

GENERAL TERMS FOR PROVIDERS AND PRODUCTS

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

Agreement means the Specific Terms, the General Terms and any attachments;

Business Day means any day of the year other than a Saturday, a Sunday, a New Zealand public holiday or Wellington or Auckland anniversary day, and a reference to days, other than Business Days, is a reference to any calendar day of the year;

Charges means the fees and charges payable by Primary ITO in accordance with this Agreement, referenced in the Specific Terms;

Confidential Information means this Agreement, personal information, and material marked “Confidential” or with a similar marking, or which, by its nature, is apparent as confidential;

Force Majeure Event means that is beyond the reasonable control of a party, excluding an event that could have been avoided by a party taking reasonable steps or reasonable care or constituted by the insolvency of the affected party or its lack of funds;

Intellectual Property means copyright, trademark, design, patent or other rights in intellectual property which are recognised or protected under Law;

Law means any New Zealand statute, regulation or subordinate legislation in force and the New Zealand common law and the law of equity as applicable to the parties from time to time;

Personnel means employees, contractors, subcontractors and subcontractors’ personnel;

Services means the services specified or referenced in the Specific Terms;

Us, We, and Primary ITO means Primary Industry Training Organisation (Incorporated); and

You and Provider means the party named as provider in the Specific Terms.

1.2 Interpretation

- a. Headings are for ease of reference only and do not affect the interpretation of this Agreement.
- b. Words in the singular include the plural and vice versa.
- c. A reference to:
 - i. a party to this Agreement includes that party’s permitted assigns; and
 - ii. “including” and similar words do not imply any limit.

2. GENERAL RESPONSIBILITIES

2.1 Mutual

Each of us will:

- a. comply with its responsibilities set out in this Agreement;
- b. comply with all Laws relevant to the performance of its obligations; and
- c. respond promptly to fulfil all reasonable requests for information made by the other party.

2.2 Provider responsibilities

You will:

- a. provide the Services within the agreed timeframes and in a professional manner, using all reasonable care, attention and skill;
- b. provide sufficient Personnel and ensure those Personnel have the necessary training and expertise to provide the Services;
- c. not do anything that is likely to negatively affect our reputation;
- d. comply with all our reasonable directions and requirements that we notify to you including requirements for courses, programmes and standards;
- e. immediately notify us of any issue that may impact your ability to deliver the Services as agreed;
- f. provide all information reasonably requested by us; and
- g. at all times hold, and ensure your Personnel providing the Services hold, the qualifications, licences, accreditations, and registrations required to undertake the Services.

2.3 Primary ITO responsibilities

We will provide you with any items that are detailed in the Specific Terms to enable you to perform the Services.

3. CHARGES AND TAXES

3.1 Pricing

- a. All pricing excludes GST and is in New Zealand dollars.
- b. We will reimburse you for reasonable expenses you have incurred where those expenses are detailed in the Specific Terms or where we otherwise agree in writing.

3.2 Invoicing and payment

- a. You will invoice us at the end of each month for Services undertaken during that month.
- b. Your invoices must be valid for the purposes of the Goods and Services Tax Act 1985, and you must include information that clearly shows the Services provided and how the Charges have been calculated. You will also provide us with invoices for agreed expenses.
- c. We will pay invoices by the 30th of the month following receipt of invoice.
- d. We may withhold any amount where we dispute it until the dispute is resolved but will pay the undisputed portion in accordance with clause 3.2c.
- e. We will not make any payments other than the Charges, including any payment for injury, sickness, superannuation, holidays, redundancy, or overtime.
- f. Nothing in this agreement shall create the relationship of employer or employee between Primary ITO and you.

3.3 Set-off and taxes

- a. We may deduct from, or set-off against, any amount payable, any sum of money that you owe us or that is due to us under this Agreement.
- b. Except for any GST payable by us, you are to pay all taxes, levies, and duties payable in connection with this Agreement under any Law.

4. SUBCONTRACTORS

- a. You will not subcontract the Services (or any aspect of the Services) except with our prior written consent.
- b. Where you do subcontract, you:
 - i. will ensure that each subcontractor is appropriately qualified and has the relevant experience to perform the work it is engaged to perform;
 - ii. remain fully responsible for all work carried out and for any act or omission of a subcontractor; and
 - iii. will ensure that any subcontract contains obligations on the subcontractor that are consistent with all the terms of this Agreement.

5. CHANGES TO SERVICES OR PROGRAMMES

- a. We may cancel or change the dates for Services or deliverables at any time (including cancelling or changing programmes), at our discretion.
- b. Conditional on you requesting payment within 90 days of the cancellation or change:
 - i. If we cancel a programme less than 12 Business Days' before it is due to start, we will pay you 20% of the Charges that would have been payable if the programme had been supplied.
 - ii. If we cancel a programme after it has started, we will pay you for the actual hours delivered before that cancellation plus 20% of the Charges payable for the remainder of the programme.
 - iii. If we defer a programme we will reimburse your reasonable costs incurred as a result of that change.

Payment by us under this clause is in full settlement of all claims arising from the cancellation or change.

6. PERFORMANCE

6.1 Key performance indicators

We may measure your performance against key performance indicators. Where we undertake that measurement:

- a. you will provide us with all reasonable assistance and information;
- b. you will meet with us to discuss the evaluation outcomes if we request; and
- c. we will advise you of the evaluation outcomes.

6.2 Annual Moderation Report and Assessment

If required by us, you will complete an "Annual Moderation Report and Assessment Plan" within the timeframe requested by us.

6.3 Other reports

You will provide the reports listed in the Specific Terms and any we reasonably request from you.

6.4 Replacement of Personnel

We may require that you replace any Personnel supplying the Services if we reasonably consider that such Personnel does not meet, or has not acted consistently with, the requirements in this Agreement (including in clause 2) or is otherwise unsatisfactory.

7. BRANDING AND COMMUNICATIONS

- a. Where you are providing a learning programme:
 - i. we will use reasonable endeavours to promote it; and
 - ii. you must use any templates that we provide.
- b. You must only use our brand on materials where we have consented to that, and you must use the version of our brand that we provide you (and in accordance with any directions we provide you).

8. COMPLIANCE

8.1 Policies

- a. You must have proper policies in place, including a policy addressing privacy in relation to trainees, and you must provide us with copies or access to such policies on request.
- b. We will notify you of relevant Primary ITO and Tertiary Education Commission policies in relation to the Services or our facilities and you must comply, and ensure all Personnel comply, with these policies.

8.2 Notifications

Subject to all applicable Laws, you must immediately notify us if you or any Personnel involved in training are charged with a criminal offence or subject to an investigation (including any investigation by New Zealand Qualifications Authority (NZQA), Tertiary Education Commission (TEC), Worksafe NZ or Ministry of Business, Innovation and Employment).

8.3 Health and safety

You must have proper health and safety policies in place, and you must actively manage health and safety in accordance with all applicable Laws including:

- a. actively identifying and managing all applicable hazards and risks so far as is reasonably practicable;
- b. providing information, training, instruction, or supervision that is necessary to protect people from risks to health and safety arising from the work carried out; and
- c. monitoring the health of workers and the conditions at the workplace to prevent illness or injury to workers arising from the work carried out.

8.4 Records and audit

- a. You must keep full, accurate and up-to-date records relating to the performance of the Services.
- b. You must allow us and/or any auditor or reviewer appointed by us to access your premises, personnel, and records as may reasonably be required to verify that you have complied with your obligations under this Agreement.

9. CONFIDENTIALITY

- a. You will keep all Confidential Information secure and:
 - i. not disclose it to any person;
 - ii. not use it for your own benefit or in any other manner which would or may harm Primary ITO's interests,except you may disclose Confidential Information to the extent necessary:
 - iii. to your Personnel for the purposes of meeting your obligations under this Agreement;
 - iv. to your professional advisers for the purposes of seeking professional advice; or
 - v. as required by Law.
- b. You will not make any public comment or statement (in writing or otherwise) related to this Agreement or Primary ITO except with our prior written approval.
- c. We will not use or disclose your Confidential Information, except where it is used or disclosed in the proper performance of our functions or responsibilities, for the purposes of seeking professional advice, or as required by Law.

10. INTELLECTUAL PROPERTY

10.1 Retained Intellectual Property

The following Intellectual Property (including any modification, enhancement, or derivative work of that Intellectual Property) remains the property of the current owner:

- a. Intellectual Property that existed prior to the date of this Agreement; and
- b. Intellectual Property that was developed independently of this Agreement.

10.2 New Intellectual Property

- a. All new Intellectual Property you create or develop in providing the Services, is owned by us on creation.
- b. If any deliverable (as part of the Services) you provide incorporates your Intellectual Property, then you grant a fully paid license to use that Intellectual Property for our Primary ITO's business purposes only.
- c. If any deliverable that you provide incorporates any third-party Intellectual Property, then you will procure for Primary ITO a fully paid-up licence to use that Intellectual Property for Primary ITO's business purposes. In the event you are unable to secure such a licence for Primary ITO then you will ensure the deliverable does not contain third party intellectual property rights.
- d. The materials provided by Primary ITO are not to be altered by you, without Primary ITO approval.

10.3 Acknowledgement of Primary ITO Intellectual Property

You acknowledge and agree that Primary ITO or its licensor is and remains the owner of and retains all Intellectual Property rights in all materials supplied by Primary ITO including learning resources, subject to clauses 10.1 and 10.2 above, and that you will not make changes to these materials without Primary ITO approval.

11. CONFLICTS OF INTEREST

Unless excluded in the Specific Terms of the agreement, during the term of this Agreement, you must not provide services to any person or entity or be involved or interested in any other employment, activity, or business that conflicts or may conflict with the interests of Primary ITO or interferes with your ability to perform your obligations under this Agreement.

12. LIABILITY

12.1 Maximum liability

The maximum aggregate liability for either of us under or in connection with this Agreement, whether in contract, tort (including negligence), breach of statutory duty or otherwise, is the total Charges paid and payable by us for the Services over the 3 months preceding the event or events giving rise to the liability.

12.2 Unrecoverable loss

Neither of us is liable to the other under or in connection with this Agreement for any loss of profit, business, revenue, or any indirect, consequential, incidental, or special loss or damage of any kind.

12.3 Unlimited liability

Clauses 12.1 and 12.2 do not apply to limit your liability for:

- a. personal injury or death;
- b. fraud or wilful misconduct; or
- c. breach of clauses 8.3 (health and safety) or 9 (confidentiality).

12.4 Indemnities

Both parties fully indemnify the other and its officers, employees, and contractors from and against any and all liability, losses, damages, costs and expenses awarded against, incurred or suffered by Primary ITO or such persons arising out of or resulting from:

- a. your unlawful, negligent, or wilful act or omission; or
- b. any allegation, claim or proceeding that Primary ITO's possession or use of any information or material supplied by you under this Agreement infringes any third party's Intellectual Property Rights.

12.5 No liability for the other's failure

Neither party will be responsible, liable, or held to be in breach of this Agreement for any failure to perform its obligations under this Agreement or otherwise, to the extent the failure is directly caused by the other party failing to comply with its obligations under this Agreement, or by the negligence or misconduct of the other party or its Personnel.

12.6 Mitigation

Each party must take reasonable steps to mitigate any loss or damage, cost, or expense it may suffer or incur arising out of anything done or not done by the other party.

13. INSURANCE

You will maintain, at your own cost, adequate insurance in respect of its potential liability for loss or damage under this Agreement, including insurance for liability (including public, statutory and employer liability where relevant), damage or material losses, and, where your business includes use of a motor vehicle, commercial motor vehicle cover, with a limit of at least \$1,000,000 for any one claim or series of claims arising out of one event.

14. TERM AND TERMINATION

14.1 Term

- a. The initial term of this Agreement is set out in the Specific Terms.
- b. At the end of the initial term, this Agreement may automatically renew if Primary ITO agree with you to renew and not terminate.
- c. Each term is subject to early termination in accordance with this clause 14.

14.2 Termination for convenience

Either party may terminate this Agreement for convenience with 90 days' notice.

14.3 Termination for breach

In addition to the other rights to terminate, either party may, by notice to the other party, immediately terminate this Agreement if either party:

- a. commit any material breach of this Agreement and the breach is not:
 - i. remedied within 10 Business Days of the receipt of notice to remedy the breach; or
 - ii. capable of being remedied;
- b. have an administrator, receiver, liquidator, statutory manager, or similar appointed, become subject to any form of external administration, suspend or threaten to suspend the payment of its debts, or cease or threaten to cease to continue business for any reason;
- c. are unable to perform the duties for 30 days or more due to Force Majeure;
- d. if you compete against us either on your own or jointly with another person or entity; or

- e. commit any act that our reasonable opinion has or may seriously damage its reputation or interests, or you are subject to a significant health and safety risk.

14.4 Termination for change in funding

In addition to the other rights to terminate, we may terminate this Agreement immediately by notice in writing if:

- a. our funding is reduced or removed; or
- b. we are impacted by changes in policy or direction by government or government agencies including the Tertiary Education Commission.

14.5 Termination for failure to pay

You may terminate this Agreement if we fail to pay, provided that the charges have been properly invoiced in a timely manner, are not the subject of a dispute, at least three months charges are outstanding and are at least 30 days overdue and that the failure to pay is not remedied within 10 Business Days of receiving notice from you.

14.6 Consequences of termination

Expiry or termination of this Agreement does not affect each party's rights and obligations accrued before the expiry or termination date. We will pay the Charges for agreed Services provided before the expiry or termination date, except where we terminate this Agreement under clause 14.3. Clauses which, by their nature are intended to survive expiry or termination, including clauses 9 (confidentiality), 10 (intellectual property), and 12 (liability), continue in force.

15. DISPUTE RESOLUTION

15.1 Good faith negotiations

- a. Before taking any court action, either of us will use best efforts to resolve any dispute through good faith negotiations.
- b. If resolution cannot be reached, either of us may refer the dispute to mediation by written notice to the other party. The mediation will be conducted by a single mediator, in accordance with the terms of the Resolution Institute Standard Mediation Agreement and at a fee to be agreed by the parties. If the parties fail to agree on the identity of the mediator and/or the mediator's fee within five Business Days of referral of the dispute to mediation, the mediator will be chosen, and the mediator's fee determined, by the chairperson for the time being of the Resolution Institute (or his or her nominee). The mediation will be held in Wellington unless agreed otherwise.

15.2 Obligations continue

Each party must, to the extent possible, continue to perform its obligations under this Agreement even if there is a dispute.

15.3 Right to seek relief

This clause 15 does not affect either party's right to seek urgent interlocutory and/or injunctive relief.

16. GENERAL

16.1 Force Majeure

Neither of us is liable to the other for any failure to perform its obligations under this Agreement to the extent caused by a Force Majeure Event, provided that the affected party:

- a. immediately notifies the other party and provides full information about the Force Majeure;
- b. uses best endeavours to overcome the Force Majeure; and
- c. continues to perform its obligations as far as practicable.

16.2 Waiver

To waive a right under this Agreement, that waiver must be in writing and signed by the waiving party.

16.3 Independent contractor

The Provider is an independent contractor of Primary ITO. No other relationship (e.g. joint venture, agency, trust or partnership) exists under this Agreement.

16.4 Notices

A notice given by a party under this Agreement must be delivered via email to an email address notified by the other party for this purpose. If the notice is given under clause 14, a copy of that email must be immediately delivered (by hand or courier) to the Chief Executive or equivalent officer of the other party at the other party's last known physical address.

16.5 Severability

Any illegality, unenforceability, or invalidity of a provision of this Agreement does not affect the legality, enforceability, or validity of the remaining provisions of this Agreement.

16.6 Variation

Any variation to this Agreement must be in writing and signed by both parties.

16.7 Entire Agreement

This Agreement constitutes the entire agreement of the parties with respect to its subject matter and supersedes all previous agreements, arrangements, understandings, or representations relating to that subject matter. The terms of this Agreement prevail over the terms contained in any standard conditions of sale, invoices, packing slips, delivery dockets and other communications from either party or its Personnel, even if the other party signs or otherwise purports to accept any such terms.

16.8 Change of ownership

You must advise us in advance of any change of ownership to the Provider and receive our consent in writing that this change is acceptable to Primary ITO for continuation of this agreement.

16.9 Assignment

You may not assign or transfer any right or obligation under this Agreement. You remain liable for your obligations under this Agreement despite any approved assignment, subcontracting, or transfer.

16.10 Law

The Agreement is governed by, and must be interpreted in accordance with, the laws of New Zealand. Each party submits to the non-exclusive jurisdiction of the Courts of New Zealand in relation to any dispute connected with this Agreement.

16.11 Counterparts

This Agreement may be signed in counterparts, each of which constitutes an original and all of which constitute the same agreement. A party may enter this Agreement by signing and sending (including by email) a counterpart copy to the other party.