

**Appendix H – Deed of Novation**

Contract for *[Contract Name & Contract Number]*

**THIS DEED** is made on ..... (*‘the Effective Date’*)

**BY** ..... (*‘the Client’*)

..... (*‘the Contractor’*)

..... (*‘the Consultant’*)

**IT IS MADE IN THE FOLLOWING CIRCUMSTANCES**

- A. The Client and the Consultant are parties to the agreement entered into on ..... , a copy of which is attached and marked ‘A’ (*‘the Agreement’*).
- B. With effect on and from the Effective Date, the Client wishes to:
  - (i) Transfer all of its rights and obligations under the Agreement to the Contractor; and
  - (ii) Be released from its obligations under the Agreement.
- C. With effect on and from the Effective Date, the Contractor wishes to accept the transfer of all the Client’s rights and obligations under the Agreement.

**THE PARTIES AGREE**

- 1. **THIS** deed shall take effect on and from the date of its execution (*‘the Effective Date’*).
- 2. **THE** Client:
  - (a) Transfers to the Contractor all of its rights and obligations under the Agreement;
  - (b) Warrants it has performed all of its obligations under the Agreement up to the Effective Date;
  - (c) Shall remain liable to the Consultant for any breach of the Agreement by the Client which occurred prior to the Effective Date; and
  - (d) Subject to the terms of any continuity deed entered into between the Client and the Consultant, releases the Consultant from all of its obligations under the Agreement for the period following the Effective Date.
- 3. **THE** Contractor:
  - (a) Accepts the transfer with effect from the Effective Date;
  - (b) Confirms that, as from the Effective Date:
    - (i) The Contractor is substituted for the Client under the Agreement as if it had originally executed the Agreement in place of the Client;
    - (ii) All references in the Agreement to the Client are to be read and construed as if they were references to the Contractor; and
    - (iii) The Contractor may exercise all the Client’s rights under the Agreement; and
  - (c) Shall perform all of the Client’s obligations under the Agreement from the Effective Date.
- 4. **THE** Consultant:
  - (a) Consents to the transfer;
  - (b) Releases the Client from all of its obligations under the Agreement for the period following the Effective Date (but for of any breach of the Agreement that occurred prior to the Effective Date);

- (c) Confirms that, as from the Effective Date:
  - (i) The Contractor is substituted for the Client under the Agreement as if it had originally executed the Agreement in place of the Client
  - (ii) All references in the Agreement to the Client are to be read and construed as if they were references to the Contractor
  - (iii) The Contractor may exercise all of the Client's rights under the Agreement; and
- (d) Shall remain liable to the Client for any breach of the Agreement by the Consultant which occurred prior to the Effective Date.

- 5. **THE** terms of the Agreement continue in full force and effect.
- 6. **EACH** party is to pay its own costs (including, without limitation, legal expenses) in entering into this deed.
- 7. **EACH** party is, at its own expense and at the request of any other party, to execute and deliver or cause its successors and permitted assigns to do all things as may be reasonably requested by that other party to obtain the full benefit of this document according to its true intent.
- 8. **AN** amendment to this deed will only be effective if it is in writing and signed by all parties.
- 9. **THIS** deed shall be construed and take effect in accordance with the laws of New Zealand.
- 10. **NOTWITHSTANDING** anything to the contrary in this deed and for the avoidance of doubt, the Consultant will:
  - (a) not owe or have any greater obligations or liability, whether in scope or duration, to the Contractor that the Consultant would have owed or had to the Client; and
  - (b) be entitled to raise all limitations and to raise all defences to liability as would have been available to it against the Client, had the Client remained a party to the Agreement.
- 11. **FOR** the avoidance of doubt, the Consultant's aggregate liability under or in connection with the Agreement or this deed, whether prior to or following the novation of the Agreement, under contract, tort, statute or otherwise (including to the Client and the Contractor) shall be collectively no greater than the applicable monetary limit of its liability under the Agreement.

**EXECUTED as a deed**

**SIGNED** on behalf of the Client by:

.....  
 Authorised Signatory of Principal

**SIGNED** on behalf of the Contractor by:

.....  
 Director

.....  
 Director

**SIGNED** on behalf of the Consultant by:

.....  
 Director

.....  
 Director

## NOTE -

- (1) A copy of the design agreement being transferred ('the Agreement) shall be attached and marked 'A'.
- (2) This deed shall be executed by the Contractor, the Client, and the Consultant in the manner required for execution of a deed. Any of these parties which are a company shall execute the bond by having it signed, under the name of the company, by two or more directors. If there is only one director, it is sufficient if the deed is signed under the name of the company by that director, but the signature shall be witnessed by another person. The witness shall not only sign but shall also add his or her occupation and address. Alternatively, companies may execute under power of attorney. Any party which is a body corporate (other than a company) shall execute in the same manner as a company by persons in a comparable position to a company director or otherwise in accordance with section 9 of the Property Law Act 2007. In the case of a party who is an individual, the party shall sign and the signature shall be witnessed by another person. The witness shall not only sign but shall also add his or her occupation and address.

**Appendix I – Form of Continuity and Duty of Care Deed**

Contract for *[Contract Name & Contract Number]*

**THIS DEED** is made on ..... day of ..... 20.....

**BY** ..... ('the Consultant')

..... ('the Principal')

..... ('the Contractor')

**IT IS MADE IN THE FOLLOWING CIRCUMSTANCES**

- A. By an agreement dated the ..... day of ..... 20....., which is attached as Schedule 1 to this deed ('the Agreement') made between the Principal and the Consultant, the Consultant agreed to carry out the services required, and meet the obligations imposed upon the Consultant, by the Agreement ('the Services').
- B. The Principal has since entered into an agreement with ....., ('the Contractor') dated the ..... day of ..... 20..... ('the Construction Contract'), under which the Principal was required to novate the Agreement to the Contractor.
- C. The Principal's novation of the Agreement has caused the Consultant to become a subconsultant of the Contractor under the Construction Contract and, accordingly, the Consultant has agreed to provide a continuity deed in respect of the Services on the terms set out in this guarantee.

**BY THIS DEED**

- 1 **THE** Consultant agrees that in the event of the employment of the Contractor being terminated under the Construction Contract, the Consultant will, if required by the Principal, complete the Services under the same terms and conditions and for the same consideration as set out in the Agreement but as varied to any extent at the time of the Contractor's termination. The Principal's obligations for payment under those conditions shall apply from the date of issue of the requirement by the Principal under this clause.
- 2 **THE** Consultant acknowledges that it has read and fully understands the provisions of the Agreement.
- 3 **ANY** dispute between the Principal and the Consultant arising out this deed, shall be resolved in accordance with Disputes clauses 10.1, 10.2 and 10.3 of the Agreement and those clauses are hereby incorporated into this deed.
- 4 **THE** dispute shall be referred to a sole arbitrator agreed by both the Client and the Principal. If the Client and Consultant cannot agree then a sole arbitrator shall be appointed pursuant to the procedures set out in the Arbitration Act 1996.
- 5 **THE** Consultant warrants and acknowledges that it:
  - (a) owes a duty of care to the Principal in carrying out its duties in respect of the Services; and
  - (b) will carry out the Services in accordance with:
    - (i) the Agreement; and
    - (ii) the degree of skill care and diligence reasonably expected of a professional consultant providing services similar to the Services for a project of a similar type and size to the Principal's project.
- 6 **THE** Consultant acknowledges that the Principal may rely upon the Consultant's warranty in clause 5 above.
- 7 **THE** covenants set out in this deed are provided subject to the terms of the Agreement an on the basis that:
  - (a) the Consultant will not owe or have any greater obligations or liability, whether in scope or duration,

to the Client than the Consultant would have owed to the Contractor under this Agreement; and

(b) the Consultant will be entitled to raise all limitations and to raise all defences to liability to the Client as are otherwise available to it against the Contractor.

8 **FOR** the avoidance of doubt, the Consultant's total aggregate liability to the Principal and the Contractor under or in connection with the Agreement, this deed or the Novation Deed, whether in contract, tort, statute or otherwise, shall be collectively no greater than the applicable monetary limit on its liability under the Agreement.

9 **FOR** the avoidance of doubt, the Consultant's total aggregate liability under or in connection with the Agreement or the deed, whether under contract, tort, statute or otherwise (including to the client and the Contractor), shall be collectively no greater than the applicable monetary limit on its liability under the Agreement.

10 **THIS** deed shall be governed by and construed in accordance with the laws of New Zealand and the Consultant submits to the non-exclusive jurisdiction of its Courts.

In witness of which this deed has been executed and delivered.

**SIGNED** on behalf of the Consultant by:

.....  
Director

.....  
Director

**SIGNED** on behalf of the Contractor by:

.....  
Director

.....  
Director

NOTE – This deed shall be executed by the Consultant in the manner required for execution of a deed. If the Consultant is a company it shall execute the deed by having it signed, under the name of the company, by two or more directors. If there is only one director, it is sufficient if the deed is signed under the name of the company by that director, but the signature shall be witnessed by another person. The witness shall not only sign but shall also add his or her occupation and address. Alternatively, companies may execute under power of attorney. Any party which is a body corporate (other than a company) shall execute in the same manner as a company by persons in a comparable position to a company director or otherwise in accordance with section 9 of the Property Law Act 2007. If the Consultant is an individual, the person shall sign and the signature shall be witnessed by another person. The witness shall not only sign but shall also add his or her occupation and address.

## **Schedule 1**

Agreement