

**Contract for Construction Works**  
**Cook Islands Government**



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## TABLE OF CONTENTS

1.	INTERPRETATION .....	3
2.	CONTRACTOR TO UNDERTAKE THE CONTRACT WORKS .....	4
3.	PRINCIPAL TO PAY CONTRACT PRICE .....	4
4.	RETENTION .....	5
5.	CONTRACTOR'S OBLIGATIONS .....	5
6.	CONTRACTOR'S WARRANTIES .....	5
7.	DESIGN OBLIGATIONS .....	6
8.	MUTUAL OBLIGATIONS .....	7
9.	INSURANCE .....	8
10.	VARIATIONS .....	8
11.	PROGRAMME OF WORKS .....	9
12.	EXTENSION OF TIME .....	9
13.	PRACTICAL COMPLETION .....	10
14.	SUBCONTRACTORS .....	10
15.	DEFECTS LIABILITY .....	10
16.	LIQUIDATED DAMAGES .....	10
17.	WEATHER TIGHTNESS .....	11
18.	COMPLIANCE WITH LAWS .....	11
19.	DISPUTES .....	11
20.	NOTICES .....	11
21.	DISCRETIONARY TERMINATION .....	12
22.	TERMINATION .....	12
23.	CONFIDENTIALITY .....	12
24.	GENERAL .....	13

**AGREEMENT** dated **20**

## **PARTIES**

Her Majesty the Queen in right of the government of the Cook Islands acting by and through the [insert [Minister/Secretary] of Agency name] (“Principal”)

The party named as Contractor in Schedule I (“Contractor”)

## **RECITALS**

- A. The Principal has selected the Contractor to undertake the Project.
- B. It is a fundamental principle that the Contractor takes responsibility for the overall Project including establishing and maintaining an appropriate Programme of Works, quality control and supervision of costs.
- C. The Principal has agreed to pay the Contractor the Contract Price.
- D. The parties wish to record the terms of their agreement in this contract.

## **AGREEMENT**

### **I. INTERPRETATION**

- I.1 Unless otherwise expressly stated to the contrary, capitalized terms used in this contract shall have the following meaning:
  - (a) Completion Date means the due date for the Practical Completion of the Project as set out in Schedule I;
  - (b) Contract Price means the amount set out in Schedule I;
  - (c) Contract Works means the works to be executed by the Contractor to complete the Project in accordance with this contract;
  - (d) Defects extends to include all defects, faults, omissions, shrinkages, undue deterioration and other faults which are due to Materials or workmanship not being in accordance with this contract;
  - (e) Defects Liability Certificate shall have the meaning set out in clause 15;
  - (f) Defects Liability Period shall have the meaning assigned to it in clause 15.2;
  - (g) Defects Liability Retention means the funds retained in clause 4.1 as retentions for potential defects;
  - (h) Force Majeure means any of the following causes provided they are outside the reasonable control of the affected party, were not reasonably foreseen and could not have been prevented or avoided by that party taking all reasonable steps:
    - (i) Act of God, earthquake, cyclone, fire, explosion, flood, landslide, lightning, storm, tempest or drought;
    - (ii) Act of public enemy, sabotage, malicious damage, terrorism or civil unrest,

but does not include any strike, lock-out, trade dispute or labour disturbance affecting the affected party or any of its representatives;

- (i) Materials means any raw or manufactured material, goods or things (other than Plant) required for use in the Contract Works;
- (j) Payment means each payment of the Contract Price made to the Contractor;
- (k) Payment Terms means the payment terms described in the Schedule 2;
- (l) PCC means the practical completion certificate issued to the Contractor when the Contractor has achieved Practical Completion;
- (m) Plans and Specifications means the plans and specifications annexed as Schedule 4;
- (n) Plant means all appliances, temporary buildings and equipment of whatsoever nature required for carrying out the Contract Works but not intended to be incorporated in the Contract Works;
- (o) Practical Completion shall have the meaning assigned to it in Clause 13;
- (p) Principal's Representative means the person named in Schedule 1;
- (q) Programme of Works means the programme for the construction of the Contract Work as further described in Clause 11.1;
- (r) Project means the project described in Schedule 1;
- (s) Repair means renewal and/or replacement necessary to remedy defects;
- (t) Site means the site described in Schedule 1;
- (u) Subcontractor means any person who contracts with the Contractor to design, carry out or supply part of the Contract Works on behalf of the contractor;
- (v) VAT means Value Added Tax under the Value Added Tax Act 1997;
- (w) Working Day means any day on which trading banks are open for business in the Cook Islands other than;
  - (i) A Saturday, Sunday or a public holiday; or
  - (ii) Any day during the period commencing on and including 24 December in one year and ending on and including 5 January in the following year.

## 2. **CONTRACTOR TO UNDERTAKE THE CONTRACT WORKS**

- 2.1 The Contractor shall construct, complete, deliver and remedy defects in the Contract Works and do all things described in this contract.

## 3. **PRINCIPAL TO PAY CONTRACT PRICE**

- 3.1 The Principal shall pay the Contract Price on the Payment Terms together with the VAT.
- 3.2 No payment shall be made pursuant to this contract until the contract is executed and signed by the Contractor and delivered to the Principal.

#### 4. RETENTION

- 4.1 The Principal shall retain the following percentage from each Payment by way of retention and the limit of the total sums retained shall be in respect of Defects Liability Retention: 10% of the Contract Price.
- 4.2 Upon the issue, by the Principal of the PCC, the Principal shall be liable to pay all retention monies (excluding the Defects Liability Retention) owing to the Contractor at the date of the Practical Completion in accordance with the Payment Terms.
- 4.3 Upon the expiry of the Defects Liability Period, the Principal shall pay the Defects Liability Retention on the date which is 10 working days after the date of the Defects Liability Certificate issued in respect of the buildings building services and landscaping.

#### 5. CONTRACTOR'S OBLIGATIONS

- 5.1 The Contractor will undertake and complete the Contract Works at its own cost, in accordance with the Programme of Works and the Plans and Specifications, in a good and workmanlike manner with all reasonable speed, in accordance with all consents. Specifically the Contractor covenants that it shall;
- (a) Comply with all obligations, restrictions, requirements and standards imposed by or arising in consequence of, all statutes, regulations, the building code, and all other codes in force for the time being affecting the carrying out and completion of the Contract Works including any building upgrade works required;
  - (b) Obtain at its cost all relevant permits, consent and approvals required to enable the Contract Works to be lawfully commenced and carried out (including any consents necessary for any Variations);
  - (c) Arrange forthwith for all inspections by all relevant authorities to be carried out at all times in accordance with all applicable laws or the building code (as may be applicable in the circumstances);
  - (d) Notify all relevant authorities on completion of the Contract Works and obtain a code compliance certificate for the Contract Works;
  - (e) Comply with all proper instructions issued by the Principal in relation to this Contract;
  - (f) Ensure that all Materials used in and forming all or part of the Contract Works are new materials and of good quality and in accordance with the provisions of this contract;
  - (g) Provide all necessary supervision during this contract and have on the Site at all working times a competent representative; and
  - (h) Have full responsibility for:
    - (i) The care of the Contract Works from the time it obtains possession of the Site until Practical Completion except where any loss or damage arises from the excepted risks listed in Clause 10.1; and
    - (ii) The adequacy, stability and safety of all Site operations and methods of construction.

#### 6. CONTRACTOR'S WARRANTIES

- 6.1 The Contractor warrants and undertakes to the Principal that the Contractor:

- (a) Is satisfied that the Contract Price is sufficient to cover the costs of performing all of its obligations under and in connection with this contract and all things and matters required for the due, proper and punctual performance of the Contract Works with the expectation of Variations;
- (b) Has taken into consideration all information which is relevant to the risks, contingencies and other circumstances which would in any way affect the Contract Works and /or the Contract Price with the exception of Variations;
- (c) Has read and reviewed all information provided to it by the Principal regarding the Site and the conditions on, under and about the Site and had made its own inquiries, including review of archival and other records which are publicly available in relation to utilities, building and other structures which have previously been located on the Site;
- (d) Is not entitled to and will not claim an entitlement to an increase in the Contract Price nor to any other compensation or benefit except those entitlements expressly provided for in this contract;
- (e) Has fully inspected the site and any existing earthworks prior to commencing the Contract Works and has made due allowance for the conditions in this contract. Having inspected the Site and the earthworks and satisfied itself with the ground conditions for the purposes of the Contract Works, the Contractor shall not be entitled to claim, or request a Variation or an extension of time;
- (f) Has fully inspected the Site and agreed with the Principal how the Contractor is permitted to access the Site and has satisfied itself that the access is appropriate for the Contract Works. The Contractor shall not be entitled to claim a Variation or an extension of time if access issues arise after the Contract Works have started;
- (g) Will remain up to date with its payments to Subcontractors and will provide, if requested, confirmation and evidence of such payments to the Principal;
- (h) Will provide guarantees for all of its work and for all of its work carried out by Subcontractors in favour of the Principal for the minimum periods as set out in the table of guarantees at Appendix A (as applicable) or as otherwise agreed in writing with the Principal;
- (i) Will provide guarantees for all materials used and for all materials used by Subcontractors in favour of the Principal for the minimum periods as set out in the table of guarantees at Appendix A (as applicable) or as otherwise agreed in writing with the Principal;
- (j) Shall assign and where necessary, procure the assignment of all manufacturers warranties on any products used in the Contract Works to the Principal; and
- (k) Shall upon 10 working days written notice from the Principal, provide the Principal with access to the Contractor's records and files relating to the cost of the Contract Works, in hard copy, electronic or other format. The Principal shall keep confidential any commercially sensitive information obtained by it in the context of this clause.

6.2 Where any guarantees and/or warranties are included in the Plans and Specifications, they will be in addition to the guarantees and warranties set out in this contract, and in the event of any inconsistency between them, the guarantees and warranties set out in this contract shall prevail.

## 7. DESIGN OBLIGATIONS

If the Contract Works include provisions of design services, the provisions of this clause 7 shall apply.

- 7.1 The Contractor warrants and undertakes to the Principal that the Contractor;
- (a) Is experienced in the management, co-ordination and/or production of design documentation for the projects containing elements similar to the elements comprising the Contract Works;
  - (b) Has examined the documents, things and requirements comprising the contract, including but not limited to the Plans and Specifications; and
  - (c) Has arranged the requisite professional indemnity insurance as required in Schedule 3.
- 7.2 The Contractor is responsible for any design and/or documentation work it carries out, and the performance and “build ability” of that design work and the Contractor must ensure that such works are designed, the design developed and the design documentation prepared with the degree of skill, care and diligence reasonably expected of a professional providing services similar to the design work, in accordance with innovative and cost effective design and construction solutions and in accordance with this contract. The Contractor must ensure that:
- (a) To the extent that the Contractor undertakes the design work, the Contractor has the necessary experience, skills, and expertise to carry out such work;
  - (b) Where it subcontracts the design work, such works are designed for the Contractor by appropriate consultants (approved by the Principal) in accordance with the proper professional architectural or engineering practices and principles;
  - (c) Such works and all services and features included in such works are professionally designed to be appropriate, adequate and fit for the purpose or purposes described in or reasonably able to be inferred from this contract;
  - (d) It has and will apply sufficient resources perform the design services to meet its obligations, including to comply with the Principal's programming requirements; and
  - (e) Where the Contractor forms the opinion on reasonable grounds, at any time that an element of the design or design documentation does not comply with the contract or contains errors or omissions the Contractor must direct its consultants to rectify the non-compliance (at no additional cost to the Principal) and inform the Principal of the direction in writing.

## 8. MUTUAL OBLIGATIONS

- 8.1 The Principal and the Contractor agree to adopt and conduct themselves in accordance with the following partnering principles:
- (a) The establishment of a relationship based on mutual trust;
  - (b) Shared intentions to achieve a maximizing of each of their respective benefits;
  - (c) Openness, promptness, consistency and fairness in all dealings and communications and reasonableness and timeliness, having regard to the internal approval process of the Principal and in particular recognizing the levels of delegated authority of the Principals; and
  - (d) Non – adversarial dealings and constructive mutual steps both to avoid differences and to identify solutions.
- 8.2 The Principal and the Contractor must, in their day to day interactions and in performing their obligations act in a manner entirely consistent with these partnering principles and the

Principal must procure the same standard of conduct from the Principal's Representative the Contractor must also procure that its subcontractors act in a manner entirely consistent with these partnering principles in performing their obligations in respect of the Contract Works.

- 8.3 The Contractor agrees to further ensure that it actively maintains positive relationships with other key stakeholders in the Project.

## 9. **INSURANCE**

- 9.1 Insurances required under this contract are to be effected by the parties as described in Schedule 3. The insurances specified are the minimum requirements for insurance and the parties are free to arrange whatever additional insurance protection they may consider appropriate.
- 9.2 These insurance arrangements do not limit or alter any indemnities or affect in any way the liabilities the parties may have as contained in this contract.
- 9.3 The insurances in Schedule 3 must:
- (a) Begin by the earlier of either the possession date of the Site by the Contractor or the date when the Contractor commences work;
  - (b) Continue until the date of issue of the PCC; and
  - (c) Cover loss or damage and all liability risks arising from the carrying out of deferred work and work required to remedy defects until such work is completed.

## 10. **VARIATIONS**

- 10.1 The Contractor can only claim a Variation for the following excepted risks:
- (a) Force Majeure;
  - (b) A General Strike or industrial action on the island where the Project is based, where the Project is over two or more islands, only in respect of that portion of the work on the affected island;
  - (c) Work required which is outside the scope of the Plans and Specifications, as first approved in writing by the Principal or the Principal's representative; or
  - (d) Any act or omission of the Principal or of any person for whose acts or omissions the Principal is, as between itself and the Contractor, responsible.
- 10.2 The Contractor must provide to the Principal as estimate of the price of work involved in a proposed Variation.
- 10.3 The Principal may, at its option, accept or reject a Variation estimate from the Contractor and will advise the Contractor accordingly within 10 Working Days of receiving the estimate. No work may proceed in respect of the Variation unless the Principal has approved the estimate for the work in writing. The Principal shall not be liable to pay for any work carried out over and above an approved estimate without its prior written approval of a further estimate and the reason for the additional cost which shall be provided by the Contractor.
- 10.4 The Contract Price and the elements that make up the Contract Price shall be adjusted by the value of Variations being added to or deducted from it.
- 10.5 The Contractor shall not vary the Plans and Specifications or the Contract works generally without an order in writing from the Principal.

## 11. PROGRAMME OF WORKS

- 11.1 The Contractor shall within 10 working days of execution of this contract and in consultation with the Principal prepare a Programme of Works in respect of the Contractor's construction and completion of the Contract Works. The Contractor will keep the Principal informed of progress of the Contract Works and if at any time Contract Works fall behind the Programme of Works, such that any key milestone dated listed in the Programme of Works will not be met, or in the reasonable opinion of the Principal, may not be met, the Principal may serve a notice on the Contractor requiring the Contractor to take such action and to apply such additional resources as are necessary to accelerate the Contract Works so that any key milestone date in the Programme of Works will be met. Any costs incurred as a result of such notice shall be at the sole costs of the Contractor.

## 12. EXTENSION OF TIME

- 12.1 The Contractor must start work within 5 Working Days of being given possession of the Site and achieve Practical Completion of the Contract Works on the Completion Date.
- 12.2 The Contractor may apply to the Principal to extend the time for the Practical Completion due to the delay arising from any of the following causes:
- (a) A consent or approval not being obtained (through no fault of Contractor);
  - (b) Unforeseeable physical conditions;
  - (c) The Contract Works being suspended with the written consent of the Principal;
  - (d) Loss or damage to any part of the Contract Works (through no fault of the Contractor);
  - (e) Variations;
  - (f) Unusually inclement weather that materially interferes with the progress of the Contract Works;
  - (g) Strike, lockout or industrial action affecting the island or islands on which the Project is based;
  - (h) The Principal not giving a direction within a reasonable time after being asked by the Contractor in writing to do so;
  - (i) The Principal not supplying Materials, information, work or services on time;
  - (j) A separate contractor's act or omission;
  - (k) The Contractor dying; or
  - (l) Something else of significance beyond the Contractor's control.
- 12.3 The Contractor must apply in writing within 5 Working Days or as soon as practicable after the delay begins. The application must state in sufficient detail the grounds for the extension, including the cause of the delay relied on, and must specify the number of Working Days claimed.
- 12.4 The Principal must respond to the Contractor's claim within 10 Working Days after the later of receiving the Contractor's claim or receiving sufficient detail for the Principal to properly assess the Contractor's claim. If the Principal fails to respond within 10 Working Days the Contractor must notify the Principal of the failure. If after a further 5 Working Days of such

notification the Principal has not responded, the time for Practical Completion must be extended by the extension of time claimed by the Contractor.

### 13. PRACTICAL COMPLETION

- 13.1 Practical Completion is that stage in the execution of the Programme of Works when the Contract Works are complete in accordance with Schedule 5, and the Contract Works may be lawfully occupied by the Principal or any person authorized by the Principal without being unreasonably inconvenienced by the rectification of minor defects.

### 14. SUBCONTRACTORS

- 14.1 The Contractor may only subcontract the Contract Works with the consent of the Principal.
- 14.2 The Contractor is responsible for the work of all subcontractors engaged by the Contractor to carry out any part of the Contract Works. The Contractor is in particular responsible for the procuring of any guarantee required by or called for under this contract or the Plans and Specifications and for ensuring that all subcontractors act in strict accordance with all legislation and any consent issued in respect of the works.

### 15. DEFECTS LIABILITY

- 15.1 When the Contractor believes that the Contract Works qualify for the issue of a Defects Liability Certificate on the basis that:

- (a) The Defects Liability Period has expired;
- (b) The Contractor has confirmed that the Contract Works have been inspected and quality for the Defects Liability Certificate;
- (c) The Contractor has remedied any minor omission or minor defects in the Contract Works; and
- (d) The Contractor has obtained the code compliance certificate,

then the Contractor shall give to the Principal a provisional Defects Liability Certificate confirming that the Defects Liability Period has expired and that there are no outstanding omissions or defects.

- 15.2 The Defects Liability Period for the Contract Works shall commence on the date of Practical Completion of the Contract Works. The Defects Liability Period shall be 12 months for buildings, building services and landscaping.
- 15.3 Upon receipt of the provisional Defects Liability Certificate and once the Principal is satisfied that the prerequisites in clause 15.2 have been satisfied and Contractor has provided the Principal with all guarantees and warranties required under this contract and the Plans and Specifications, then the Principal shall issue a Defects Liability Certificate to the Contractor.

### 16. LIQUIDATED DAMAGES

- 16.1 If the Contractor does not achieve Practical Completion by the Completion Date, the Principal is entitled to deduct liquidated damages at the rate set out in Schedule 1. The liquidated damages shall run from the Completion Date to the actual date of Practical Completion.
- 16.2 Without prejudice to any other means of recovery, the Principal may deduct the amount of liquidated damages from any monies payable to the Contractor in accordance with the contract.

**17. WEATHER TIGHTNESS**

- 17.1 The Contractor warrants to and covenants with the Principal that the total building envelope and Contract Works shall remain weathertight for a period of ten years from Practical Completion.
- 17.2 The Contractor guarantees to the Principal that it shall, at its own expense, Repair all Defects that may compromise the weathertightness of the building envelope or the Contract Works and make good any damage to the building caused by any Defect.
- 17.3 The Contractor indemnifies the Principal in respect of all direct losses incurred by the Principal that may be occasioned by or arise out of any Defect in the weathertightness of the building envelope or the Contract Works.
- 17.4 If the Contractor does not Repair any Defects within 10 Working Days, or where imported Plant or Materials are required for such Repair, within a reasonable period of receiving notice from the Principal that the building envelope or the Contract Works is not weathertight, the Principal may remedy the Defect and recover all costs thereby incurred from the Contractor but without releasing the Contractor from any obligations or liability. Such costs may include the cost of all labour, material, travelling, and other charges incurred by the Principal in repairing such Defect.
- 17.5 The Contractor shall not be liable for any direct, indirect or consequential loss or damage solely attributable to:
- (a) Any act omission or negligence of the Principal or any other person for which the Principal is responsible, as between itself and the Contractor; or
  - (b) Any forces of nature which could not be reasonably foreseen or mitigated by the Contractor.
- 17.6 The Contractor further indemnifies and holds the Principal harmless from and against any costs, claims, liabilities, or expenses which the Principal may incur or for which the Principal may become liable arising from any failure by the Contractor to Repair and/or rectify any Defect in accordance with the requirements of this clause.

**18. COMPLIANCE WITH LAWS**

- 18.1 In carrying out the Contract Works the Principal and the Contractor shall comply with the provisions of all statutes, regulations and policies that may be applicable to the Contract Works.
- 18.2 The Contractor must comply, at its costs with all licenses, consents, approvals, obtained and all conditions attaching to such licenses, consents or approvals.

**19. DISPUTES**

- 19.1 Any dispute arising under this contract shall, in the first instance be referred to the Principals Representative and appropriate person for the Contractor for resolution. If the dispute is not resolved within 14 Working Days, the dispute will be referred to the Head of Agency and the equivalent person in respect of the Contractor. Where this process fails to achieve a resolution, the matter will be referred to arbitration in accordance with the Arbitration Act 2009.

**20. NOTICES**

- 20.1 All notices to a party must be delivered by hand or sent by post, courier, fax or email to that party's address for notices stated in Schedule I.

- 20.2 Notices must be signed or in the case of email sent by the appropriate manager or person having authority to do so.
- 20.3 A notice will be considered to be received:
- (a) If delivered by hand, on the date it is delivered
  - (b) If sent by post on the 7th Working Day after the date it is sent;
  - (c) If sent by courier on the date it is delivered;
  - (d) If sent by fax, on the sender receiving fax machine report that it is successfully sent;  
or
  - (e) If sent by email, upon receipt of a confirmation email from the recipient.
- 20.4 A notice received after 4pm on a Working Day or on a day that is not Working Day will be considered to be received on the next Working Day.

## 21. DISCRETIONARY TERMINATION

- 21.1 In addition to any other rights of termination that the Principal may have under the contract or at law generally, the Principal reserves the right to terminate the contract at any time. When exercising this right, the Principal shall give at least 20 Working Days notice to the Contractor who shall then do everything necessary to comply with the notice and demobilize from the Site. At the time of giving notice to the Contractor the Principal shall inform the Contractor of the date of termination.
- 21.2 The Principal shall meet the costs of early termination and demobilization and the Contractor shall be entitled to be paid in accordance with the contract for all work up to the date of termination. The Contractor shall be entitled to such reasonable costs which the Contractor can demonstrate are a direct result of such early termination but it will not be entitled to any payment for anticipated profit for preliminary and general costs in respect of the unfinished work or any consequential loss of any kind whatsoever.

## 22. TERMINATION

- 22.1 The Principal may terminate this contract immediately by written notice to the Contractor if:
- (a) The Contractor suspends work on site for 10 Working Days; or
  - (b) A receiver, liquidator, statutory manager is appointed to the Contractor, the Contractor is adjudged bankrupt, or otherwise enters into a compromise with its creditors; or
  - (c) The Contractor breaches this contract and fails to remedy the breach within 5 Working Days of receipt of written notice from the Principal to remedy the breach.

## 23. CONFIDENTIALITY

- 23.1 The Contractor must use its best endeavours to keep confidential all matters relating to the contract. The Contractor must not disclose any information except to the extent that:
- (a) The disclosure of that information is necessary for the Contractor to carry out its obligations under this contract or to enforce any of its rights under it; and
  - (b) That disclosure is required by law.
- 23.2 The Contractor must keep confidential any claim or dispute under the contract.

23.3 The Contractor must not advertise its relationship with the Principal or its involvement in the Contract Works without the written permission of the Principal.

23.4 The Contractor must ensure that its subcontractors and suppliers are bound by a clause similar to this clause.

24. **GENERAL**

24.1 Subject to clause 14, the Contractor must not assign or novate any rights under the contract without first obtaining the Principal's consent. The Principal's consent may be given or withheld at the Principal's absolute discretion.

24.2 The Principal may assign its rights under this contract without the consent of the Contractor.

24.3 The Principal is entitled to set off, against any sums that would otherwise be due to the Contractor, amounts in respect of any claims it has, including damages for breach of contract by the Contractor (whether pursuant to this contract or any other contract between the Principal and the Contractor).

24.4 The Principal may, acting reasonably, request that the Contractor immediately remove any on-site personnel from the Site. The Contractor shall pay any costs incurred in such removal and any costs of subsequent replacement and the person required to be removed (or prevented access) shall not again be employed in relation to the Contract Works without the permission of the Principal.

24.5 This contract evidences the entire agreement between the Contractor and Principal in connection with the Contract Works and supersedes and extinguishes all prior agreements between the Contractor and Principal relating to such matters.

24.6 Except as provided at law or elsewhere in the contract, nothing in the contract can be varied, waived, discharged or released, unless both parties agree in writing.

24.7 This contract may be signed in any number of counterparts (which may be emailed pdf or facsimile copies) all of which when taken together shall constitute one and the same contract.

24.8 This contract is governed by Cook Islands law and the parties submit to the jurisdiction of the High Court of the Cook Islands.

24.9 Unless otherwise noted, all amounts referred to, including the Contract Price, exclude VAT.

**SCHEDULE 1: PARTICULARS**

**SCHEDULE 2: PAYMENT TERMS**

**SCHEDULE 3: INSURANCES**

**SCHEDULE 4: PLANS AND SPECIFICATIONS**

**SCHEDULE 5: PRACTICAL COMPLETION**

**APPENDIX A – TABLE OF GUARANTEES**