commercial Information [redacted]	Multi-criteria analysis of options	Commercial Information [redacted]	Selection of preferred site	Commercial Information [redacted]	Preparation of RMA documents for designation: [redacted] and Assessment of Environmental Effects	Commercial Information [redacted]	Lodgement of [redacted]	Commercial Information [redacted]	[redacted] confirmed ( [redacted] )	Commercial Information [redacted]	Completion of land acquisitions [redacted]	Commercial Information [redacted]
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<p><b>7 Funding</b></p>	<p>The total Funding available under this Agreement is up to <b>NZ\$40,000,000</b> excluding GST (if any). This is the Total Maximum Amount Payable.</p>																
<p><b>8 Reporting</b></p>	<p>The Recipient will provide Treasury with the following reports:</p>																

- 1 A monthly report by the 20<sup>th</sup> Business Day following the end of each month.
- 2 A quarterly report by the 20<sup>th</sup> Business Day following the end of each quarter (quarters ending in March, June, September and December).
- 3 A Post-Investment Review submitted within 20 Business Days following the End Date.
- 4 On request made by MBIE within Commercial Inform of the completion of the Project, provision of data (gathered in the normal course of business) evidencing economic growth outcomes, such as leasing rates and freight throughput, to allow an assessment by MBIE of the extent to which the facility has seeded additional regional investment.

**Each monthly report** must include the following information:

- 1 The spend to date;
- 2 The funding drawdown to date;
- 3 Upcoming milestones;
- 4 The number of jobs created (both current jobs and sustainable jobs)

**Each quarterly report** must include the following information:

- 1 Description and analysis of actual progress of the Project against planned progress including an updated project timetable, Milestone dates and (except for the penultimate report prior to completion of the Project) the proposed funding required by equity injection for the subsequent Funding Period;
- 2 Progress and achievement of any of the Milestones;
- 3 A statement of the Funding received, spent, projected to be spent and remaining;
- 4 A costs update (including actual to date and cost to completion for each Milestone and the Project); and
- 5 Plans for the next six month period (not required in the final report following completion of the Project) to be agreed with Treasury.
- 6 For the first report, a copy of the risk register for the Project; and
- 7 Any occurrence of, or major change in the risk rating of, a material risk associated with the Project.

The **Post Investment Review** will include the following information:

- (a) an analysis of how the Funding has enabled the Recipient to deliver the Project ;
- (b) details of Funding received and a summary of actual expenditure against

	<p>budget;</p> <p>(c) a description of the Recipient’s proposed next steps to develop the land acquired as part of the Project; and</p> <p>(d) any other information that is notified by the Treasury in writing to the Recipient.</p>	
<b>9 Special Terms</b>	N/A	
<b>10 Contact Person</b>	<p>Treasury’s Contact Person:</p> <p>Name: Mark Donnell</p> <p>Email: Privacy of natural persons</p>	<p>Recipient’s Contact Person:</p> <p>Name: David Gordon</p> <p>Email: Privacy of natural persons</p>
<b>11 Address for Notices</b>	<p>To the Treasury:</p> <p>Attention: Mark Donnell</p> <p>Email: Privacy of natural persons</p>	<p>To the Recipient:</p> <p>KiwiRail Holdings Limited</p> <p>Level 3, 8-14 Stanley St, Parnell, Auckland 1010 (Mailing Address: Private Bag 92138, Victoria Street West, Auckland Mail Centre 1142)Attention: David Gordon, GGM Investment, Planning &amp; Risk</p> <p>Email: Privacy of natural persons</p>
<b>SIGNATURES</b>	<p><b>SIGNED</b> for an on behalf of the <b>SOVEREIGN IN RIGHT OF NEW ZEALAND</b> by the person named below, being a person duly authorised to enter into obligations on behalf of The Treasury:</p> <p>_____</p> <p>Name: Jon Grayson</p> <p>Position: Deputy Secretary, Financial and Commercial</p> <p>Date:</p>	<p><b>SIGNED</b> for and on behalf of the <b>RECIPIENT</b> by the person named below, being a person duly authorised to enter into obligations on behalf of the Recipient:</p> <p>_____</p> <p>Name:</p> <p>Position:</p> <p>Date:</p>

**PART 2: GENERAL TERMS**

**1 FUNDING**

1.1 The Treasury will make the Funding (up to the “Total Maximum Amount Payable” specified in the Key Details) available to the Recipient as a capital contribution by way of subscription for fully paid shares in the Recipient on the terms of the established share subscription and entitled persons agreement between the Recipient and the Recipient’s shareholding ministers on behalf of the Crown and otherwise subject to the terms of this Agreement.

1.2 Share subscriptions and associated allocations of Funding are expected to be made each Funding Period in accordance with the procedure set out in clause 1.45, against the following indicative annual appropriations for the Project:

FY19	FY20	FY21	Total
Commercial Information	Commercial Information	Commercial Information	40,000,000

1.3 The Recipient must use the Funding for, or ensure the Funding is applied towards, the purposes of the Project as set out in the Key Details and as otherwise described in the business case accompanying KiwiRail’s funding application to the PGF. The Recipient can only request payment of the Funding in accordance with this Agreement and to the extent necessary to cover Eligible Costs.

1.4 Funding for forecast and actual Eligible Costs will be claimed by the Recipient and paid by the Treasury to the Recipient as follows:

(a) By the last calendar day of each Funding Period, the Recipient will submit a Payment Request to the Treasury for the forecast and actual Eligible Costs in the following Funding Period and (if applicable) any adjustment required as a result of the forecast expenditure paid for the previous Funding Period being more or less than the actual expenditure for Eligible Costs (Wash Up). In addition, the Recipient may submit a Payment Request for Eligible Costs outside the usual Funding Period cycle (“**Interim Payment Request**”) where such funding is required to meet an immediate actual or anticipated contractual commitment during the then current Funding Period.

(b) The first Payment Request will include Eligible Costs incurred on and from the Funding Start Date as well as forecast and actual Eligible Costs for the following Funding Period.

(c) For the Payment Request in respect of the final Funding Period prior to completion of the Project, an accounting of the equity injections made to date and those forecast for the final Funding Period against the Total Maximum Amount Payable shall be made, with the purpose of ensuring that at the end of the final Funding Period the total Eligible Costs do not exceed the Total Maximum Amount Payable.

(d) **Commercial Information**  
 Subscription and payment shall be made by not later than:

(i) generally, the 19th calendar day of the next Funding Period, and if such day is not a Business Day, on the preceding Business Day; or

- (ii) in the case of an interim Funding Request only, 20 Working Days following receipt of the Interim Funding Request,  
  
to enable the Recipient to pay expenditure incurred in carrying out the Project as it falls due.
  - (e) The Recipient shall calculate the amount of the Funding Period Wash Up and provide details (including evidence of the actual expenditure incurred) to the Treasury as part of the Payment Request for the following Funding Period.
- 1.5 Each Payment Request is to be signed by an authorised signatory of the Recipient and must be in the form set out in the Schedule and include the confirmations set out there, and must include:
- (a) the amount of Funding requested;
  - (b) a breakdown of total Eligible Costs forecast and incurred by the Recipient and which the requested Funding is to meet and confirmation that such costs are Eligible Costs for the purpose of this Agreement and are currently due and payable or are reasonably expected to become payable within the relevant Funding Period;
  - (c) copies of the share subscription and entitled persons agreement for the share subscription the subject of the Payment Request;
  - (d) if the Payment Request includes a GST component, contain a valid GST invoice complying with the Goods and Services Tax Act 1985; and
  - (e) contain any other information reasonably required by the Treasury.
- 1.6 The Treasury is not required to pay any Funding in respect of a Payment Request:
- (a) to the extent that payment will result in the Funding exceeding the Total Maximum Amount Payable specified in the Key Details;
  - (b) if the information that is contained within, or provided in connection with, the Payment Request does not include the information required under this Agreement (noting that in the context of the Payment Request the Treasury will pay the Recipient for undisputed Eligible Costs that are the subject of the Payment Request but may withhold payment for other Eligible Costs that the Treasury disputes);
  - (c) while there are one or more Termination Event(s);
  - (d) if this Agreement has expired or been terminated;
  - (e) where the Recipient has abandoned the Project, subject to clause 6.5; and/or
  - (f) while the Recipient is in material breach of this Agreement.
- 1.7 Subject to the terms of this Agreement, the Treasury will pay the undisputed portion of each valid Payment Request in accordance with the procedure set out in clause 1.4. If the Treasury disputes any Eligible Costs the subject of the Payment Request the Treasury shall notify the Recipient promptly of that dispute and the reasons for it, but no later than 10 Business Days after receipt of the Payment Request.
- 1.8 Within 20 Business Days following the end of the final Funding Period, KiwiRail will provide the Treasury with a Wash Up detailing any final adjustment required as a result of the Funding drawn

being more or less than the total actual expenditure for Eligible Costs during the term of this Agreement. Following receipt of the Wash Up:

- (a) Where the Funding distributed to date is less than the total Eligible Costs, KiwiRail shall submit a final Payment Request to the Treasury which will be paid in accordance with clause 1.5; or
- (b) Where the Funding distributed to date is greater than the total Eligible Costs, any overpayment will be returned to the Treasury. The parties will consult as to the best way to return the overpayment which may include, without limitation:
  - (i) by way of offset against future KiwiRail capital requirements; or
  - (ii) repayment of capital and cancellation of shares.

1.9 The Funding does not include GST. Where GST is payable on the Funding it will be paid by the Treasury in addition to the Funding following presentation of a valid GST tax invoice for the relevant sum.

## 2 LAND PURCHASING

2.1 The Treasury acknowledges and agrees that, in accordance with the Core Lease, the Recipient may elect that the New Zealand Railways Corporation will act as the purchaser of some or all of the land required for the Project, in which case that land will be added to the Core Lease. In such circumstances the Recipient shall pay the vendor of the land the relevant purchase price, and the Recipient shall procure that the title to the land is acquired from the vendor in the name of the New Zealand Railways Corporation. That purchase price shall still be treated as a forecast Eligible Cost that will be pre-paid by the Treasury to the Recipient in accordance with this Agreement.

2.2 KiwiRail agrees that any land acquired using the Funding shall be held and used only for the development of an intermodal freight hub.

2.3  Commercial Information

## 3 RECIPIENT'S RESPONSIBILITIES

### Standards and compliance with laws

- 3.1 The Recipient will use reasonable endeavours to undertake the Project as described in this Agreement.
- 3.2 In undertaking the Project, the Recipient will comply with all applicable laws, regulations, rules and professional codes of conduct or practice.

### Milestones, Contractors and the Project

- 3.3 The Recipient will use its reasonable endeavours to meet the Milestones and carry out the Project:
  - (a) with due diligence, care and skill, and in a manner that meets or exceeds Best Industry Practice; and
  - (b) utilising appropriately trained, qualified, experienced and supervised persons.



- 3.4 The Recipient will use reasonable endeavours to achieve the Milestones by the relevant “Completion Date” specified in the Key Details, as updated in accordance with the provisions of this Agreement.
- 3.5 The Recipient is responsible for the acts and omissions of any of the Recipient’s contractors in performance of the Project.
- 3.6 The Recipient will ensure (and will procure that any head contractor when engaging with any other contractor ensures) that all agreements it enters into with contractors or any other party in connection with the Project are on an “arm’s length” basis, provide value-for-money and do not give rise to any Conflict of Interest. The Recipient must provide MBIE and/or the Treasury with reasonable evidence of compliance with this clause 3.6 in response to any request from MBIE and/or Treasury from time to time.

#### **Information Undertakings**

- 3.7 The Recipient will provide the Treasury with the reports (if any) specified in the Key Details, in accordance with the timeframes and reporting requirements set out in the Key Details.
- 3.8 The Recipient will provide the Treasury with any other information about the Project requested by the Treasury (acting reasonably) within the timeframe set out in the request.
- 3.9 The Recipient shall promptly notify the Treasury if:
- (a) the Recipient (or any of its personnel or contractors) becomes aware of, or subject to, a Conflict of Interest;
  - (b) the Recipient becomes aware of any matter that could reasonably be expected to have a material adverse effect on the Project, or result in a Termination Event or a breach of any term of this Agreement by the Recipient.
- 3.10 The Recipient will not at any time do anything in respect of the Project that could reasonably be expected to have a material adverse effect on the reputation, good standing or goodwill of the Treasury. The Recipient will keep the Treasury informed of any matter known to the Recipient which could reasonably be expected to have such an effect.

#### **Funding, records and auditors**

- 3.11 The Recipient will receive and manage all Funding in accordance with good financial management and accounting practices and to a high standard that demonstrates appropriate use of public funds.
- 3.12 The Recipient must keep full and accurate records (including accounting records) of the Project, and retain them for at least 7 years after the last payment of Funding under this Agreement. The Recipient must permit the Treasury (or any auditor nominated by the Treasury) to inspect all records relating to the Project and will allow the Treasury and/or the auditor access to the Recipient’s premises, systems and personnel for the purposes of this inspection.

#### **4 PROJECT GOVERNANCE**

- 4.1 At the request of the Treasury, representatives of the parties will meet at least quarterly to discuss:
- (a) the contents of the relevant quarterly reports and any matters arising from those reports;
- and

- (b) any material matters which have arisen in respect of the Project since the delivery of the relevant quarterly reports;
- (c) the key tasks, actions and decisions anticipated for the following quarter; and
- (d) any other material issues in respect of the Project.

4.2 Representatives of the parties will meet within 10 Business Days prior to the end of each Funding Period to review and discuss:

- (a) actual expenditure of Funding during that Funding Period;
- (b) the Funding Request for the immediately following Funding Period; and
- (c) progress to date against the Milestones.

For the avoidance of doubt such meetings may be held concurrently with any meetings requested by the Treasury and/or MBIE under clause 4.1.

## 5 INTELLECTUAL PROPERTY

5.1 The Treasury acknowledges that the Recipient and its licensors will retain ownership of all pre-existing intellectual property which they contribute to the Project, and all new intellectual property which they create in the course of the Project.

## 6 TERM AND TERMINATION

6.1 This Agreement will be effective on and from the Commencement Date and will remain in force until the End Date, unless terminated in accordance with this Agreement (the **Term**).

6.2 The Treasury can terminate this Agreement with immediate effect, by giving notice to the Recipient, at any time while:

- (a) the Recipient is insolvent or bankrupt;
- (b) the Recipient is subject to the appointment of, or a proposal to appoint, a liquidator, receiver, manager or similar person in respect of any material part of its assets;
- (c) the Recipient has ceased to carry on its operations or business (or a material part of them) in New Zealand;
- (d) the entirety of the Recipient's ordinary shares cease to be exclusively owned or controlled by the Crown; or
- (e) any one or more of the follow events or circumstances remains unremedied:
  - (i) the Recipient is in breach of any material obligation, or a condition or warranty, under this Agreement;
  - (ii) the Recipient has abandoned the Project;
  - (iii) the Recipient is involved in any intentional or reckless conduct in connection with the Project which, in the reasonable opinion of the Treasury, has materially damaged or could materially damage the reputation, good standing or goodwill of the

Treasury, another government department or the Crown generally, or is involved in any intentional and material misrepresentation or any fraud in connection with the Project;

- (iv) the Recipient (or any of its personnel or contractors) is subject to a Conflict of Interest which cannot be managed to the Treasury's satisfaction; or
- (v) the Recipient is unable to comply with a material obligation under this Agreement as a result of a Force Majeure Event and that inability to comply continues for more than 40 consecutive Business Days.

6.3 However, where a Termination Event set out in clause 6.2(e) applies, the Treasury will give notice to the Recipient requesting a remedy, and will not exercise its right of termination unless the relevant event remains unremedied for at least 30 Business Days (or any longer period agreed with the Recipient) after that notice has been provided by the Treasury.

6.4 The Treasury may recover Funding from the Recipient as follows:

- (a) **Misspent Funding.** At any time the Treasury may recover the amount of any Funding that has been spent or used other than in accordance with this Agreement, together with interest on all such amounts calculated at <sup>Comm</sup> % per annum from the date of the misspending to the date the money is repaid.
- (b) **Project abandoned.** If the Recipient has abandoned the Project or stated an intention to abandon the Project, and does not within 10 Business Days of being requested to do so by the Treasury demonstrate to the Treasury's satisfaction that the Recipient will proceed with the Project, the Treasury may recover an amount up to the total value of the Funding, provided the Treasury may not recover under this subclause if the Recipient satisfies the Treasury that it acted on reasonable grounds in deciding to abandon the Project or where the Project is abandoned due to a Force Majeure Event. Where any Funding has been applied to the purchase price of land prior to the date of abandonment the Recipient may, with the agreement of the Treasury and subject to any statutory obligations in respect of the land, transfer the relevant land to the Treasury or another department or crown entity in lieu of repayment of the relevant Funding.

6.5 Clauses 1.6, 1.7, 2.2, 3.2, 3.12, 3.11, 5, 6, 7, 9, 10 and 12 survive expiry or termination of this Agreement, along with any other parts of this Agreement necessary to give effect to those provisions. Expiry or termination of this Agreement does not affect any accrued rights, including any rights in respect of a breach of this Agreement or Termination Event that occurred before expiry or termination.

6.6 Notwithstanding the termination of this Agreement for any reason but subject to clause 6.5, the Treasury will pay the Recipient:

- (a) Funding for Eligible Costs incurred on the Project prior to the date of termination;
- (b) Funding for any Eligible Costs (including for land, materials or services) for which the Recipient has entered a binding purchase commitment prior to the date of termination; and
- (c) any other unavoidable Eligible Costs reasonably incurred by the Recipient prior to the date of termination in expectation of completing the Project, so far as such cost is not covered by 6.7(a) or (b) above.

## 7 **FORCE MAJEURE**

- 7.1 Notwithstanding anything else in this Agreement, the Recipient is not liable for any failure or delay in performing, or a breach of, an obligation under this Agreement if the failure, delay or breach arises from a cause reasonably unforeseeable and beyond the control of the Recipient including, without limitation, act of god, earthquakes, landslides, unforeseen ground conditions, floods, storms, fires, adverse weather conditions, derailment, strikes or industrial disturbances, civil commotion, or restrictions by government (“Force Majeure Event”).
- 7.2 If a cause to which clause 7.1 applies arises, the Recipient must upon becoming aware of the cause, notify the Treasury in writing of the nature of, expected duration of, and the obligation affected by, the cause, and the potential response of any of the Recipient’s insurances to that cause. Notwithstanding that any such cause arises, the Recipient must use its reasonable endeavours to:
- (a) mitigate the effects of the cause on the Recipient’s obligations under this Agreement; and
  - (b) progress any valid insurance claim that the Recipient may have in respect of that cause.

## 8 **WARRANTIES**

- 8.1 The Recipient warrants that, in the course of its activities in connection with the Project, it will not infringe any intellectual property or other rights of any third party.
- 8.2 The Recipient warrants that, as at the date of this Agreement:
- (a) the information in the Business Case submitted by the Recipient to the Provincial Growth Fund in respect of the Project was, as at the date of submission, and remains, true and correct in all material respects, does not omit any material matter, and is not likely to mislead or deceive the Treasury as to any material matter, and the Recipient has made or will make the Treasury aware of any material changes to that information which it has become or becomes aware of since the date of submission as soon as reasonably practicable following the Recipient becoming aware of such information;
  - (b) it has disclosed to the Treasury all matters known to the Recipient (relating to Project, the Recipient or its personnel) that could reasonably be expected to have an adverse effect on the reputation, good standing or goodwill of the Treasury; and
  - (c) it is not aware of any material information that has not been disclosed to the Treasury which may, if disclosed, be reasonably expected to materially adversely affect the decision of the Treasury whether to provide the Funding.
- 8.3 The Recipient acknowledges that the Treasury has entered into this Agreement in reliance on these warranties.
- 8.4 The Recipient acknowledges and agrees that neither the Treasury nor MBIE has made any warranty or representation that any funding or financial support is or will be available to the Recipient in respect of the Project other than the Funding. The Recipient must not make any statement or representation to any person (including the media) that the Treasury or MBIE has agreed to provide any funding or financial support to the Project (other than the Total Maximum Amount Payable).

## 9 CONFIDENTIALITY

- 9.1 Any Confidential Information supplied by either party to the other party must not be disclosed by the Recipient to any third party without the prior written consent of the disclosing party, except to the extent:
- (a) required by Law; or
  - (b) necessary to satisfy the requirements of any stock exchange; or
  - (c) necessary to obtain the benefit of, or to carry out obligations under, this Agreement; or
  - (d) that the information is or becomes available in the public domain without breach by a party of its confidentiality obligations under this clause or at Law; or
  - (e) required to enable a party to meet its obligations under any constitutional or parliamentary convention (or other obligation at law) of or in relation to the New Zealand Parliament, the New Zealand House of Representatives or any of its Committees, any Minister of the Crown, or the New Zealand Auditor-General, including any obligations under the "no surprises" policy advised by Ministers of the Crown.
- 9.2 The obligations under this clause are continuing obligations and will survive the termination of this Agreement for a period of 5 years.

## 10 DISPUTES

- 10.1 In the event of any dispute, controversy or claim arising out of or in connection with this Agreement, or in relation to any question regarding its existence, breach, termination or invalidity (in each case, a *Dispute*), either party may give written notice to the other specifying the nature of the Dispute and requesting discussions under this clause 10 (*Dispute Notice*). As soon as reasonably practicable following receipt of a Dispute Notice, the parties will meet (in person, or by audio or video conference) and endeavour to resolve the Dispute by discussion, negotiation and agreement.
- 10.2 A party must not commence any proceedings in connection with a Dispute unless at least 40 days have elapsed since the issue of a corresponding Dispute Notice, and that party has used reasonable endeavours to comply with this clause 10. However, nothing in this clause will prevent either party from seeking urgent interim relief from a court (or other tribunal) of competent jurisdiction.

## 11 CONTACT PERSONS

- 11.1 All matters or enquiries regarding this Agreement will be directed to each party's Contact Person (set out in the Key Details).
- 11.2 Each party may from time to time change the person designated as its Contact Person on 10 Business Days' written notice to the other Party.

## 12 GENERAL

- 12.1 Each notice or other communication given under this Agreement (each a notice) will be in writing and delivered personally or sent by post or email to the address of the relevant party set out in the Key Details or to any other address from time to time designated for that purpose by at least 10 Business Days' prior written notice to the other party. A notice under this Agreement is deemed to be received if:

- (a) **Delivery:** delivered personally, when delivered;
- (b) **Post:** posted, 5 Business Days after posting or, in the case of international post, 7 Business Days after posting; and
- (c) **Email:** sent by email:
  - (i) If sent between the hours of 9am and 5pm (local time) on a Business Day, at the time of transmission; or
  - (ii) If subclause (i) does not apply, at 9am (local time) on the Business Day most immediately after the time of sending,

provided that an email is not deemed received unless (if receipt is disputed) the party giving notice produces a printed copy of the email which evidences that the email was sent to the email address of the party given notice.

- 12.2 Each party agrees to execute and deliver any documents and to do all things as may be required by the other party to obtain the full benefit of this Agreement according to its true intent.
- 12.3 No legal partnership, employer-employee, principal-agent or joint venture relationship is created or evidenced by this Agreement.
- 12.4 This Agreement constitutes the sole and entire understanding with respect to its subject matter and supersedes all prior discussions, representations and understandings, written or oral.
- 12.5 No amendment to this Agreement will be effective unless agreed in writing and signed by both parties.
- 12.6 The Recipient may not assign or transfer any of its contractual rights or obligations under this Agreement, except with the Treasury's prior written approval.
- 12.7 The Treasury may assign or transfer any of its contractual rights or obligations under this Agreement without the Recipient's prior approval. The Treasury may at any time disclose to a proposed assignee or transferee any information which relates to, or was provided in connection with, the Recipient, the Project or this Agreement.
- 12.8 No failure, delay or indulgence by any party in exercising any power or right conferred on that party by this Agreement shall operate as a waiver. A single exercise of any of those powers or rights does not preclude further exercises of those powers or rights or the exercise of any other powers or rights.
- 12.9 The exercise by a party of any express right set out in this Agreement is without prejudice to any other rights, powers or remedies available to a party in contract, at law or in equity, including any rights, powers or remedies which would be available if the express rights were not set out in this Agreement.
- 12.10 This Agreement is not intended to confer any benefit on or create any obligation enforceable at the suit of any person not a party to this Agreement.
- 12.11 Any provision of this Agreement that is invalid or unenforceable will be deemed deleted, and will not affect the other provisions of this Agreement, all of which remain in force to the extent permitted by law, subject to any modifications made necessary by the deletion of the invalid or unenforceable provision.

- 12.12 This Agreement is to be governed by the laws of New Zealand, and the parties submit to the non-exclusive jurisdiction of the courts of New Zealand.
- 12.13 This Agreement may be executed in any number of counterparts (including scanned and emailed copies). So long as each party has received a counterpart signed by each of the other parties, the counterparts together shall constitute a binding and enforceable agreement.

*END OF PART 2*

**PART 3: DEFINITIONS AND CONSTRUCTION****Defined terms**

In this Agreement, unless the context requires otherwise:

*Best Industry Practice* means that degree of skill, care and foresight and operating practice that would reasonably and ordinarily be expected of a skilled and competent supplier of services engaged in the same type of undertaking as that of the Recipient or any contractors (as applicable) under the same or similar circumstances as those contemplated by this Agreement;

*Business Day* means any day other than a Saturday, Sunday or public holiday within the meaning of section 44 of the Holidays Act 2003.

*Commencement Date* has the meaning given in clause 6.1 of Part 2.

*Confidential Information* means any information, documents and communications provided by one party to the other that is either:

- (a) related to the Project; or
- (b) designated by the disclosing party as confidential,

and, without limitation, includes any notes, documents, formula, plans, drawings, designs, models, trade secrets and includes any of the aforesaid which may be oral, written, stored in electronic form, translated from original form, re-compiled, copied, made into a compilation or altered from original form.

*Conflict of Interest* means any matter, circumstance, interest or activity of the Recipient, its personnel or contractors in connection with the Project that might reasonably be expected to substantially erode public confidence in the Project or the role of the Recipient in the delivery of the Project because it:

- (a) conflicts with:
  - (i) the obligations of the Recipient (or its personnel or contractors) to the Treasury under this Agreement; or
  - (ii) the interests of the Recipient in relation to this Agreement and/or the procuring of the Project; or
- (b) otherwise significantly impairs or is reasonably considered to significantly impair the ability of the Recipient (or any of its personnel or contractors) to diligently and independently carry out the Project in accordance with this Agreement.

*Core Lease* means the Variation and Restatement of Lease of the Crown rail estate between the Crown, NZRC and KiwiRail Limited dated 20 February 2013 as varied from time to time.

*Deliverable* means a deliverable to be provided by the Recipient to the Treasury, as set out in the Key Details.

*Eligible Costs* means, in respect of the Project, the forecast and actual costs reasonably incurred by the Recipient:

- (a) on or after the Funding Start Date and no later than the End Date;
- (b) for the purposes of purchasing land or interests in land required for the Project;



- (c) in good faith for the purpose of carrying out the Project or for purposes incidental to the Project, including all internal costs, disbursements and expenses incurred by the Recipient for such purposes (and to the extent the Recipient is carrying out any other activities) reasonably and proportionately allocated towards such purposes;
- (d) to a third party as a result of a breach of the Treasury’s obligations to pay the Funding in accordance with this Agreement and the consequent inability of the Recipient to meet a purchase or payment obligation to that third party; and
- (e) to the extent that the expenditure relates to work performed by parties not at “arm’s length”, that expenditure is assessed at reasonable market value, and contains no unacceptable overhead and no element of “in group profit”,

and for the avoidance of doubt does not include working capital or operational costs (including salaries or staffing costs) of the Recipient except to the extent that these relate to the Project.

*End Date* means the “End Date” specified in the Key Details.

*Force Majeure Event* has the meaning given to that term in clause 7.1 of the General Terms.

*Funding* means the funding or any part of the funding (as the context requires) payable by the Treasury to the Recipient in accordance with the terms of this Agreement, as described in the Key Details.

*Funding Period* means a six-month period commencing on 1 July and 1 January each year.

*Funding Start Date* means the “Funding Start Date” specified in the Key Details.

*Key Details* means Part 1 of this Agreement.

*Payment Request* means a request submitted to the Treasury by the Recipient seeking payment of Funding substantially in the form set out in the Schedule to this Agreement.

*Project* means the “Project” described in the Key Details.

*Recipient* means the Recipient specified in the Key Details.

*Shareholding Ministers* mean the Minister for State Owned Enterprises or the Minister of Finance, and includes any other Minister of the Crown appointed from time to time to hold shares of the Recipient.

*Termination Event* means any one or more of the events or circumstances set out in clause 6.2.

### **Construction**

In the construction of this Agreement, unless the context requires otherwise:

*Currency*: a reference to any monetary amount is to New Zealand currency;

*Defined Terms*: words or phrases appearing in this Agreement with capitalised initial letters are defined terms and have the meanings given to them in this Agreement;

*Documents*: a reference to any document, including this Agreement, includes a reference to that document as amended or replaced from time to time;

*Inclusions*: a reference to “includes” is a reference to “includes without limitation”, and “include”, “included” and “including” have corresponding meanings;

*Joint and Several Liability:* any provision of this Agreement to be performed or observed by two or more persons binds those persons jointly and severally;

*Parties:* a reference to a party to this Agreement or any other document includes that party's personal representatives/successors and permitted assigns;

*Person:* a reference to a person includes a corporation sole and also a body of persons, whether corporate or unincorporated;

*Precedence:* if there is any conflict between the different parts of this Agreement, then unless specifically stated otherwise, Part 2 will prevail over the Key Details, and the Key Details will prevail over any Attachments;

*Related Terms:* where a word or expression is defined in this Agreement, other parts of speech and grammatical forms of that word or expression have corresponding meanings;

*Statutes and Regulations:* a reference to an enactment or any regulations is a reference to that enactment or those regulations as amended, or to any enactment or regulations substituted for that enactment or those regulations;

*Writing:* a reference to "written" or "in writing" includes email and any commonly used electronic document format such as .DOC or .PDF.

*END OF PART 3*

**Schedule: Payment Request**

To: THE TREASURY

Dated: [•]

PAYMENT REQUEST NO. [•]

1. We refer to the Funding Agreement dated [•] and agreement number [•] between [x] as recipient (**Recipient**) and The Treasury (**Treasury**) (the **Agreement**). Terms defined in the Agreement have the same meaning in this Payment Request.
2. This is a Payment Request for the purpose of clause 1.4 of the Agreement.
5. The amount of Funding requested is \$[x] excluding GST if any.
6. The Funding requested in this Payment Request is required to meet the following Eligible Costs that are forecast or have been incurred by us:  
  
*[include breakdown description of Eligible Costs].*
8. Each of the items referred to in paragraph 6 are Eligible Costs for the purpose of the Agreement have been paid or are currently due and payable or are expected to become payable within the Funding Period to which this Payment Request relates.
9. A copy of the share subscription and entitled persons agreement is attached.
10. *[Include valid GST invoice if relevant].*
11. We confirm that no Termination Event is subsisting.

Except to the extent otherwise agreed in writing by the Treasury, all those items forming part of the Eligible Costs identified in the previous Payment Request as due or becoming due and payable, have been paid in full (subject to the terms of any retentions as agreed between the Recipient and a Contractor).

By and on behalf of the Recipient by

*[insert name of Recipient]*

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Authorised Officer