



Request for Proposal:

This RFP is listed on behalf of the Education New Zealand Trust

Comparative Student Body Profile and Potential

Education New Zealand

August 2008

A. Background

1. Education New Zealand, ENZ, is a non-profit charitable trust. The organisation is governed by an independent Chairperson and a Board of Directors (The Trust Board) comprising members from education sector peak bodies, covering state and private, secondary and tertiary providers.

B. Functions of Education New Zealand

1. Education New Zealand undertakes activity in a number of functional domains including:
 - advocacy on behalf of New Zealand's education export industry;
 - assisting the New Zealand government and its agencies with policy development in relation to the education export industry;
 - advice to foreign governments;
 - generic and collective promotion of New Zealand as a study destination;
 - promotion of the 'Educated in New Zealand' brand; and
 - market research and scoping of new opportunities for New Zealand providers.
2. In order to maintain and develop the strong base and reputation New Zealand export education providers have established, the industry needs to ensure it is innovative and maintains a competitive edge.
3. The project described in this document is a component of the Education Export Industry Development work programme funded by the Export Education Industry Development Fund (EEDIF).

In administering the EEDIF, Education New Zealand convenes industry reference groups that advise on the formation of work plans.

There are three reference groups in total: Research, Capability and Quality Development (Professional Development), and Promotion.

One of the projects identified by the Research Reference Group, after consultation with the export education industry, is Comparative Study Body Profile and Potential, and is described more fully in the attached Terms of Reference at Schedule 1.

C. Purpose of this RFP

1. ENZ is inviting the submission of Proposals from parties interested in undertaking this project. Details of the project are contained in the attached Terms of Reference at Schedule One.
2. The Contract is expected to begin in October 2008.
3. In submitting a response to this Request for Proposal the proposer accepts and agrees to be bound by ENZ's Conditions of Proposal.
4. Proposals will be evaluated according to the attached Proposal Assessment Criteria.
5. The proposed timeframe for the Proposal process is as follows:

Deadline for submission of Proposals:	Friday 26 th September 2008
Selection Panel Convened:	Week of 13 th October 2008
Notification to preferred Applicant:	Week of 20 th October 2008
Contract start date:	Friday 31 st October 2008

Please note that this timeframe is indicative only and may be subject to change.

D. Conditions of Proposal

1 Official Liaison Person

- 1.1 All enquires related to this Proposal must be directed in writing to:

Kathy Phillips
Industry Development Programme Manager
Education New Zealand

PO Box 10-500
Level 6, ABB House
138 The Terrace
Wellington

e-mail: kathy.phillips@educationnz.org.nz

E. Submission of Proposals

- 1 The deadline for submission of Proposals is **12 noon 26th September 2008**. Proposals received after this time may not be considered.
- 2 Proposals must arrive at the address stated in clause D., on or before the deadline.
- 3 Proposals may be sent by mail, couriered or hand delivered to this address. Faxed, e-mailed or electronic copies of Proposals will not be accepted.
- 4 Proposals should be placed in a sealed envelope and clearly marked: "Comparative Student Body Profile and Potential – *Commercial in Confidence*"
- 5 Proposals should be addressed to the Industry Development Programme Manager. Proposals must be submitted in hard copy form (3 copies) along with one electronic diskette of the proposal.
- 6 The Terms of Reference for the project is attached at Schedule 1.
- 7 Proposals will be assessed against the following criteria:

#	PROPOSAL ASSESSMENT CRITERIA	
	Qualifications, Skills and Experience	
1	Qualifications and related experience of the person directing the project, and any other key personnel.	
2	Evidence of proposer's knowledge and experience of the subject area particularly in a global sense and particularly relating to the multi-sector education market.	
	Capability to undertake Project	
3	Evidence from previous research that demonstrates an ability to extract key findings and realistic recommendations, and an ability to effectively communicate and present these findings and recommendations to all relevant stakeholders.	

Methodology and Approach		
4	a <u>methodology</u> which demonstrates an understanding of the objectives of the research	
5	a <u>draft work plan</u> for the research which ensures participation and consultation with all relevant stakeholders and includes self-management systems that ensure: <ul style="list-style-type: none"> • Achievable workflow and timetable • Meeting milestones • Robust, high quality output • On time completion 	
6	a <u>risk management</u> plan which identifies the key issues of the research and constraints and how these will be managed in the project process	
7	price or financial proposal (in a separate sealed envelope)	

8 **Applicants are asked to submit in the following order a Bound Proposal comprising the following documents:**

Proposers are asked to submit a Proposal comprising the following documents:

- i. A detailed summary of addressing Criteria numbers 2 and 3 (no longer than five pages¹).
- ii. A summary of methodology and approach, including a draft work plan, as per Criteria numbers 4 and 5 (no longer than five pages).
- iii. A risk management plan as per Assessment Criteria number 6 (no longer than two pages).
- iv. A background of the key personnel highlighting relevant qualifications, skills and experience address Assessment Criteria number 1 and including CVs.
- v. The names and contact details of two referees for ENZ to contact
- vi. A proposed estimated budget (exclusive of GST) in NZ Dollars (NZ\$) in a separate sealed envelope.
(NB the proposed estimated budget for the entire project must be indicated).
- vii. A completed Proposal Statement as per the template attached at Schedule 2.
- viii. 1 x electronic version (i.e. CD or floppy disc) of the Proposal documentation to be compatible with Microsoft software
- ix. Three bound copies of the completed Proposal.

9 The Proposal **must** include a signed statement at schedule 2 (Applicants Declaration) and where necessary identifying any actual or potential conflict of interest arising from experience or affiliations of each nominated consultant and accepting the terms and conditions of the attached Standard Funding Arrangement.

¹ The definition of a page is an A4 page where the type size must be no smaller than 10 point. Where the maximum number of pages allowable is exceeded the additional pages will not be considered by the Assessment Panel.

- 10 ENZ requests that **all** Proposals conform to these Conditions of Proposal, in the format indicated above and reserves the right to reject any non-conforming Proposal.

F Proposal Documents

- 1 Each Applicant shall examine, or be deemed to have examined, the Conditions of Proposal, Terms of Reference, Standard Agreement and Proposal Assessment Criteria and any other information supplied by ENZ in writing. Where the Proposal documents are ambiguous or unclear to an Applicant, then the Applicant may at any time, up until **12 noon 25th September 2008**, contact the Industry Development Programme Manager.
- 2 ENZ reserves the right to change, suspend or cancel this Proposal, or the contents of the Proposal documentation at any time prior to the full acceptance of a Proposal. Where any change is made ENZ shall notify all Applicants in writing and shall alter the Proposal closing time, as it thinks fit. ENZ may issue a Supplementary Notice, which shall be published on the GETS and ENZ's web site and shall, upon issue, become part of the Proposal documents.

G Form Content and Preparation of Proposals

- 1 Each Applicant shall provide the contact name, telephone number, e-mail and contact address of one individual to act as one point of contact during the Proposal process as per the attached Schedule 3. That person may be required to answer questions which may arise during examination of the Proposal or provide additional information if requested by ENZ.
- 2 The Proposal Statement document in Schedule 2 is to be signed by a duly authorised officer, for and on behalf of, the Applicant.
- 3 All pages are to be bound together in the above order of section 8 to form the Applicants final proposal document.
- 4 All Proposals shall be firm offers and may not be withdrawn for a period of 30 calendar days following the deadline for submission of Proposals.
- 5 The cost of preparing and submitting the Proposal shall be borne by the Applicant.

H The Proposal Process

- 1 During the Proposal period **Applicants must not contact ENZ staff directly regarding this Proposal except in accordance with clause D.1.**
- 2 ENZ reserves the right to clarify or request additional information from any Applicant before accepting any Proposal and to implement additional processes to evaluate the Proposals.
- 3 ENZ reserves the right to negotiate with any one and/or all Applicants with a discretionary view to forming multiple contracts.
- 4 ENZ reserves the right to negotiate without restriction with Applicants after the close of Proposals on any matter contained in the Proposal, without disclosing this to any other person.
- 5 ENZ shall have no liability for any information it provides, or for any cost or loss to any Applicant, in the event of that this Proposal is cancelled, suspended or changed.
- 6 Applicants may only submit one proposal per project and must not include multiple projects in one proposal.

- 7 ENZ reserves the right to accept or reject any, or all Proposal(s), and to annul the Proposing process, at any time, thereby rejecting all Proposals, prior to any contract being awarded.

I Acceptance of Proposal

- 1 Any Proposal will not necessarily be accepted.
- 2 Each Applicant shall be notified in writing of the acceptance or rejection of its Proposal as soon as possible. No Proposal shall be deemed to be accepted unless and until the Applicant has been notified by ENZ in writing.
- 3 Nothing contained or implied in this invitation to Proposal shall oblige ENZ to discuss, justify or give reasons for any of its decisions or actions relating to this Proposal process or any individual Proposal.

J Confidentiality

- 1 Applicants should mark their proposals "*Commercial - In Confidence*" if they wish to protect specific information. ENZ will treat all Proposals in the strictest confidence.

K Subject to Contract

- 1 Following the Proposal evaluations, the preferred proposer will be contacted and invited to enter into negotiations with a view to entering into a Contract with ENZ. Such an invitation is not a formal contract offer.
- 2 Proposals are submitted on the basis that no binding legal relations with ENZ are created unless and until a formal written arrangement is signed by both ENZ and the successful Applicant.
- 3 The acceptance by ENZ of any Proposal, whether with or without negotiation, or the negotiation with an unsuccessful Applicant, shall not create binding legal relations between ENZ and the party whose Proposal has been accepted or which is negotiating with ENZ.

L Evaluation Criteria

- 1 Proposals will be evaluated by an Assessment Panel, convened by ENZ, with a focus on the criteria outlined in the Proposal Assessment Criteria – Page 3.
- 2 The assessment panel intends informing all applicants of its decision on the preferred proposer by **close of business Friday 24th October 2008**. Decisions will be communicated in writing.
- 3 Education New Zealand, and/or other representatives of the assessment panel, may seek further information from proposers, wish to discuss a proposal with the applicant and/or wish to negotiate changes to a proposal.
- 4 An interview/presentation may be required prior to final selection. Proposers will be given notification of the Panel's decision to conduct interviews/presentation shortly before the interview/presentation date.
- 5 ENZ reserves its absolute discretion in the evaluation and selection process.

M Contract Negotiations

- 1 Once decisions are communicated, contract negotiations will commence with the successful proposer. It is Education New Zealand's intention to see these concluded as swiftly as possible, with the process completed by 30th

October 2008. Proposers should note that until both parties have signed a written agreement, the agreement is an arrangement in principle only.

- 2 Both parties agree to negotiate in good faith, and on successful conclusion of negotiations the preferred proposer(s) will sign a formal Contract with ENZ.

ENZ looks forward to receiving your Proposal for the above project.

Kathy Phillips
Industry Development Programme Manager
Education New Zealand

enc: Schedule 1. Terms of Reference
 Schedule 2. Proposal Statement template
 Schedule 3. Standard Contract for Services template

TERMS OF REFERENCE

Comparative Student Body Profile and Potential**Background**

New Zealand and Australia are broadly similar societies with comparable abilities to adapt and live with foreign students as a proportion of their populations. Australia appears to be performing well with much higher levels of international students than NZ, living, studying and working there, with no apparent undue social, economic stress or outcry as a result. There is no apparent reason why NZ could not accommodate a similar international student presence, from a similarly diverse range of source countries as Australia.

Objectives

The objective of this research is to benchmark the actual achievement of NZ, directly against Australia. This comparison could be used to establish defined targets to match or, where appropriate, surpass Australia per capita enrolments. If NZ matched, on average, the Australian level of international student enrolment, there is no reason to believe that NZ could not achieve and manage similar numbers and diversity of international students.

Scope / Deliverables

The outcome of this project is to be a research report that benchmarks directly against Australia (by sector):

- NZ's actual numbers of international students,
- source countries,
- length of study,
- geographical destination post study

Budget

\$30,000 (exclusive GST)

Project Completion

The report, professionally proof read and in the ENZ house style (see below), is to be produced by 17th March 2009, along with all data files and documents used for the report.

The report is to be provided in Word version.

A single, one page summary of the research and key findings for promotional purposes is also to be provided.

Communication

All reports and evaluations will be first released by the Education New Zealand Trust. The report will be sent to key stakeholders and will be made available on the Education New Zealand Trust website.

Requirements of Proposals

Proposals should provide an outline of contents for the analysis/methodology and approach, and project costs (excluding GST) for each component.

Education New Zealand House Style (for report formatting):

MAIN HEADING

Font: Tahoma
Point Size: 10
Colour: R122, G193, B66 (Green)
Special: All Caps

SUB HEADING

Font: Tahoma
Point Size: 10
Colour: R0, G0, B0 (Black)
Special: All Caps

Paragraph

Font: Tahoma
Point Size: 9
Colour: R0, G0, B0 (Black)
Line Spacing: 1.5

Footnotes

Font: Tahoma
Point Size: 7
Colour: R0, G0, B0 (Black)



PROPOSAL STATEMENT

Comparative Student Body Profile and Potential

1. APPLICANT'S CONTACT DETAILS

Contact Name:

Full legal business name:

Business postal address:

Business courier address:

Business phone number:

Business fax number:

Cellular phone number:

Email address:

Authorised contracting officer /
contract signatory:

3. APPLICANT'S DECLARATION (to be completed by authorised contracting officer/contract signatory)

In submitting this Proposal I make the following declarations:

- ▶ I confirm that I have read, understood and agree to be bound by the Conditions of Proposal.
- ▶ I agree that ENZ may contact all nominated referees, and at ENZ's discretion, carry out reference checks in relation to any previous work which has been undertaken and that all references and reports obtained by ENZ will be confidential to ENZ.
- ▶ I confirm that in submitting this information I am not aware of any situation or issue that would conflict with the interests of ENZ. Where an actual, potential or perceived conflict of interest does arise I undertake to report it to ENZ immediately.
- ▶ I confirm that I have read and understood the standard Agreement for Service template attached to the Request for Proposal. If successful, I agree to sign an Agreement on these terms.
- ▶ I have personally completed this Proposal Statement on behalf of my organisation/company and declare that the above particulars provided here are true and correct. I understand that should I be successful then falsification of information, supply of misleading information or the suppression of material information will be grounds for the termination of the contract.

signed for and on behalf of the Applicant by an authorised contracting officer / contract signatory

signature

full name

position

date

PLEASE DO NOT INCLUDE IN PROPOSAL SUBMISSION

It is necessary for applicants to read and accept these standard terms and conditions before submitting a proposal

Standard Terms and Conditions

AGREEMENT dated 2007

PARTIES

EDUCATION NEW ZEALAND TRUST, a charitable trust incorporated under the Charitable Trusts Act 1957 ("ENZ)

[Name of Provider] ("Provider")

BACKGROUND

- A. ENZ wishes to procure the services of the Provider to perform certain services for, and to provide certain deliverables to, ENZ.
- B. The Provider has agreed to perform such services and provide such deliverables on the terms and conditions set out below.

AGREEMENT

1. DEFINITIONS AND INTERPRETAION

1.1 **Definitions:** In this Agreement, the following terms will have the following meanings:

"Agreement" means this agreement including the Schedules;

"Business Day" means a day, excluding Saturdays, Sundays, statutory public holidays or any day in the period commencing 24 December and ending on 5 January, on which registered banks are open for ordinary over-the-counter business in Wellington;

"Confidential Information" means all information of any kind, whether or not it is in tangible or documentary form, and whether or not marked or identified as being confidential, that related to ENZ or its business affairs and includes information relating to:

- (a) the business operations, business strategies, marketing plans and technologies of ENZ;
- (b) the Services;
- (c) the Deliverables;
- (d) any Inventions; and
- (e) the terms of this Agreement;

“Deliverables” means the deliverables described in Part B of Schedule 1:

“Existing Material” means Intellectual Property Rights owned by or licensed to the Provider at or following the date of this Agreement and used in the performance of the Services, or incorporated in the Deliverables or any Inventions;

“Fee” means the fee as specified in Part A of Schedule 2;

“GST” means goods and services tax payable under the Goods and Services Tax Act 1985 at the rate prevailing from time to time, including any tax levied in substitution for that tax (but excluding any penalties or interest payable under such Act);

“Intellectual Property Rights” means all industrial and intellectual property rights whether conferred by statute, at common law or in equity, including, but not limited to, all copyright and similar rights that may subsist or may hereafter subsist in works or other subject matter, rights in relation to inventions (including all patent applications), trade secrets and know-how rights in relation to designs (whether or not registrable), rights in relation to registered and unregistered trade marks, business names and rights in relation to domain names;

“Invention” means any invention, improvement, modification, process, formula, model, prototype, sketch, design, drawing, plan, software or other work or material that the Provider alone or with others may make, devise, develop or discover during the performance of the Services or using any of the materials or resources of ENZ;

“Payment Milestones” means the milestones for payment of the Fee as set out in Part B of Schedule 2;

“Services” means the creation and provision to ENZ of the Deliverables, together with such other services as described in Part A of Schedule 1;

“Specified Personnel” means the personnel specified in Part D of Schedule 1;

“Term” means the term set out in clause 7.1; and

“Work Programme” means the work programme set out in Part C of Schedule 1.

1.2 **Interpretation:** In this Agreement:

- (a) headings are used for convenience only and will not affect its interpretation;
- (b) references to the singular include the plural and vice versa;
- (c) references to a party include that party’s successors, executors, administrators and permitted assignees (as the case may be);
- (d) references to clauses and Schedules are to those clauses and Schedules in this Agreement;
- (e) where a word or phrase is defined, its other grammatical forms have corresponding meaning;
- (f) words importing one gender include any other gender;

- (g) references to a "person" include an individual, firm, company, corporation or unincorporated body of persons, any public, territorial or regional authority, any government, and any agency of any government or of any such authority; and
- (h) an obligation not to do anything includes an obligation not to suffer, permit or cause that thing to be done.

2. PROVIDER'S OBLIGATIONS

- 2.1 **Perform Services:** In consideration of the Fee, the Provider will perform the Services.
- 2.2 **Follow directions:** In performing the Services, the Provider will follow all reasonable directions of ENZ from time to time.
- 2.3 **Performance and delivery:**
 - (a) The Provider will perform the Services and deliver the Deliverables to ENZ within the timeframes and at the places specified in the Work Programme. Time for performance and delivery will be of the essence.
 - (b) The Provider will promptly notify ENZ in writing if it becomes aware of any likely failure or delay by it in performing the Services or providing the Deliverables.
- 2.4 **Meetings:** The Provider will report to ENZ on a regular basis regarding the Provider's progress in performing the Services as and when reasonably required by ENZ.
- 2.5 **Changes:** Any change to the Services or Deliverables will be agreed in writing by the parties. When a change is requested by a party, it will inform the other party of the nature of the change requested and the additional costs or impacts on the Fee and the Work Programme. The Provider agrees not to unreasonably refuse to perform any change requested by ENZ or seek to impose any unreasonable terms or charges in the event of such request.
- 2.6 **Resources:** The Provider will provide at its own cost all equipment, tools, materials, implements and resources necessary for the efficient, prompt and proper carrying on and completion of the Services except where otherwise provided in the Work Programme.
- 2.7 **Format:** The Provider will consult with ENZ prior to finalising any design or branding format relating to the Deliverables.
- 2.8 **Access to work of Provider:** For the purpose of ensuring compliance with the Provider's obligations under this Agreement, ENZ will have access to and the right to inspect any work being carried out by the Provider under this Agreement.
- 2.9 **Maintain reputation:** The Provider will not engage in any activity or conduct that might adversely impact on the good name, goodwill, reputation or image of ENZ.
- 2.10 **Specified Personnel:**
 - (a) Unless the parties agree otherwise in writing, the Provider will ensure the Services are performed using only the Specified Personnel.
 - (b) If ENZ for any reason considers that any of the Specified Personnel are inappropriately qualified, unsuitable or incapable of performing the Services to the standard required under this Agreement, then without prejudice to any other right or remedy it may have, ENZ may require the Provider to replace such Specified Personnel, at the Provider's cost, with new personnel reasonably acceptable to ENZ.

- (c) The Provider will be responsible for all acts and omissions of the Specified Personnel as if they were the acts or omissions of the Provider.

2.11 Sub-contractors:

- (a) If the Provider wishes to sub-contract the performance of any of the Services to any other person it will first obtain ENZ's written consent.
- (b) The Provider will remain liable to ENZ for all acts or omissions of any sub-contractors as if they were the acts or omissions of the Provider.

2.12 Health and safety: The Provider will comply, and will ensure that the Specified Personnel and all sub-contractors comply with all of ENZ's security, health and safety requirements notified by ENZ while on the premises of ENZ.

2.13 Provider to pay taxes: The parties agree that this Agreement will not constitute an employment agreement under the Employment Relations Act 2000. The Provider will be responsible for and will pay all taxes, ACC Levies and any other levies relating to the Provider or any person employed by the Provider from time to time. The Provider will indemnify ENZ from and against any and all liability, losses, damages, costs and expenses awarded against, incurred or suffered by ENZ arising out of any breach by the Provider of this clause 2.13.

2.14 Conflict of interest: The Provider agrees during the Term of this Agreement that it will not undertake any work for, or provide any services to any other person where the provision of such work or services is likely to conflict with the Provider's obligations to ENZ under this Agreement, without first obtaining ENZ's written consent, such consent not to be unreasonably withheld. The Provider agrees that in the case of doubt as to whether a conflict exists, it will notify ENZ in writing, and ENZ's decision will be binding on the Provider.

3. PAYMENTS

3.1 Fee: In consideration of the Services, ENZ will pay to the Provider the Fee.

3.2 Invoicing and payment:

- (a) The Provider will invoice ENZ, within seven days after meeting the relevant Payment Milestones, in accordance with the schedule of payments of the Fee specified in Part B of Schedule 2.
- (b) If, upon receipt of an invoice under clause 3.2(a), ENZ is satisfied that the Provider has met the relevant Payment Milestones then subject to clause 3.4, ENZ will make payment in respect of such invoice by the 20th day of the month following the month of receipt by ENZ of the invoice.

3.3 Expenses: The Provider will be responsible for all disbursements and other expenses incurred by it in performing the Services, unless the parties agree otherwise in writing.

3.4 Dispute over invoice: If ENZ disputes in good faith the whole or any portion of any invoice issued under clause 3.2, ENZ will pay the portion of the invoice that is not in dispute, but may withhold payment of the disputed portion until the dispute is resolved.

3.5 Payment terms: All sums due to the Provider under this Agreement:

- (a) are exclusive of GST or similar tax which, where applicable, will be payable by ENZ to the Provider in addition on the rendering by the Provider of an appropriate tax invoice; and
- (b) will be paid in New Zealand currency by cheque payment the Provider.

4. INTELLECTUAL PROPERTY RIGHTS

4.1 **Ownership:** All Deliverables and Inventions and all Intellectual Property Rights in and to such Deliverables and Inventions will be exclusively owned by ENZ. To the extent that any such Intellectual Property Rights do not on their creation vest in ENZ, the Provider will hold such Intellectual Property Rights in trust for ENZ, and the Provider will if called upon by ENZ, assign to ENZ all of the Provider rights, title and interest in and to such Intellectual Property Rights. ENZ will be entitled to:

- (a) seek protection in respect of such Intellectual Property Rights anywhere in the world (as it decides in its absolute discretion). To this end, the provider hereby assigns to ENZ the right to apply for protection of such Intellectual Property Rights;
- (b) assign, transfer, license or otherwise deal with such Intellectual Property Rights as it sees fit in its absolute discretion; and
- (c) commercially exploit the Deliverables and Inventions at its sole discretion and expense.

4.2 **Inventions:** The Provider will promptly disclose to ENZ in writing full detail of any Inventions, and the Provider will supply ENZ with all information and know-how in the Provider's possession that is reasonably necessary to enable ENZ to understand the exact mode of working and producing such Inventions.

4.3 **Acknowledgement:** The Provider acknowledges and agrees that:

- (a) the Provider has no claim over the Deliverables or Inventions or any Intellectual Property Rights therein; and
- (b) subject to clause 4.4, the Provider has no licence to use the Deliverables or Inventions or any Intellectual Property Rights therein except as necessary to perform the Services.

4.4 **Licence to use Deliverables or Inventions:** If the Provider wishes to have a licence to use any of the Deliverables or Inventions other than to perform the Services, it will first obtain the written consent of ENZ to such use, such consent not to be unreasonably withheld. Any such licence will be non-exclusive, non-transferable and non-sub licensable, and will be subject to such other restrictions or conditions as ENZ may reasonably determine.

4.5 **Further actions:** If requested by ENZ, the Provider will (at ENZ's expense):

- (a) apply for and obtain or (if ENZ thinks fit) join with ENZ in applying for and obtaining protection of the Intellectual Property Rights in and to any Deliverables and Inventions with the understanding and the intention that all rights, title and interest in and to such applications and any granted protection are to vest in ENZ; and
- (b) execute all documents, give such assistance and do all other acts and things as may be necessary or desirable to apply for and obtain protection of the Intellectual Property Rights in and to any Deliverables and Inventions, vest any such protection to ENZ, enable enforcement of any such Intellectual Property Rights, defeat any challenge to the validity of any such Intellectual Property Rights and otherwise to implement and carry out the Provider's obligations under this clause 4.

- 4.6. **Existing Material:** To the extent that any Deliverables or Inventions incorporate or rely on any of the Provider's Existing Material, the Provider:
- (a) will disclose to ENZ in writing full details of such Existing Material; and
 - (b) hereby grants ENZ an irrevocable, royalty-free, non-exclusive, transferable, sub-licensable, worldwide and perpetual licence to use such Existing Material for the purpose of:
 - (c) using or commercially exploiting the Deliverables or Inventions and all Intellectual Property Rights therein; and
 - (d) filing, registering, protecting, renewing, prosecuting or defending any or all of the Intellectual Property Rights in and to the Deliverables or Inventions.
- 4.7. **Power of attorney:** The Provider hereby irrevocably appoints ENZ as the Provider's attorney with full power to act in the Provider's name and on the Provider's behalf in fulfilling any of the matters set out in clause 4.5:
- (a) to the extent that the Provider fails to do any of such matters after being called upon to do so by ENZ; or
 - (b) if ENZ is unable after making reasonable and proper inquiries to locate the Provider to request the fulfilment of such matters.

5. CONFIDENTIAL INFORMATION

- 5.1 **Confidentiality obligations:** The Provider will maintain as secret and confidential, at all times, all Confidential Information and undertakes to:
- (a) respect ENZ's rights to such Confidential Information;
 - (b) use the same exclusively for the purposes of this Agreement; and
 - (c) disclose or provide Confidential Information only to those of its Specified Personnel and permitted sub-contractors to whom and to the extent that such disclosure is reasonably necessary for the purposes of this Agreement
- 5.2 **Exceptions to obligations:** The provisions of clause 5.1 will not apply to Confidential Information that the Provider can conclusively demonstrate by written evidence:
- (a) is subsequently disclosed to the Provider, without any obligations of confidence, by a third party who has not derived it directly or indirectly from ENZ;
 - (b) is or becomes generally available to the public through no act or default of the Provider; or
 - (c) is required to be disclosed to the courts of any competent jurisdiction, or to any government regulatory agency or financial authority.
- 5.3 **Disclosure to Specified Personnel:** The Provider will ensure that any Specified Personnel or permitted sub-contractors to whom any disclosure is made in accordance with clause 5.1(c):
- (a) are made aware of and subject to the Provider's obligations under clause 5.1; and
 - (b) have entered into written undertakings of confidentiality in favour of the Provider at least as restrictive as those set out in clauses 5.1 and 5.2 and that apply to the Confidential Information.

The Provider will be responsible to ENZ for any unauthorised disclosure of Confidential Information by such Specified Personnel and permitted sub-contractors as if the disclosure was a disclosure by the Provider under this clause 5.

5.4 **Security:** The Provider will effect and maintain adequate security measures to safeguard the Confidential Information from access or use by unauthorised persons and to keep the Confidential Information under the Provider's control, such measures being at least to the same standard of care as used by the Provider for the Provider's own confidential information.

5.5 **Equitable remedies:** The parties acknowledge that monetary damages alone may be an inadequate remedy for breach of the Provider's obligations under this Agreement. In addition to any other remedy, which may be available in law or equity, ENZ may be entitled to interlocutory injunctive relief to prevent a breach of this Agreement and to compel specific performance of this Agreement.

5.6 **Publication:**

(a) For the avoidance of doubt, the Provider may not publish or disclose any information relating to the Services or to any Invention without first obtaining ENZ's consent in writing. Such consent may be withheld or delayed if ENZ in its sole discretion determines that publication or disclosure may adversely affect the interests of ENZ.

(b) The Provider will, in any publication or disclosure permitted by ENZ under clause 5.6(b), appropriately acknowledge the financial contribution of the Export Education Industry Development Fund, and will provide such other acknowledgements relating to the role of ENZ and the ownership of any relevant Deliverables or Inventions that ENZ may reasonably require.

6. WARRANTIES AND INDEMNITY

6.1 **Warranties:** The Provider warrants that:

(a) the Services will be performed in a timely manner to a high standard of skill, care and diligence and in accordance with the standards and practices applicable to the relevant industry;

(b) all Deliverables will be fit for the use, purpose or application intended for them by ENZ, and will comply with all relevant statutory and regulatory provisions or requirements;

(c) the Specified Personnel are appropriately qualified, suitable and capable of performing the Services to the standard required under this Agreement;

(d) except to the extent expressly acknowledged to ENZ in writing (such as the inclusion of publicly available material), all Deliverables and Inventions will be the Provider's own original work and will not in any way rely on, utilise or incorporate any work written or created by any third party or undertaken at any time by the Provider for any third party; and

(e) to the best of the Provider's knowledge, the use by ENZ of the Provider's Existing Material, the Deliverables and/or the Inventions will not infringe the Intellectual Property Rights of any other person.

6.2 **Rectification:**

(a) If any of the Services, Deliverables or Inventions do not comply with the warranties specified in clause 6.1 then, without prejudice to any other rights or remedies ENZ may have, ENZ may by notice in writing to the Provider require the Provider to rectify such

failure to comply, and upon receiving such written notice the Provider will immediately rectify such failure at its own cost.

- (b) If the Provider fails to rectify such failure within a reasonable time following written notice by ENZ then, without prejudice to any other rights or remedies ENZ may have, ENZ may itself rectify the failure or commission any other person to rectify the failure, and the Provider will be responsible for all costs incurred by ENZ arising from such rectification.

6.3 **Indemnity:** The Provider will at all times indemnify and keep indemnified ENZ and ENZ's officers, employees and agents from and against any and all liability, losses, damages, costs and expenses of any nature whatsoever awarded against, incurred or suffered by them, whether direct or consequential (including, but without limitation, any economic loss or other loss of profits, business opportunity, data or goodwill), arising out of or resulting from:

- (a) the non-performance by the Provider of any of its obligations under this Agreement; or
- (b) any claims or threatened claims concerning the Services or Deliverables,
- (c) except to the extent that such liability, losses, damages, costs and expenses arise solely as a result of the negligent or wrongful act or omission of ENZ or its officers, employees or agents.

6.4 **Limitations of Liability:**

- (a) Unless otherwise agreed in writing by both parties, the Provider's liability for any claims, demands, damages, costs (including legal costs) and expenses resulting from any omission, act or breach of this Agreement will be limited to the amount of any fees payable to the Provider in respect of the specific Deliverable which is the subject of the potential claim.

7. TERM AND TERMINATION

7.1. **Term:** This Agreement will commence on the date of this Agreement and, unless earlier terminated in accordance with this clause 7, will continue in full force and effect until the Provider has completed the Services to the satisfaction of ENZ.

7.2. **Early Termination:** Notwithstanding clause 7.1, either party may terminate this Agreement by giving the other party at least 60 days' notice in writing that it wishes to terminate this Agreement for whatever reason.

7.3 **Termination without breach:** Without prejudice to any other right or remedy it may have, ENZ may immediately terminate this Agreement at any time by notice in writing to the Provider if:

- (a) the Provider:
 - (i) is in material breach of this Agreement and, in the case of a material breach capable of remedy within 14 days, the material breach is not remedied within 14 days of the Provider receiving notice specifying the material breach and requiring its remedy;
 - (ii) ceases or threatens to cease to carry on all or substantially all of its business or operation, is declared or becomes bankrupt or insolvent, is unable to pay its debts as they fall due, enters into a general assignment of its indebtedness or a scheme of arrangement, or composition with its creditors, or takes or suffers any similar or analogous action in consequence of debt; or

(iii) has a trustee, manager, administrator, administrative receiver, receiver, inspector under any legislation or similar officer appointed in respect of the whole or any part of the Provider's assets or business, or an order is made or a resolution is passed for the liquidation of the Provider (other than voluntarily for the purposes of a solvent amalgamation or reconstruction); or

(b) an order is made or a resolution is passed for the liquidation of the Provider (other than voluntarily for the purpose of a solvent amalgamation or reconstruction).

7.4 Consequences of termination: On termination or expiration of this Agreement for any reason whatsoever:

(a) the Provider will cease to perform the Services and ENZ will pay the Provider for any Payment Milestones met by the Provider up to the date of termination;

(b) the Provider will return to ENZ all property that ENZ has provided to the Provider during the course of the Services;

(c) the Provider will, upon receipt of a written request from ENZ, return or destroy (at ENZ's option), all Confidential Information in the Provider's possession or control. Upon the return or destruction (as the case may be) of all such Confidential Information, the Provider will provide to ENZ a certificate stating that the Confidential Information returned or destroyed comprises all the Confidential Information in the Provider's possession or control; and

(d) subject as provided in this clause 7.4 and in clause 7.5, and except in respect of any accrued rights, neither party will be under any further obligation to the other party.

7.5 Survival of provisions: Upon termination of this Agreement for any reason, the provisions of clauses 2.10(c), 2.11(b), 2.13, 4.1 to 4.7, 5.1 to 5.6, 6.1 to 6.4, 7.4 to 7.6, 9.1 to 9.12 and any other clauses intended to survive termination, together with those other provisions of this Agreement that are incidental to, and required in order to give effect to those clauses, will remain in full force and effect.

7.6 Accrued rights: Termination of this Agreement will be without prejudice to the rights and remedies of the parties accrued prior to termination including in respect of any antecedent breach of this Agreement.

7.7 Cancellation: The parties may mutually agree in writing to cancel this Agreement at any time.

8. DISPUTES

8.1 Procedure: If a dispute arises in relation to this Agreement, the parties will attempt to resolve the dispute using the dispute resolution process set out below.

8.2 Informal resolution: Either party can initiate the dispute resolution process by giving written notice to the other party of the dispute ("Dispute Notice"). The parties will work together in good faith to resolve any dispute or difference arising between them in connection with this Agreement. Pending resolution of a dispute, each party, to the extent it is able, will continue to perform its obligations under this Agreement.

8.3 Mediation:

(a) If the parties cannot resolve the dispute by negotiation within ten Business Days after delivery of the Dispute Notice, the dispute will be submitted to mediation in New Zealand in accordance with the provisions of the LEADR New Zealand Incorporated Standard Mediation Agreement ("Mediation").

(b) The Mediation will be conducted by a mediator and at a fee agreed by the parties. If the parties fail to reach such an agreement within ten Business Days, the mediator will be selected and the mediator's fee will be determined, by the Chair for the time being of LEADR New Zealand Incorporated.

8.4 **Arbitration:** If the parties cannot resolve the dispute within 20 Business Days after commencement of Mediation, the dispute will, at the election of either party (by written notice to the other party) be determined by arbitration under the Arbitration Act 1996 ("Act").

8.5 **Conduct of arbitration:** For the purposes of the Act:

(a) the arbitrator will be the person agreed on in writing by the parties within ten Business Days after the date of receipt of any notice given under clause 8.4 or, failing agreement within that time, will be the person appointed, at either party's request, as arbitrator by the Chair for the time being of LEADR New Zealand Incorporated following any consultation with the parties that the Chair considers appropriate;

(b) the place of arbitration will be Wellington; and

(c) the date on which the arbitral proceedings commence will be the date 20 Business Days after the date on which the dispute between the parties is submitted to arbitration under clause 8.4.

8.6 **Interlocutory relief:** Nothing in this Agreement will prevent either party, at any time, from seeking any urgent interlocutory relief from a court of competent jurisdiction as referred to in clause 9.11 in relation to any matter that arises under this Agreement.

9. GENERAL

9.1 **Force Majeure:**

(a) Neither party will be liable to the other party for any breach or failure to perform any of its obligations under this Agreement where such breach or failure is caused by war, civil commotion, hostility, act of terrorism, strike, lockout, other industrial act, weather phenomena or other act of God, governmental regulation or direction, or any other cause beyond that party's reasonable control whether similar to any of the foregoing or not ("Force Majeure"), provided that the party seeking to rely on this clause 9.1:

(i) notifies the other party if it is or is likely to be affected by an event of Force Majeure as soon as reasonably practicable;

(ii) uses all reasonable endeavours to avoid, overcome or mitigate the effects of an event of Force Majeure as quickly as practicable; and

(iii) consults with the other party on its efforts under clause 9.1(a)(ii).

(b) If the event of Force Majeure, or the effects of an event of Force Majeure, continue for more than 20 Business Days such that a party is unable to perform its obligations under this Agreement, then either party may (after consultation with the other party) terminate this Agreement on giving the other party ten Business Days' written notice.

(c) Nothing in this clause 9.1 will excuse a party from any obligation to make a payment when due under this Agreement.

9.2 **Variations:** No amendment, variation or modification to this Agreement will be effective unless it is in writing and signed by duly authorised representatives of both parties.

- 9.3 **Assignment:** The Provider may not sell, assign, transfer, novate, sub-license, sub-contract, charge, pledge or otherwise encumber this Agreement or any of the Provider's rights or obligations under this Agreement, without first obtaining the written consent of ENZ.
- 9.4 **Waiver:** No failure or delay on the part of either party to exercise any right or remedy under this Agreement will be construed or operate as a waiver thereof, nor will any single or partial exercise of any right or remedy preclude the further exercise of such right or remedy.
- 9.5 **Invalid clauses:** If any provision or part of this Agreement is held to be invalid, unenforceable or illegal for any reason, this Agreement will be deemed to be amended by the addition or deletion of wording as appropriate to remove the invalid, unenforceable or illegal provision or part but otherwise to retain the provision and the other provisions of this Agreement to the maximum extent permissible under applicable law.
- 9.6 **Costs:** Each party will bear their own legal and other costs and expenses incurred in connection with the preparation, negotiation and execution of this Agreement.
- 9.7 **Relationship:** The parties will perform their respective obligations under this Agreement as independent contractors to each other. Nothing in this Agreement will create, constitute or evidence any partnership, joint venture, agency, trust or employer/employee relationship between the parties, and neither party may make or allow to be made, any representation that any such relationship exists between the parties. Neither party will have the authority to act for, or incur any obligation on behalf of, the other party, except as expressly provided for in this Agreement.
- 9.8 **Entire agreement:** This Agreement contains the whole of the contract and understanding between the parties in respect of the matters covered by it and supersedes all prior representations, agreements, statements and understandings between the parties in respect of those matters, whether verbal or in writing. The parties acknowledge that they are not relying on any representation, agreement, term or condition that is not set out in this Agreement.
- 9.9 **Remedies cumulative:** The rights of the parties under this Agreement are cumulative and not exclusive of any rights provided by law.
- 9.10 **Notices:**
- (a) Each notice or other communication to be given under this Agreement will be in writing and will be sent by post, facsimile (confirmed by post) or personal delivery to the addressee at the facsimile number, physical address, or postal address, and marked for the attention of the person or office holder (if any), from time to time designated for the purpose by the addressee to the other party. The initial facsimile number, address, and relevant person or office holder of each party is as follows:
- ENZ: Education New Zealand Trust
Level 6, 138 The Terrace
PO Box 10-500
WELLINGTON
- Facsimile: 04 471 2828
Attention: Kathy Phillips
- Provider: *[insert name]*
[insert street address]
[insert postal address]
[insert city]
- Facsimile: *[insert]*
Attention: *[insert]*

(b) No notice or communication will be effective until received. A communication is, however, deemed to be received:

(i) in the case of posting, on the third Business Day following the date of posting;

(ii) in the case of personal delivery, when received; and

(iii) in the case of a facsimile, following receipt of a report from the machine on which the facsimile was sent confirming that all pages were successfully transmitted,

provided that any notice personally delivered or sent by facsimile either after 5pm on a Business Day or on any day that is not a Business Day will be deemed to have been received on the next Business Day.

9.11 **Governing law:** The formation, validity, construction and performance of this Agreement will be governed by and construed in accordance with the law of New Zealand and will be subject to the non-exclusive jurisdiction of the New Zealand courts to which the parties hereby submit.

9.12 **Counterparts:** This Agreement may be executed in any number of counterparts (including facsimile copies) all of which, when taken together, will constitute one and the same instrument. A party may enter into this Agreement by executing any counterpart. The parties acknowledge that this Agreement may be executed on the basis of an exchange of facsimile copies and confirm that their respective execution of this Agreement by such means will be a valid and sufficient execution.

SIGNED

SIGNATURES OF AGREEMENT AUTHORITIES:	<u>For THE PROVIDER</u>	<u>In presence of Witness</u>
	_____ (Signature) Name: Position: Date:	_____ (Signature) Name: Position: Date:
SIGNATURES OF AGREEMENT AUTHORITIES:	<u>For ENZ</u>	<u>In presence of Witness</u>
	_____ (Signature) Name: Robert Stevens Position: CEO Date:	_____ (Signature) Name: Kathy Phillips Position: Industry Development Programme Manager Date:

SCHEDULE 1
SERVICES, DELIVERABLES AND WORK PROGRAMME

A. Deliverables:

[Describe any reports, documents, materials or other items to be supplied by the Provider]

B. Services:

[Describe any services to be performed other than the provision of the Deliverables]

A. Work Programme:

[set out the timeframes for performance of the Services and delivery of the Deliverables. Specify where the Services are to be performed. Also specify any resources to be provided by ENZ]

D. Specified Personnel:

[Specify]

**SCHEDULE 2
FEE AND PAYMENT**

A. Fee:

[Specify and describe when invoices are issued – i.e. dates and milestones]

B. Payment Milestones:

Milestone Number	Description of Payment Milestone	Milestone Due Date	Payment due on meeting Payment Milestone (ex GST)
			\$
			\$
			\$
			\$
Total:			\$

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