

Solar Energy Service Agreements – Minimum Terms

The minimum terms set out below are to apply to any solar panel provider (the **Provider**) who proposes to install and operate solar panels at Schools.

The Provider must ensure that the minimum terms set out below are incorporated into the terms of any proposed solar energy services agreement before such agreement is provided to the School and the New Zealand School Property Agency (NZSPA) for consideration. The minimum terms (including the definitions) can be adapted where necessary, however the main principles must be retained.

The School/NZSPA may make further amendments to the minimum terms, or any other provisions of the proposed agreement.

KEY TERMS	
The Works	The Agreement should provide: 1. that the Provider must, at its cost: (a) carry out any Works in a proper and workmanlike manner and in accordance with industry best practice; (b) comply with all applicable laws, standards, codes and consent requirements and obtain all relevant statutory and regulatory licences, permits or consents; (c) carry out the Works in accordance with plans (approved by the School) and Weathertightness Requirements; and (d) tidy up during and following completion of the Works, make good any damage the Provider may have caused to the Property and surrounding area and/or improvements.
Design	The School (and therefore the NZSPA) needs to be involved in the process for design and installation of the Works. Having the School involved in this process will increase the likelihood that a mistake (if any) will be picked up early, and rectified before it has caused any substantial damage to the Crown's buildings. The Agreement should provide: 1. that the Provider must, at its cost: (a) provide a programme for the Works to the School for its approval; (b) submit details relating to the nature of the Works and its design plans for the Works to the School for its approval (including specifications and warranties available for the Energy Hardware); and (c) outline any additional costs to the School; 2. if the School does not approve the plans for the Works, the parties will endeavour to agree on changes to the plans or either party may terminate the Agreement; 1. notwithstanding 2 above, if the School does not approve the plans due to the age and/or condition of the roof of the Property or because of any additional costs to the School, the School (at its own discretion or upon instruction from the NZSPA) may immediately terminate the Agreement upon written notice; 2. notwithstanding the School's review and approval of the plans for the Works: (a) the School has no responsibility or liability for; and (a) the Provider will at all times be and remain responsible for; the Plans, the performance and "buildability" of the Plans, and the Works.
Works Contract	The Works contract needs to reflect the terms of the Agreement. The Provider will: 1. obtain contractors' and suppliers' guarantees and warranties from suppliers, consultants, the contractor and its subcontractors in respect of the Works; 2. advise the School of all guarantees and warranties it has obtained and provide the School with copies of the same; and

	3. at the request of the school, use commercially reasonable endeavours to enforce (for the benefit of the Provider, the School, the NZSPA and the Crown) all guarantees and warranties obtained by the Provider from suppliers, consultants, the contractor and its subcontractors, in respect of the works including in relation to design, workmanship, plant and equipment, or materials.
Technical Requirements	The Provider must: 1. obtain and comply with all consents from any authorities necessary to allow the Provider to lawfully carry out the Works (including obtaining Requiring Authority consent under s176 Resource Management Act 1991 from the NZSPA); and 2. comply with: (a) all NZSPA police vetting requirements prior to any of the Provider's employees, agents, contractors or subcontractors accessing any part of the Property (details of these may be found on the following website: https://www.schoolproperty.govt.nz/day-to-day-management/police-vetting-for-school-property-contractors-and-consultants). (b) the asbestos handling requirements for the identification and management of Asbestos on school sites including the NZSPA issued process flowcharts and asbestos management plan (details of these may be found on the following website: https://www.schoolproperty.govt.nz/day-to-day-management/hazardous-materials-and-substances/managing-asbestos-in-schools). (c) all relevant MBIE (and any other relevant authority's) guidelines and requirements, including: (i) the New Zealand Metal Roofing and Wall Cladding Code of Practice (as amended from time to time); (ii) the guidance for the installation of solar panels on metal roofing published by the New Zealand Metal Roofing Manufacturers Association Incorporated; (iii) the Sustainable Electricity Association of New Zealand's (SEANZ) installation criteria (including, for the avoidance of doubt, installation by a registered SEANZ member, entry into the energy safety high risk database and proper orientation to the sun); and (iv) all relevant MBIE electrical requirements (including any FENZ guidance). 3. The Provider must obtain the prior written consent of the School and the NZSPA before installing its own installation control point (ICP) at the school.
Performance Warranty	The Agreement should include a performance warranty from the Provider which should include (without limitation) the following undertakings from the Provider: 1. if battery storage is specified, it will, at its cost, replace the battery when it reaches the manufacturer's end of life criteria, and in any event when the battery requires replacement; 2. that it will perform its obligations under the agreement to the accepted and reasonable professional standards within the industry and prudent electrical practices, complying with all relevant statutory and regulatory requirements and professional codes; 3. that the Energy Hardware will be free from defects or breakdown in materials or components; and 4. that if the Provider causes any damage to the Property or any School property at any time during the Term the Provider will repair or pay for that damage (including any damage caused as a result of the Provider's actions or inactions) so as to restore the Property or that other property to the condition it was in immediately prior to the damage occurring.
Health and Safety	The Agreement should provide detailed health and safety clauses acknowledging the Provider's specific health and safety obligations under the Health and Safety at Work Act 2015 (HSWA). Such clauses should include: 1. the Provider must comply with its duties as a Person Conducting a Business or Undertaking (PCBU) (including (but not limited to) any additional duties the Provider may have as a PCBU with a role in designing structures, plant or substances) as prescribed in the HSWA;

	2. the Provider shall provide information or notify the School, as appropriate, about health and safety matters involving the Property and/or the Energy Service that will impact on their shared duty to ensure health and safety; 3. the Provider must at all times have in place and operate proper processes and procedures for risk identification and mitigation, emergencies, supervision of works and effective drug and alcohol policies for its workers; 4. the Provider must, in association with any Notifiable Event (as that term is defined under the HSWA) and in addition to the requirements of the HSWA: (a) as soon as possible, give to the School: (i) a copy of any information or notice which the Provider is required to provide or make to the HSWA Regulator; and (ii) a report giving complete details, including results of investigations into the cause of the Notifiable Event and any recommendations or strategies for prevention of any similar Notifiable Event in the future; (a) provide the School with such assistance as may be reasonably necessary to conduct a Notifiable Event incident or accident investigation; and (b) immediately notify the School of any proceedings and/or enforcement action it is issued with.
Weathertightness	The School/NZSPA is particularly concerned about weathertightness of the Property and the impact the Works and the Energy Hardware may have on the weathertightness. The Agreement should include a weathertightness warranty confirming the Provider's compliance with the Weathertightness Requirements. An example of an acceptable weathertightness warranty is set out below. 1. <i>When the Provider penetrates or closes up the roof of the Property when carrying out the Works, the Provider will ensure that the Works comply with the Weathertightness Requirements, and within a reasonable time following completion of the Works, provide to the School for the School's approval detailed drawings demonstrating compliance with the Weathertightness Requirements.</i> 2. <i>Where the Works affect (or, in the opinion of the School, have the potential to affect) the envelope of the Property, the Provider provides the following weathertightness warranty to the School (Weathertightness Warranty):</i> (a) <i>the Works when completed shall be weathertight in accordance with this Agreement and best New Zealand industry standards, and shall remain weathertight for a period of ten (10) years from the date of practical completion of the Works, notwithstanding that the Term may have ended (the Warranty Period);</i> (b) <i>the Provider indemnifies the School in respect of all costs, losses and liabilities incurred by the failure of the Works to remain weathertight in accordance with this Agreement and best New Zealand industry standards, or by any failure by the Provider to meet its obligations under the Weathertightness Warranty;</i> (c) <i>the Weathertightness Warranty is in addition to and shall not derogate from any manufacturer's warranty, or any warranty implied by law, attaching to any part of the Works;</i> (d) <i>the Provider will promptly take steps to remedy or procure the remedy of defects and damage in the Works arising from any failure of the Works to remain weathertight in accordance with this Agreement and best New Zealand industry standards which are notified in writing by the School to the Provider during the Warranty Period;</i> (e) <i>any remedial work which the Provider is required to undertake under the Weathertightness Warranty shall be carried out:</i> (i) <i>within fourteen (14) Business Days of receipt of the School's notice or within such other reasonable time period as may be agreed (failing which the School may undertake the remedial work itself having first given at least five (5) Business Days' notice of its intention to do so, at the Provider's cost);</i> (ii) <i>to the standard required by this Agreement;</i> (iii) <i>to the reasonable satisfaction of the School;</i>

	(iv) <i>without unnecessary inconvenience to any occupants of the Property;</i> (v) <i>at the Provider's cost; and</i> (vi) <i>subject to reasonable access being provided to the Provider for the purpose of carrying out the remedial works.</i> (f) <i>The Provider will make good any damage to buildings or structures on the Property and/or in the vicinity of the Works caused by the Provider including (but not limited to):</i> (i) <i>a failure of the Works to remain weathertight in accordance with this Agreement and best New Zealand industry standards; or</i> (ii) <i>any remedial works carried out by or on behalf of the Provider in accordance with this Weathertightness Warranty.</i>
Ownership, Repair, Removal and Reinstatement	The Works and the Energy Hardware will remain the responsibility of the Provider throughout the term of the Agreement. The Agreement should include (without limitation) provisions acknowledging: 1. risk and title to the Energy Hardware remains with the Provider at all times; 2. the Provider at its cost, is responsible for the ongoing maintenance and repair of the Energy Hardware; 3. the Provider shall not carry out any repairs or maintenance of the Energy Hardware without first obtaining written consent of the School; 4. all maintenance and repair work must be carried out as efficiently and quickly as possible; 5. at the expiry date (or earlier termination of the Agreement), the Provider must yield up the Property in the same good order, condition and repair as it was in at the commencement of the Agreement; 6. if the Energy Hardware needs to be removed to facilitate repairs or maintenance to the Property, or to transport the Energy Hardware to a new property pursuant to the Agreement, then the School will notify the Provider of such removal and the Provider, will, or will appoint an authorised agent to, carry out such removal and re-installation if required; 7. on the expiry date or at the end of the Agreement, the Provider must, at its cost: (a) remove the Energy Hardware from the Property and make good any damage to the Property (including the roof) caused by the same at its expense; and (b) ensure that all services to the Energy Hardware, and the Property in connection with the Energy Service, are properly and lawfully disconnected; and 8. to avoid doubt, any Works carried out by the Provider under these clauses must comply with the Weathertightness Requirements and will also be covered by the Weathertightness Warranty.
Assignment, Novation and Transfer	The Agreement should include provisions noting the following: 1. The School may transfer this Agreement by novating it to another school established under Part 123 of the Education and Training Act 2020) or to another third party. 2. The School may transfer the Energy Hardware to a new property (which will become the Property) and this Agreement will continue on its terms for, at the School's election, the balance of the Term, or a new term.
Grant of Licence	To enable the Provider to access (and remain) on the Property, the School will need to grant the Provider a non-exclusive licence to the Property under s162 Education and Training Act 2020. The Agreement should include an execution block for the Board of NZSPA to confirm the Board of NZSPA's written consent to the licence, as required by s162 and a provision to provide for the licence, noting: 1. the School will retain the absolute right to refuse entry to the Property to any person who the School, acting reasonably, suspects: (a) may cause harm to any occupant of the Property; and/or (b) is prohibited by any Authority from coming into contact with children; and 2. the licence is non-exclusive and the Provider must cooperate with any other persons who come onto the Property, including representatives of the School or other third parties;

	3. the Provider must give reasonable notice to the School (being no less than 48 hours) to carry out the Works and for other reasons it needs to enter the Property; and 4. any representative nominated by the School shall have access at all reasonable times to those parts of the Property where the Works (or any part of the Works) are being carried out. The Provider shall afford every reasonable facility for, and assistance in, obtaining access for any such nominated representative.
Cancellation, Review and Termination	The Agreement should include the following termination provisions: 1. The School may terminate the Agreement by giving the Provider written notice of termination at least 30 Business Days prior to (but not after) commencement of the Works. 2. In the event that: (a) the School is to be, or is, closed or disestablished under section 199 of the Education and Training Act 2020 or under any other equivalent provision; (b) the School is to be, or is, merged with another school under section 204 of the Education and Training Act 2020 or under any other equivalent provision; (c) the relevant Property is to be, or is declared to be no longer needed for educational purposes under section 561 of the Education and Training Act 2020, under the terms of any relevant lease, or under any other equivalent provision; or (d) the underlying location of the solar panels is required by the NZSPA (acting reasonably) to accommodate an educational purpose, and the NZSPA considers that there is no other reasonable alternative, then the School will give the Provider as much written notice as possible of the impending or actual change in circumstances and the following will apply: (e) in the first instance, the parties will confer in good faith with a view to preserving the installation and operation of the Energy Hardware so as to preserve to the Provider the benefit of the Agreement over its term yet giving the School the flexibility to deal with the change in circumstances, whether by assignment or transfer of the Agreement; (f) only if, upon implementation of subclause (e) above, no acceptable outcome is found within 60 Business Days notwithstanding the application of best efforts, then the School shall be entitled to terminate the Agreement by giving to the Provider not less than 30 Business Days' prior written notice of termination and meeting in full the actual direct costs to the Provider (including its or its subcontractors' time and materials) of de-connecting, removing and transporting the Energy Hardware to its storage facility and meeting its make good and reinstatement obligations hereunder (as substantiated by the Provider). 3. Additionally, the School may terminate the Agreement: (a) by giving the Provider not less than 30 Business Days' prior written notice if, at any time: (i) the Provider sells the Energy Service or ceases to be involved in or concerned with the Energy Service (in the reasonable opinion of the School); and/or (ii) the Provider is in breach of any covenant under the Agreement and the Provider has not rectified that breach within fourteen (14) days of written notice to do so; (b) immediately if, at any time: (i) any assignment is made of the Provider's property for the benefit of creditors or if the Provider compounds with its creditors; (ii) the interests of the Provider in or under the Agreement or in the Property or in the Energy Service are attached or taken in execution or under any legal process; or (iii) the Provider is placed in liquidation, administration, receivership or under official or statutory management (except for a solvent reorganisation or reconstruction), or any person takes formal steps under the Companies Act 1993 to have the Provider removed from the companies register.

Damage or Loss Insurance	The Agreement will need to include clauses relating to damage or loss insurance. These should include, at a minimum, confirmation from the Provider that: 1. it will not have any claim under an insurance policy held by the School and will maintain its own insurance coverage for the Energy Hardware and Energy Service in amounts and against risks that are normal for businesses similar to that of the Provider; 2. it will maintain coverage in respect of public liability for not less than \$5,000,000 (and such policy covers liability for damage to the NZSPA, the Crown, the Property and School caused or contributed to by the Provider or its contractors); 3. it will, on each occasion, arrange and maintain contract works insurance during the Works: (a) to cover loss or damage suffered to the Works, to the Property and/or the School property; and (b) in the joint names of the School, the NZSPA, the Crown and the Provider; 4. its insurance is sufficient to cover the estimated cost of demolition, disposal and preparation for replacement work necessarily incurred following any loss or damage to the Works and is not less than the value of the Works; 5. its insurance covers loss or damage resulting from an act or omission of the Provider in the performance of its obligations under the Agreement; 6. it shall provide the Energy Service and carry out the Works entirely at its own risk, and the School will not be responsible at any time for any loss, damage or injury: (a) to persons or property arising out of the Works; or (b) caused to the Works by any person (whether under the control of the School or not); 7. it will maintain comprehensive policy of insurance throughout the term on a full replacement and reinstatement basis; and 8. it will indemnify the School from and against all actual and direct (not consequential) costs, expenses, actions, claims or demands arising directly from the Provider's breach of the Agreement and the School's enforcement of its rights under the Agreement and, for the avoidance of doubt, such indemnity shall include any costs, expenses or loss suffered or incurred by the School in relation to damage to the Property caused or contributed to by any action or omission of the Provider. This indemnity will remain in force following termination or expiry of the Agreement.
Limitation of Liability	The most significant risk to the School (and therefore the NZSPA and the Crown) is substantial damage to the Crown's buildings. The NZSPA will not generally accept a limitation of liability in respect of damage to the Property. If the Provider requires a limitation of liability, it will not be accepted by the NZSPA if it is less than: 1. in respect of any damage to the Property or School property resulting from the Works or operation of the Energy Hardware, the Provider's liability for each occurrence will be limited to a maximum of the greater of: (a) NZD\$1 million; and (a) the amount received by the Provider in respect of such damage under its insurances held under the Agreement, and any proceeds that would have been recovered, but for any failure to claim and/or breach of the relevant insurance policy by the Provider, or due to the failure by the Provider to maintain an insurance policy; 2. that without limiting any other obligation or liability the Provider may have under the Agreement, in the event of any damage to the Property or School property, the Provider will consult with the NZSPA or the School (as the case may be) and will claim against its insurance and use all reasonable commercial endeavours to secure payment by the insurer against that claim; and 3. that Provider's liability shall not be limited in any way (and the above clauses shall not apply) in the event of any fraudulent or illegal act or omission, or wilful default by the Provider under the Agreement. In respect of any other loss or damages, for each occurrence, will be limited to the total amount payable by the School to the Provider during the Term (including renewals). In respect of any other damages incurred, we would expect:

	1. that each party will take whatever reasonable steps are necessary to mitigate any losses it may incur resulting from actions or inactions with respect to the Agreement; 2. unless expressly provided otherwise, that no party will be liable to the other for: (b) any damages other than as a result of its breach of the Agreement; or (a) for any consequential, incidental or indirect damages.
Disputes	The Agreement should also provide a detailed process for dealing with disputes. An example of an acceptable disputes resolution clause is set out below. 1. <i>If a dispute arises under the Agreement, the parties will actively and in good faith enter into negotiations with each other with a view to a speedy resolution of such dispute or disputes.</i> 2. <i>If the parties, within 10 Business Days of the dispute arising:</i> (a) <i>are unable to resolve the dispute by negotiations under clause 1; and</i> (b) <i>agree,</i> <i>then the dispute shall be referred for determination to an expert who is relevantly qualified and experienced, and recognised as an expert, in relation to the subject matter of the dispute in accordance with the clauses set out below.</i> 3. <i>The parties shall:</i> (a) <i>jointly appoint the expert by agreement and if they cannot agree then such appointment shall be made by the Building Disputes Tribunal; and</i> (b) <i>use all reasonable endeavours to assist the expert in resolving the dispute.</i> 4. <i>The parties agree, for the purposes of 3(a), a suitably qualified expert in respect of issues regarding:</i> (a) <i>safety in design, is a health and safety practitioner:</i> (b) <i>roof penetrations, is a façade specialist:</i> (c) <i>manufacturer's specifications or installation instructions, is the manufacturer.</i> 5. <i>The expert shall act as an expert and not as an arbitrator, and the expert's opinion shall be final and binding on the parties, except in the case of manifest error or fraud.</i> 6. <i>The parties shall each bear their own costs in respect of the issue referred to the expert for determination and each party shall pay half of all costs incurred by the expert unless the expert (at his or her discretion) determines otherwise. Any such determination as to costs shall be binding on the parties.</i> 7. <i>If the parties do not agree under clause 2 to refer the dispute to an expert, then they will without prejudice to any other right, immediately explore whether such dispute can be resolved by agreement between them using informal dispute resolution techniques such as mediation. The rules governing any such technique if adopted will be agreed between the parties or as selected by the organisation known as "The Resolution Institute".</i> 8. <i>If the parties cannot agree on any dispute resolution technique within a further fifteen (15) Business Days of any dispute being considered for referral by both parties to any informal dispute resolution technique under clause 7 then the dispute shall be settled by reference to arbitration. The reference shall be to a single arbitrator if one can be agreed upon, or to two arbitrators (one to be appointed by each party) and their umpire (appointed by the arbitrators prior to their arbitration), such arbitration to be carried out in accordance with the Arbitration Act 1996 and the substantive law of New Zealand.</i> 9. <i>The parties will co-operate to ensure the expeditious conduct of any arbitration. In particular, each party will comply with any reasonable time limits sought by the other for settling terms of reference, interlocutory matters and generally all steps preliminary and incidental to the hearing and determination of the proceedings.</i> 10. <i>The decision of the arbitrator (including the right to determine damages and costs) will be final and binding on the parties, except in the case of manifest error or fraud.</i> 11. <i>Nothing in this clause shall prejudice the right of either party to institute proceedings to seek interlocutory or injunctive relief.</i>

NZSPA	The Property is located on land owned and held for a public work by the Crown and managed by the NZSPA. The School occupies the Property pursuant to a Property Occupancy Document for state (non-integrated) schools notified by New Zealand Gazette, 12 July 2022(as amended, revised, substituted or consolidated from time to time) (the POD). Pursuant to the POD and section 162 of the Education and Training Act 2020, the School is required to obtain the consent of the Board of NZSPA to grant a licence to the Provider under this Agreement. The School is entering into the Agreement in its capacity as a Crown entity. The Agreement should include provisions to: 1. acknowledge that the School's payment obligations under this Agreement will be met by funding granted to the School from the Ministry, pursuant to Part 6 of the Education and Training Act 2020; 2. that the Provider owes a duty of care to the School, the NZSPA and the Crown when exercising its rights and carrying out the Works contemplated under this Agreement; and 3. that the parties agree that all the promises (including but not limited to any warranties) granted to the School under the Agreement by the Provider are also granted to (and for the benefit of) the NZSPA and the Crown and that Part 2, subpart 1 of the Contract and Commercial Law Act 2017 applies and accordingly, the NZSPA and the Crown are able to enforce any promise conferred on the School or the NZSPA or the Crown under the Agreement directly under that subpart, even though the NZSPA and the Crown are not party to the Agreement, subject to the limitations expressed in the Agreement
Definitions	Agreement means the energy services agreement to be entered into by the Provider and the School; Business Day means any day which is not a Saturday, Sunday or public holiday in both the region in which the School is located; Energy Hardware means the Provider's solar panels, inverters, framing, wiring, energy management and control systems, software, controls, battery and any other equipment as is installed on the Property by or for the Provider; Energy Service means the suite of energy services provided by the Provider to the School under the Agreement; Ministry means the Ministry of Education; NZSPA means the New Zealand School Property Agency; Property means all buildings located at the School, including where the Energy Hardware is installed, and being the primary location where electricity will be generated; Requiring Authority has the meaning given to that term in the Resource Management Act 1991; School means the School that is the subject of the Agreement; Term means the Term of the Agreement; Weathertightness Requirements means the requirements set out in the NZSPA's document entitled "Weathertightness Design Requirements for New School Buildings" (September 2020) and any subsequent amendments thereto (refer: https://www.schoolproperty.govt.nz/designing-school-property/requirements-for-school-design-in-new-zealand/weathertightness-design-standards-for-school-buildings). ; Works means the works to be carried out by the Provider associated with the construction, erection, installation and removal of the Energy Hardware at the Property and includes the maintenance, repair and/or replacement of that Energy Hardware, excluding any work on the Property which the Provider finds is needed to repair or remedy a pre-existing underlying defect.