



PROVINCIAL  
DEVELOPMENT  
UNIT

New Zealand Government

# **FUNDING AGREEMENT**

BETWEEN

**MINISTRY OF BUSINESS,  
INNOVATION AND EMPLOYMENT**

AND

**KIWIRAIL HOLDINGS LIMITED**

FOR

**KIWIRAIL DUNEDIN HILLSIDE WORKSHOPS**

PROACTIVELY RELEASED

**AGREEMENT**

The parties (identified below in Part 1) agree to be bound by the terms and conditions of this Agreement, as set out below in Part 1 (Key Details), Part 2 (General Terms), Part 3 (Definitions and Construction) and the Schedule (Payment Request).

**PART 1: KEY DETAILS**

- 1 **Parties**

The Sovereign in right of New Zealand, acting by and through the Chief Executive of the Ministry of Business, Innovation and Employment (**Ministry**)

Kiwirail Holdings Limited, company number 487638, with registered offices at Level 3, 8 - 14 Stanley Street, Parnell, Auckland (**KiwiRail or Recipient**)
- 2 **Funding Start Date**

Commencement Date
- 3 **End Date**

Commercial Information
- 4 **Background**

Through the Provincial Development Unit, the Ministry is responsible for administering the Provincial Growth Fund, which aims to lift productivity potential in New Zealand’s provinces. Its priorities are to enhance economic development opportunities, create sustainable jobs, enable Māori to reach full potential, boost social inclusion and participation, build resilient communities, and help meet New Zealand’s climate change targets.

KiwiRail is a State Enterprise under the State-Owned Enterprise Act 1986. It is responsible for rail operations in New Zealand.

The Recipient has sought a funding contribution from the Ministry for the purposes of the Project described below. The Ministry has agreed to contribute funding on the terms and conditions of this Agreement (**Agreement**).

Key details of this Agreement are set out in this **Part 1**. The full terms and conditions are set out in **Part 2**. Defined terms and rules of interpretation are set out in **Part 3**.
- 5 **Conditions Precedent**

No Funding is payable under this Agreement until the Ministry has confirmed to the Recipient in writing that it has received, and found, in its sole discretion, to be satisfactory to it in form and substance, the following documents and evidence:

  - Financial information - a full scope of work and budget setting out the proposed application of funds in relation to the Project, including all fees, costs and expenses (including taxes) in connection with the same.

These conditions precedent must be satisfied within a <sup>Commercial Information</sup> period from the date of signing, unless agreed otherwise in writing with the Ministry. In the event that they are not satisfied within that time, the Ministry may notify the Recipient that this Agreement has not come into effect and is null and void.
- 6 **Project Description**

KiwiRail Dunedin Hillside Workshops is currently the only operational heavy-engineering rail workshop in the South Island. The Funding provided under this Agreement will enable the re-use of the larger Heavy Lift building providing additional capacity for increased workloads, contribute to rolling-stock resilience, improved land optimisation, support Maori prosperity, unlock niche high-value engineering job opportunities in the

region and provide opportunities for other development on the remainder of the site.

PGF investment for the Project will be specifically used for two phases of the Project which includes:

1. Demolition of the existing unoccupied building(s) and infrastructure located at 200 Hillside Road including buildings Commercial Information. Some or all of buildings Commercial Information may also be demolished as part of the Project, subject to funding.
2. Commercial Information following demolition and within assets 1812 and 1813.
3. Workshop upgrades to Buildings 1812 and 1813 including:
  - i. re-cladding;
  - ii. separation, upgrade and installation of site power supplies and fire protection;
  - iii. upgrading infrastructure to current seismic standards;
  - iv. remediate sinking floors and lay foundations;
  - v. upgrade and reconfigure adjacent rail track;
  - vi. creation of pedestal roads; and
  - vii. creation of shunt servicing facilities.
4. Essential interior upgrades:
  - i. overhaul of the heavy lift crane;
  - ii. overhaul of the traverser; and
  - iii. development of offices for Rolling Stock and Network Servicing teams, including affiliated carparking.

A pictorial outlining the footprint of the KiwiRail Dunedin Hillside Workshop is attached at Annex One.

Expected outcomes of the project which align with the PGF objectives:

• **Provincial Growth Fund Tier 1 alignment – Capability Building**

1. Upgraded, safe site complements apprenticeships and work experience programmes.
2. Students more inclined to train in the sector and remain in the region if industry invests in a long-term commitment.
3. An upgraded site will attract experienced workers, encouraging valuable knowledge transfer.
4. Investment would unlock construction and engineering opportunities both at Hillside, Commercial Information and indirectly – relocating businesses to a service sector.

• **Provincial Growth Fund Tier 2 alignment – Economic Opportunities**

5. Investment in the Project will unlock work opportunities directly and indirectly through construction, upon operation and via supply chain impacts.
6. Upgraded workshops and site optimisation will be a catalyst for short, medium, and long term work in the industrial sector.
7. The Project will seek experienced industry talent as demands grow, ensuring skills are transferred.

• **Provincial Growth Fund Tier 3 alignment – Enabling Infrastructure**

1. Supports essential South Island rolling stock servicing.
  2. Rail supports New Zealand wide zero-carbon goals.
  3. Rail contributes to sustainability goals and reducing road congestion.
  4. Better use of site space, opening opportunities for aligned industries Commercial Information.
  5. An upgraded site will improve site attractiveness, capacity levels and value.
- **Within Commercial Information of completion of the Project the expected benefits will be:**
    1. The current KiwiRail Dunedin Hillside site workforce will increase from the current Commercial Information full time employees to Commercial Information full time employees Commercial Information. This is a mixture of labour across a range of rail related industries and also includes apprentices.
    2. With increased headcount, there will be the re-instatement of afternoon shifts, reducing the out of service locomotives at any time by between Commercial Information%. Allowing both buildings to be used will also increase capacity, reduce lead times for servicing and increase productivity of staff.
    3. There is an increased need for servicing due to increased freight in the South Island.
  - **Within Commercial Information of completion of the Project the expected benefits will be:**
    1. With both buildings online and working to capacity there will be an additional increase of a further Commercial Information full time employees taking the total workforce at Dunedin Hillside to approximately Commercial Information plus those Commercial Information.
    2. Improved heavy Engineering capacity to service future rolling stock refurbish and rebuild programs for KiwiRail and third-party rail operators.
    3. One additional locomotive will be available to Hillside for servicing equating to increased revenue of \$ Commercial Information per annum.
    4. Both refurbished buildings will be used for further refurbishment and re-fabrication of tourist carriages. It is expected that supporting businesses such as cabinet making, furniture manufacture, plumbing, air conditioning will be established in the area to support this work.
  - **Within Commercial Information of completion of the Project the expected benefits will be:**
    1. A sustained workforce of Commercial Information staff.
    2. Development of a heavy engineering hub on the remaining vacant land will allow for the establishment of other supporting businesses which will have the ability to relocate to Hillside in newly developed buildings.

The total minimum number of jobs to be created from this Project is as follows:

Timeframe	New Job Numbers*	Total job numbers*
Within <sup>Commercial Information</sup> of completion of the Project	Comme	Comme
Within <sup>Commercial Information</sup> of completion of the Project	Comme	Comme
Within <sup>Commercial Informatio</sup> of completion of the Project	Commerc	Commercial I

\* <sup>Commercial Information</sup>

## 7 Project Deliverables and Instalments

The Recipient is to complete the following Project Deliverables for the Project to the satisfaction of the Ministry by the following dates :

Completion Date	Project Deliverable	Instalment payable on completion of Project Deliverable plus GST (if any)
Commence ment Date	Funding Agreement executed by both parties and all Conditions Precedent have been satisfied or waived.	up to \$ <sup>Commercial Information</sup>
<sup>Commercial Information</sup>	<b>Phase 1 preparation including:</b> - Demolition of end of life/unoccupied buildings <sup>Commercial Informat</sup> - Commercial Information	\$ <sup>Commercial Information</sup>
<sup>Commercial Information</sup>	<b>Phase 2 construction works Workshop Upgrade (1812) including:</b> - Services (power, fire and Plumbing) installation stage one. - Demolition of amenity block stage one complete. Copy of all necessary Authorisations for Phase 2 construction works provided	\$ <sup>Commercial Information</sup>
<sup>Commercial Information</sup>	<b>Phase 2 construction works Workshop Upgrade (1812) including:</b> - Services (power, fire and Plumbing) installation stage two. - External works commence.	up to \$ <sup>Commercial Information</sup>

	<ul style="list-style-type: none"> <li>- Demolition of amenity block stage two.</li> <li>- Construction of new amenity block stage one.</li> <li>- Internal works commence.</li> </ul> <p><b>Phase 2 construction works Workshop Upgrade (1813) including:</b></p> <ul style="list-style-type: none"> <li>- Services (power, fire and Plumbing) installation stage one.</li> <li>- External works commence.</li> </ul> <p><b>Phase 2 construction works - Mechanical Upgrade including:</b></p> <ul style="list-style-type: none"> <li>- Overhauls of heavy lift cranes stage one.</li> <li>- Overhauls of traverser.</li> </ul> <p>Independent assurance report on delivery of the Project provided by the Quantity Surveyor or Engineer to the Project to the Ministry. Report to include confirmation on progress and costs incurred. Report must be satisfactory to the Ministry in form and content.</p>	
<p>Commercial Information</p>	<p><b>Phase 2 construction works Workshop upgrade (1812) including:</b></p> <ul style="list-style-type: none"> <li>- Construction of new amenities stage two.</li> </ul> <p><b>Phase 2 construction works Workshop Upgrade (1813) including:</b></p> <ul style="list-style-type: none"> <li>- Services (power, fire and Plumbing) installation stage two.</li> <li>- External works stage two.</li> <li>- Internal works.</li> </ul> <p><b>Phase 2 construction works Mechanical Upgrade including:</b></p> <ul style="list-style-type: none"> <li>- Overhauls of heavy lift cranes stage two.</li> </ul> <p>Independent assurance report on delivery of the Project provided by the Quantity Surveyor or Engineer to the Project to the Ministry. Report to include confirmation on progress and costs incurred. Report must be satisfactory to the Ministry in form and content.</p>	<p>up to \$ Commercial Information</p>

Key Personnel	Respective Roles
Stephanie Campbell	Project Sponsor - KiwiRail
Olivia Poulsen	Project Director - Kiwirail

9 **Approved Contractors** As approved in writing by the Ministry.

10 **Funding** The total Funding available under this Agreement is up to **NZ\$19,970,000.00** plus GST (if any). This is the Total Maximum Amount Payable.

The Funding will be paid in instalments on satisfactory completion of the relevant Project Deliverable; receipt of a Payment Request in accordance with clause 1 of Part 2 and the terms and conditions of this Agreement.

11 **Reporting** The Recipient will provide the Ministry with the following reports:

1. A Monthly report by the 10th Business Day following the end of each Month and within 20 Business Days of completion of the Project.
2. A Post Contract Outcomes Report at 12 months after the End Date.

In addition a representative of the Provincial Development Unit will have a place on and receive reporting in conjunction with the Recipient's Programme Governance Board.

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

- (a) description and analysis of actual progress of the Project against planned progress including achievement of any Project Deliverables;
- (b) total number of jobs created at the time of the submission of the monthly report; these must be broken down into:
  - (c) Full-Time
  - (d) Part-Time
- (e) and state if the roles are either consultants, contractors or permanent.
- (f) a summary of Funding and any co-funding received for the Project;
- (g) a summary of expenditure to date, actual against budgeted;
- (h) plans for the next month;
- (i) any risks and/or issues arising or expected to arise with the Project, costs or performance of this Agreement including detail of any issues notified to the Ministry in accordance with clause 2.11 of Part 2;
- (j) an update on media, marketing and communication activities for the Project; and
- (k) any other information that is notified by the Ministry in writing to the Recipient.

**The Post Contract Outcome** report must include the following information:

- (a) an analysis of how the Funding has enabled the Recipient to achieve the key outcomes of the Project;
- (b) how the Funding has accelerated regional development through increasing the productivity potential of and contributing to more

- and better paid jobs in the region;
- (c) the number of jobs that have been created resulting from the Project;
  - (d) how the Project has increased social inclusion and participation;
  - (e) how the Project has contributed to Māori development;
  - (f) how the Project has contributed to New Zealand's climate change commitments and environmental sustainability;
  - (g) how the Project has increased regional and national resilience by improving critical infrastructure and/or growth and diversification of the economy; and
  - (h) any other information that is notified by the Ministry in writing to the Recipient.

The Recipient acknowledges that the Ministry is developing an evaluation framework for the Provincial Growth Fund and the Recipient is likely to receive requests for additional information from the Ministry.

## 12 Insurance

Refer to Part 2, section 2.15, and:

Prior to commencement of construction of the Project the Recipient must ensure that at all times insurances are maintained in full force and effect, which:

- a) insure in respect of its interests in all buildings, plant and equipment on the property (including fixtures and improvements) on an indemnity basis (Unless otherwise notified to the Ministry) and to:
  - i) provide customary cover against loss or damage, including by fire, storm, tempest, flood, earthquake, lightning, explosion, impact, aircraft and other aerial devices and articles dropped from them, riot, civil commotion and malicious damage, bursting or overflowing of water tanks, apparatus or pipes and all other normally insurable risks of loss or damage;
  - ii) provide for contractor's all risks insurance covering contractors and sub-contractors on terms consistent with KiwiRail's annual contract works insurance policy; and
- b) include public liability and third party liability insurance.

## 13 Special Terms

1. Upon completion of the Project, KiwiRail will ensure the maintenance of and maintain the buildings at 200 Hillside Road and related facilities and all related assets out of its standard overall operating budget and in accordance with best industry practice, in any way necessary to be maintained in:
  - a. good and substantial repair and condition and, as appropriate, in good working order having regard to their condition at the completion of the Project; and
  - b. such repair, condition and order as to enable them to be used in accordance with all applicable laws and regulations.
2. The Recipient must notify the Ministry in advance of any decision to sell, lease (other than in the ordinary course of business) dispose, transfer, assign or cease to legally and beneficially own the Project



and related property provided that any obligation on the Recipient in this regard shall terminate 10 years after the End Date

**14 Contact Person**

Ministry's Contact Person:

Name: Manager - Regional Development Central/South

Email: [pgf@mbie.govt.nz](mailto:pgf@mbie.govt.nz)

Contract ID: Confidential

Provincial Development Unit's Contact Person:

Name: Mark Patterson

Email: [mark.patterson2@mbie.govt.nz](mailto:mark.patterson2@mbie.govt.nz)

Recipient's Contact Person:

Name: David Gordon

Email: Privacy of natural persons

**15 Address for Notices**

To the Ministry:

15 Stout Street,

PO Box 1473

Wellington 6140

Attention: Provincial Development Unit

Email: [monitorpgf@mbie.govt.nz](mailto:monitorpgf@mbie.govt.nz)

To the Recipient:

KiwiRail Holdings Limited

Level 3, 8 - 14 Stanley Street, Parnell, Auckland Attention: David Gordon

Email Commercial Information

**SIGNATURES**

**SIGNED** by the **SOVEREIGN IN RIGHT OF NEW ZEALAND** acting by and through the Chief Executive of the Ministry of Business, Innovation and Employment or his or her authorised delegate:

**SIGNED** for and on behalf of the **KIWIRAIL HOLDINGS LIMITED** by the person named below, being a person duly authorised to enter into obligations on behalf of the Recipient:

\_\_\_\_\_  
Name:

Position:

Date:

\_\_\_\_\_  
Name:

Position:

Date:

\_\_\_\_\_  
Name:

Position:

Date:

*Each signatory warrants that the persons signing on behalf of the Recipient have the necessary authority to execute this Agreement on behalf of the Recipient.*

END OF PART 1

## PART 2: GENERAL TERMS

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### 1 FUNDING

- 1.1 The Ministry must pay the Funding (up to the "Total Maximum Amount Payable" specified in the Key Details) to the Recipient, subject to the terms of this Agreement. Unless stated otherwise in this Agreement, the Recipient may only claim the Funding to the extent necessary to cover Eligible Costs incurred by the Recipient. If the Recipient receives any Funding before it has incurred corresponding Eligible Costs, the Recipient must use the Funding solely on Eligible Costs.
- 1.2 On completion of a Project Deliverable, the Recipient must submit a Payment Request to [monitorpgf@mbie.govt.nz](mailto:monitorpgf@mbie.govt.nz) and copying in Ministry's Contact Person in accordance with item 7 (Project Deliverables and Instalments) of the Key Details.
- 1.3 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 therein, and must include:
- (a) the amount of Funding requested, which must not exceed the Instalment set out in item 7 of the Key Details;
  - (b) a breakdown of total Eligible Costs incurred by the Recipient and confirmation that such costs are Eligible Costs for the purpose of this Agreement and have been paid or are currently due and payable or will become payable within 30 days of the date of the Payment Request (not required for any initial payment to be paid on the Commencement Date);
  - (c) copies of invoices received by the Recipient from third parties in relation to the Eligible Costs where those Eligible Costs are more than \$1,000 (on an individual basis or when grouped by supplier or subject matter) and statements and accounts showing the Eligible Costs incurred;
  - (d) a valid GST invoice complying with the Goods and Services Tax Act 1985;
  - (e) contain any other information reasonably required by the Ministry.
- 1.4 The Ministry is not required to pay any Funding in respect of a Payment Request:
- (a) if any Project Deliverable(s) have not been completed by the relevant "Completion Date" specified in the Key Details;
  - (b) if the information that is contained within, or provided in connection with, the reports or the Payment Request does not include all information required pursuant to this Agreement;
  - (c) if payment will result in the Funding exceeding the "Total Maximum Amount Payable" ;
  - (d) while there are one or more Termination Event(s);
  - (e) if this Agreement has expired or been terminated; and/or
  - (f) while the Recipient is in material breach of this Agreement.

- 1.5 Subject to the terms of this Agreement, the Ministry must pay each valid Payment Request by no later than the 20th day of the month after the month the Payment Request is dated, and if such day is not a Business Day, on the next Business Day.

## 2 RECIPIENT'S RESPONSIBILITIES

### Standards and compliance with laws

- 2.1 The Recipient must undertake the Project as described in this Agreement.
- 2.2 In undertaking the Project, the Recipient must comply with all applicable laws, regulations, rules and professional codes of conduct or practice.

### Project Deliverables, Key Personnel, Contractors and the Project

- 2.3 The Recipient must ensure that the Project Deliverables and the Project are carried out:
- (a) promptly with due diligence, care and skill, and in a manner that meets or exceeds Best Industry Practice; and
  - (b) by appropriately trained, qualified, experienced and supervised persons.
- 2.4 The Recipient must ensure that the Project Deliverables are completed by the relevant "Completion Date" specified in the Key Details.
- 2.5 The Recipient must ensure that the Key Personnel undertake their respective roles in connection with the Project as specified in the Key Details, except as otherwise approved in writing by the Ministry. If any Key Personnel become unavailable to perform their role, the Recipient must promptly arrange replacement Key Personnel and advise the Ministry of such change.
- 2.6 The Recipient may contract the delivery of the Project or any of its obligations under this Agreement provided that it notifies the Ministry in advance where the subcontract is for more than \$100,000.
- 2.7 The Recipient is responsible for the acts and omissions of any of the Recipient's contractors in performance of this Project.
- 2.8 The Recipient must ensure (and must procure that the 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 the Ministry with reasonable evidence of compliance with this clause 2.8 in response to any request by the Ministry from time to time.

### Information Undertakings

- 2.9 The Recipient must provide the Ministry with the reports (if any) specified in the Key Details, in accordance with the timeframes and reporting requirements set out in the Key Details.
- 2.10 The Recipient must provide the Ministry with any other information about the Project requested by the Ministry (acting reasonably) within the timeframe set out in the request.

- 2.11 The Recipient must promptly notify the Ministry 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 an adverse effect on the Project, or result in a Termination Event or a breach of any term of this Agreement by the Recipient.
- 2.12 The Recipient must not at any time do anything that could reasonably be expected to have an adverse effect on the reputation, good standing or goodwill of the Ministry. The Recipient must keep the Ministry informed of any matter known to the Recipient which could reasonably be expected to have such an effect.

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

- 2.13 The Recipient must 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.
- 2.14 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 Ministry (or any auditor nominated by the Ministry) to inspect all records relating to the Project and must allow the Ministry and/or the auditor access to the Recipient's premises, systems and personnel for the purposes of this inspection.

#### **Insurance**

- 2.15 The Recipient must effect and maintain insurance as specified in the Key Details. The Recipient must, on request, provide the Ministry with evidence of its insurance cover required under this clause.

#### **Health and Safety**

- 2.16 Without limiting its other obligations under this Agreement, the Recipient must:
- (a) consult, cooperate and coordinate with the Ministry to the extent required by the Ministry to ensure that the Ministry can comply with their obligations under the Health and Safety at Work Act 2015 as they relate to this Agreement and the Project;
  - (b) perform its, and ensure that the contractors perform their, obligations under this Agreement and the Project (as applicable) in compliance with its and their obligations under the Health and Safety at Work Act 2015;
  - (c) comply with all directions of the Ministry relating to health, safety, and security; and
  - (d) report any health and safety incident, injury or near miss, or any notice issued under the Health and Safety at Work Act 2015, to the Ministry to the extent that it relates to, or affects, this Agreement or the Project.

### 3 INTELLECTUAL PROPERTY

- 3.1 The Ministry acknowledges that the Recipient and its licensors own 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. The Recipient acknowledges that the Ministry shall have the right to use and rely on all reports provided to the Ministry in the course of the Project.

### 4 TERM AND TERMINATION

- 4.1 This Agreement will be effective on and from the Commencement Date, which will be the latest to occur of:
- (a) the date this Agreement has been signed by both parties and
  - (b) the date on which the Ministry has provided written notice to the Recipient that the Conditions Precedent specified in the Key Details, if any, have either been satisfied (in the opinion of the Ministry) or waived by the Ministry.
- 4.2 This Agreement will remain in force until the End Date, unless terminated in accordance with this Agreement (the **Term**).
- 4.3 The Ministry can terminate this Agreement with immediate effect, by giving notice to the Recipient, at any time while:
- (a) the Recipient has become insolvent or bankrupt;
  - (b) the Recipient is subject to the appointment of 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 owned or controlled by the Crown; or
  - (e) any one or more of the follow events or circumstances remains unremedied:
    - (i) the Recipient is materially in breach of any obligation, or a condition or warranty, under this Agreement;
    - (ii) the Recipient abandons the Project;
    - (iii) the Recipient has provided the Ministry with information in connection with or under this Agreement that (whether intentionally or not) is materially incorrect or misleading, and/or omits material information;
    - (iv) the Ministry reasonably considers that this Agreement or the Project has caused, or may cause, the Ministry and/or the New Zealand Government to breach any legal obligations (including its international trade obligations);
    - (v) the Recipient is involved in any intentional or reckless conduct in connection with the Project which, in the reaosnable opinion of the Ministry, has damaged or could damage the reputation, good standing or goodwill of the Ministry, or is involved in any material misrepresentation or any fraud in connection with the Project;

- (vi) the Recipient (or any of its personnel or contractors) is subject to a Conflict of Interest which cannot be managed to the Ministry's satisfaction;
- (vii) any change in law, regulations, government policy or other circumstances materially affects the Ministry's ability to perform its obligations under this Agreement.

4.4 However, where the Ministry considers that a Termination Event set out in clause 4.3(e) can be remedied, the Ministry must give notice to the Recipient requesting a remedy, and must 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 Ministry.

4.5 The Ministry may recover Funding from the Recipient as follows:

- (a) **Misspent Funding.** At any time the Ministry 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 10% per annum from the date of the misspending to the date the money is repaid.
- (b) **Uncommitted Funding.** On expiry or termination of this Agreement, the Ministry may recover any Funding paid to the Recipient, which the Recipient:
  - (i) has not spent or contractually committed to spend in accordance with this Agreement; or
  - (ii) has spent or contractually committed to spend in accordance with this Agreement but which the Recipient can have refunded or released from that commitment, provided the Recipient must use all reasonable endeavours to obtain such refund or release.
- (c) **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 Ministry demonstrate to the Ministry's satisfaction that the Recipient will proceed with the Project, the Ministry may recover an amount up to the total value of the Funding, provided the Ministry may not recover under this subclause if the Recipient satisfies the Ministry that it acted on reasonable grounds in deciding to abandon the Project or where the Project is abandoned due to a Force Majeure Event.
- (d) **Excess Funding.** On expiry or termination of this Agreement, where the total Funding paid under this Agreement and any other money received by the Recipient to carry out the Project exceeds the funding required to perform the Project, the Recipient must upon request refund to the Ministry the excess amount. The Recipient is not required to refund, under this clause 4.5(d), any amount that exceeds the total amount of Funding.

4.6 Item 14 (Special Terms) of Part 1 and Clauses 1.4, 2.1, 2.13, 2.14, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of Part 2 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.

5 **FORCE MAJEURE**

- 5.1 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**").
- 5.2 If a cause to which clause 5.1 applies arises, the Recipient must upon becoming aware of the cause, notify the Ministry 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.

6 **WARRANTIES**

- 6.1 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.
- 6.2 The Recipient warrants that, as at the date of this Agreement:
- (a) It has full power and authority to enter into and perform its obligations under this Agreement which, when executed, will constitute binding obligations on it in accordance with this Agreement's terms;
  - (b) all information and representations disclosed or made to the Ministry by the Recipient in connection with this Agreement are true and correct, do not omit any material matter, and are not likely to mislead or deceive the Ministry as to any material matter;
  - (c) it has disclosed to the Ministry all matters known to the Recipient (relating to Project, the Recipient, its contractors or its personnel) that could reasonably be expected to have an adverse effect on the reputation, good standing or goodwill of the Ministry; and
  - (d) it is not aware of any material information that has not been disclosed to the Ministry which may, if disclosed, be reasonably expected to materially adversely affect the decision of the Ministry whether to provide the Funding.
- 6.3 The Recipient acknowledges that the Ministry has entered into this Agreement in reliance on these warranties.
- 6.4 The Recipient acknowledges and agrees that the Ministry has made no 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.



## 7 LIABILITY

- 7.1 The maximum liability of the Ministry under or in connection with this Agreement, whether arising in contract, tort (including negligence) or otherwise, is limited to the total amount of Funding paid or payable under this Agreement except where, and to the extent that, the Recipient has incurred additional costs as a result of the Ministry's breach of this Agreement. The maximum liability of the Recipient under or in connection with this Agreement, whether arising in contract, tort (including negligence) or otherwise, is limited to the aggregate of: (i) the total amount of Funding paid or payable under this Agreement; and (ii) the amount of any interest payable under clause 5.5(a) of the General Terms;
- 7.2 Neither party is liable for any claim under or in connection with this Agreement, whether arising in contract, tort (including negligence) or otherwise, where such claim is or relates to any loss of profit, loss of revenue, loss of use, loss of reputation, loss of goodwill, loss of opportunity (in each case whether direct, indirect or consequential) or any other indirect, consequential or incidental loss or damages of any kind whatsoever.

## 8 CONFIDENTIALITY

- 8.1 Subject to clause 8.3, each party must keep the other party's Confidential Information in confidence, and must use or disclose that Confidential Information only to the extent necessary to perform its obligations, and/or take the intended benefit of its rights, under this Agreement. However, this will not prohibit:
- (a) either party from using or disclosing any information with the written prior consent of the other party;
  - (b) use or disclosure of information that has become generally known to the public other than through a breach of this Agreement;
  - (c) either party from disclosing information to its personnel or contractors with a need to know, so long as the relevant personnel and contractors use the information solely to enable that party to perform its obligations and/or take the intended benefit of its rights under this Agreement, and so long as they are informed of the confidential nature of the information and in the case of the Recipient, the Recipient receives an acknowledgement from its personnel or contractors that they acknowledge, and must comply with, the confidentiality obligations in this Agreement as if they were party to it;
  - (d) disclosure required by any law, or any compulsory order or requirement issued pursuant to any law;
  - (e) disclosure 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.



8.2 Each party may publicise and report on the awarding of the Funding, including the Recipient's and any of its contractor's names, the amount and duration of the Funding and a brief description of the Project, on websites; in media releases; general announcements and annual reports.

8.3 Each party acknowledges that:

- (a) the contents of this Agreement; and
- (b) information provided to the Ministry

may be official information in terms of the Official Information Act 1982 and, in line with the purpose and principles of the Official Information Act 1982, this Agreement and such information may be released to the public unless there is good reason, in terms of the Official Information Act 1982 to withhold it.

## 9 MEDIA AND COMMUNICATIONS

9.1 Before making any media statements or press releases (including social media posts) regarding this Agreement and/or the Ministry's involvement with the Project, the Recipient will consult with the Ministry..

9.2 The Recipient will acknowledge the Ministry as a source of funding in all publications (including any digital presence) and publicity regarding the Project in accordance with the PGF Funding Acknowledgement Guidelines on the website:  
[www.growregions.govt.nz](http://www.growregions.govt.nz).

9.3 If requested by the Ministry, the Recipient will establish or erect temporary and/or permanent signage (which may be in the form of a plaque) at the site of the Project acknowledging the Ministry as a source of funding for the Project. The Ministry may provide such signage and the Ministry will consult with the Recipient in respect of a suitable location for such signage.

9.4 The Recipient does not have the right to enter into any commitment, contract or agreement on behalf of the Ministry or any associated body, or to make any public statement or comment on behalf of the Ministry.

9.5 All correspondence with the Ministry under this clause 9 must be directed to the Ministry's Contact Person and copied to [pducomms@mbie.govt.nz](mailto:pducomms@mbie.govt.nz).

## 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. As soon as reasonably practicable following receipt of a Dispute Notice, the parties must 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 must 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) must 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 The Recipient agrees to execute and deliver any documents and to do all things as may be required by the Ministry 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 the subject matter hereof 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 Ministry's prior written approval.
- 12.7 The Ministry may assign or transfer any of its contractual rights or obligations under this Agreement without the Recipient's prior approval. The Ministry may at any time disclose to a proposed assignee or transferee any information which relates to, or was provided in connection with, 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

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#### Defined terms

In this Agreement, unless the context requires otherwise:

*Agreement* means this agreement including Parts 1, 2 and 3 and Schedule 1 (and any other annexures or attachments).

*Approved Contractor* means an “Approved Contractor” specified in the Key Details.

*Authorisation* is defined as any consent, authorisation, registration, certificate, licence, permission approval, authority, exemption or waiver required from, by, or with a governmental agency of require by law, including any consent under the Resource Management Act 1991.

*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 4.1 of Part 2.

*Completion Date* is the date that the relevant Project Deliverable is to be completed by the Recipient, described in the Key Details, and includes any amendment to the date which may be agreed in writing (including by email but only when the Ministry’s Contact Person expressly confirms in writing that they have received approval of the change from the correct Ministry delegation holder) between the parties from time to time, both acting reasonably.

*Confidential Information* of a party (Owner), means any information in the possession or control of another party (Holder) that:

- (a) was originally acquired by the Holder in connection with this Agreement through disclosures made by or at the request of the Owner; and/or
- (b) was originally acquired by the Holder in connection with this Agreement through any access to, or viewing, inspection or evaluation of, the premises, facilities, documents, systems or other assets owned or controlled by the Owner; and/or
- (c) is derived from information of a kind described in paragraph (a) or (b) above; but excludes any information which the Holder can show:
- (d) was lawfully acquired by the Holder, entirely independently of its activities in connection with this Agreement, and is free of any other obligation of confidence owed to the Owner; and/or
- (e) has been independently developed by the Holder without reference to the Owner’s Confidential Information, and without breaching any other obligation of confidence owed to the Owner.

Notwithstanding the foregoing, the terms of this Agreement are Confidential Information of which each Party is both an Owner and a Holder.

*Conflict of Interest* means any matter, circumstance, interest or activity of the Recipient, its personnel or contractors, or any other person with whom the Recipient has a relationship that:

- (a) conflicts with:
  - (i) the obligations of the Recipient (or its personnel or contractors) to the Ministry 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 impairs or might appear to 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.

*Eligible Costs* means the actual costs reasonably incurred by the Recipient:

- (a) on or after the Funding Start Date and no later than the End Date;
- (b) 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; and
- (c) 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".

*End Date* means the "End Date" specified in the Key Details

*Force Majeure Event* has the meaning given to it in clause 5.1 of the General Terms.

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

*Funding Start Date* means the "Funding Start Date" specified in the Key Details.

*Key Details* means Part 1 of this Agreement.

*Key Personnel* means the "Key Personnel" specified in the Key Details.

*Payment Request* means a request submitted to the Ministry 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.

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

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

*Termination Event* means any one or more of the events or circumstances set out in clause 4.3.

### **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 unincorporate;

*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.

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END OF PART 3

PROACTIVELY RELEASED

## SCHEDULE: PAYMENT REQUEST

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To: MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT

Dated: [•]

PAYMENT REQUEST NO. [•]

1. We refer to the Funding Agreement dated [•] between [•] as recipient (**Recipient**) and The Sovereign in right of New Zealand, acting by and through the Chief Executive of the Ministry of Business, Innovation and Employment (**Ministry**) (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 1.3 of the Agreement.
3. The Project Deliverables which are the subject of this Payment Request are  
*[insert description of Project Deliverables]*.
4. The amount of Funding requested is \$[•] plus GST if any.
5. The Funding requested in this Payment Request is required to meet the Eligible Costs.
6. Invoices/statements and accounts evidencing the Eligible Costs incurred are attached.
7. That each of the items referred to in paragraph 5 are Eligible Costs for the purpose of the Agreement have been paid or are currently due and payable.
8. We confirm that:
  - (a) no Termination Event is subsisting; and

Except to the extent otherwise agreed in writing by the Ministry, all those items forming part of the Eligible Costs identified in any 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

Kiwirail Limited

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Authorised Officer

**Annex One – KiwiRail Dunedin Hillside layout**

Commercial Information

PROACTIVELY RELEASED



**Planned redevelopment**

Commercial Information

PROACTIVELY RELEASED