

# Graphic & Interactive Design Services Agreement

## Terms & Conditions

### 1 ENGAGEMENT

The Client engages the Designer to provide the Design Works, and the Designer accepts that engagement, on the following terms and conditions.

### 2 PERFORMANCE & DELIVERY

- (a) The Designer shall provide the Design Works in accordance with the reasonable standard of skill, care and diligence generally exercised by the design profession in New Zealand subject to any financial, physical, time or other constraints imposed by the Client or reasonably resulting from the nature of the engagement.
- (b) The Designer shall, where practicable, advise the Client of any matter, circumstance or instruction that may affect the timely delivery or quality of the Design Works and/or constitute a variation to the Design Works and thereby require an adjustment to a Fee estimate (if any).
- (c) The Designer shall not make any material change to Design Works approved in writing by the Client except:
  - (i) With the Client's instruction or agreement; or
  - (ii) Where circumstances or Project issues require the Designer to exercise urgent discretion, and the Client is promptly notified.
- (d) Any periods of time for delivery of Design Works by the Designer or the Client are indicative estimates only, and any delay shall not entitle the Client to terminate this Agreement or claim remedies.
- (e) The Client agrees to:
  - (i) Provide the Designer with a full brief of the Project requirements and objectives, together with full information about the purpose, implementation and any other information reasonably requested by the Designer;
  - (ii) Provide the Designer with all components/material (including logos, graphics, text and other materials/data/hardware) as reasonably required for the Design Works and/or as set out in the project proposal information; and
  - (iii) Work constructively and in good faith with the Designer in order to resolve any aspects of the Design Works or the Project, to enable the Design Works to be provided.

### 3 CONDITIONS OF LICENCE / SALE

- (a) The Client shall receive full copies of the completed Design Works once full payment of the Fee has been received, and the Client's rights to the Design Works as provided for in this Agreement commence at the date of full payment of the Fee (except where the Designer otherwise gives express written permission).
- (b) Other than as provided in the Project Details, the Designer is not obliged to provide copies of the Design Works in any particular electronic/physical or editable formats, and full copies may (at the Designer's discretion) be provided in any print /electronic or non-editable electronic form.
- (c) Unless specifically recorded in writing as a deliverable under this Agreement, any aspect of "preliminary art", incomplete or draft Design Works, technical files and any non-final products, including plans and sketches, builder files/code and technical frameworks remain the property of the Designer and are not licensed or transferred to the Client.
- (d) The Client shall seek the Designer's prior written consent to use the Design Works for any purpose outside the scope of this Agreement. The Designer shall not unreasonably withhold consent, but may impose reasonable conditions governing the additional use of the Design Works, including (without limitation) the payment of a reasonable usage fee.

- (e) If the Client fails to make any payment when due, the Designer may suspend or revoke any licence, or refuse to transfer ownership (whichever is applicable).
- (f) Any licence under this Agreement must not be assigned to any third party without the Designer's prior written permission. The licence will terminate automatically on the bankruptcy, receivership or liquidation of the Client.
- (g) The parties agree that for any supply of Interactive Design services, the additional terms set out in Schedule 3 apply.

### 4 NOTICE OF DEFECTS

If, during the term of this Agreement or after completion of it, the Client becomes aware of any problem with the Design Works, or non-compliance with this Agreement, the Client must no later than 20 Working Days after becoming aware of it, notify the Designer in writing. Failure to do so will be considered a waiver by the Client of any claim it may have against the Designer (in contract, tort (including negligence), equity or otherwise) in relation to the Design Works.

### 5 CORE INTELLECTUAL PROPERTY TERMS

- (a) This Agreement incorporates these core intellectual property terms, and any additional intellectual property terms selected by the parties in Schedule 1 to this Agreement. Where no additional intellectual property terms in Schedule 1 are selected, this Agreement confers a licence on the terms as set out in paragraph (module) "B" of Schedule 1.
- (b) This Agreement also incorporates, and the Parties agree to implement, attribution arrangements (if selected) as described in Schedule 2.
- (c) All Intellectual Property Rights in the Design Works and/or created incidentally, (with the exception of any pre-existing Intellectual Property Rights in materials supplied by the Client) are the property of the Designer. The Designer does not accept commissions to create copyright works other than to develop and select Design Works then licence (or sell selected components of) the Design Works for delivery to the Client. This overrides section 21(3) of the Copyright Act 1994 in accordance with section 21(4) of that Act.
- (d) Despite any other provision of this Agreement, any rights transferred to the Client will exclude the essential work practices, tools and processes developed by the Designer, which are reserved as the property of the Designer.
- (e) The Designer retains the right to reasonably use the Design Works for the purposes of the Designer's portfolio and in other media, websites, galleries, exhibits, competitions, for recognition of creative excellence and/or marketing.
- (f) The Client acknowledges that Design Works' constituent materials, for example licensed works incorporated in the project, (such as commercial typefaces, photographs, vector art, video, audio, code and/or software owned by or created by third parties) may only be licensed/transferred to a limited extent, depending on the licence under which they are utilised in the Design Works.
- (g) The Client warrants that:
  - (i) It owns or is lawfully authorised to use any pre-existing Intellectual Property Rights in materials supplied by the Client to the Designer; and
  - (ii) The Designer is fully entitled to use those materials without restriction, for the purposes of this Agreement. The Designer is also permitted, but not obliged, to make incidental usage and copies of those materials, including for working drafts, backups, archiving, and storage.
  - (iii) Where the Design Works are licensed to the Client, except for as expressly provided in writing in this Agreement, the Client will ensure that the Design Works are not altered in any way, at any time, without prior written consent from the Designer. Metadata removal is expressly prohibited.

## 6 INFORMATION USE (PRIVACY AND CONFIDENTIALITY)

- (a) The Designer shall abide by the Privacy Act 1993 and shall take all practical steps to achieve privacy protection.
- (b) The Parties will take all reasonable steps to keep secure and private each other's data. The Parties agree not to use confidential information relating to the Project for any other purpose.
- (c) Prior to release, the Designer will keep as confidential the details of the Project and the Design Works where instructed to do so by the Client.

## 7 FEES AND PAYMENT

- (a) The Client shall pay the Designer's Fees within ten (10) days of invoice.
- (b) The Designer may invoice the Client for Fees monthly, or at the completion of a Design Phase or delivery of Design Works, or as the Project progresses and in the manner stipulated under Project Details in this agreement (if any).
- (c) Where this Agreement has been entered into by an agent (or person purporting to be an agent) on behalf of the Client, the agent and Client shall be jointly and severally liable for the payment of all Fees due to the Designer under this Agreement.
- (d) Where the Fee is calculated on a fee-estimate basis, the Fee is subject to reasonable upward adjustment in the event that:
  - (i) After this Agreement is signed, the Client changes the scope of the Design Works required; or
  - (ii) After completion and approval of any Design Phase, the Client instructs the Designer to alter the Design Works supplied; or
  - (iii) Through no fault of the Designer, the provision Design Works will take longer or require more work than reasonably contemplated, or materials required unexpectedly cost significantly more than anticipated, through no fault of the Designer; or
  - (iv) In the event that the supply price for goods or services required for the Design Works increases after quotation but before supply, the Designer reserves the right to adjust the price payable by the Client.
- (e) The Designer shall endeavour to provide advance notice of variations to Fee estimates, but failure to do so will not prejudice or affect the Designer's rights under this clause.
- (f) The Designer shall notify the Client if specific Design Works need to be delayed or accelerated due to changes in instructions from the Client, or circumstances beyond the Designer's control, and The Designer shall be entitled to an additional Fee to cover the costs of disruption and additional time spent.
- (g) Where the Designer takes over the design services provided by a former designer, the Designer may charge an additional Fee to cover the time spent to correct or accommodate the deficiencies in the previous design services.
- (h) The Client shall pay for all disbursements and expenses actually and properly incurred by the Designer in the course of producing the Design Works.
- (i) Where the Fee is calculated on an hourly-rate basis, the Designer shall keep records of time spent and shall make these records available for inspection by the Client on request.
- (j) The Client may not deduct, withhold or offset any sum from the amounts owed to the Designer under this Agreement.
- (k) The Client may not reduce or withhold payment to the Designer because a third party involved in the Project has not carried out their obligations to the Client.
- (l) Unless otherwise stated quotes and invoices are exclusive of GST and remain valid for a period of no more than 30 days from the date of quote.
- (m) Royalties: Where royalties are provided for in the Project Details:
  - (i) The Client shall pay royalties to the Designer at the rate specified in the Project Details.
  - (ii) Within 30 days after the end of each calendar month, the Client shall provide to the Designer a statement setting out:
    - i. the royalties due; and
    - ii. the number of units manufactured; and
    - iii. the number of units soldin respect of the relevant calendar month and shall arrange for the deposit of the royalties into the nominated bank account of the Designer specified in the Project Details, unless a differing payment arrangement is otherwise agreed in writing between the parties.
  - (iii) Upon receipt of the royalties, the Designer shall immediately provide a receipt for the royalties suitable for the purposes of GST or otherwise so as to enable the

Client to recover or off set such taxes as it may be entitled at law.

- (iv) The Client shall keep full and accurate records from which the accuracy of the statement provided to the Designer in accordance with subclause (m)(ii) above may be verified.
- (v) The Client shall permit the Designer by its authorised agent or officer at all reasonable times and upon reasonable notice to inspect and take copies of extracts from any books, accounts, receipts or other records of any kind in the possession of or under the control of the Client relating to the manufacture and sale of product using or incorporating the Design Works.

## 8 LATE PAYMENT

- (a) Any monies not paid in full in accordance with clause 7 may be charged with interest at a rate of 2% per month or part month overdue, and the Designer is, in addition, entitled to recover all debt collection costs and related legal expenses (on a solicitor-client basis).
- (b) In the event any monies due are not paid in full, the Designer reserves the right to immediately suspend further work for the Client. If Design Works are suspended, the Designer shall not be obliged to resume services until the amount owing, and any costs incurred in relation to the suspension, are paid in full and the Designer has adequate security for future Fees. The Designer will not be liable to the Client or any person for losses arising from suspension of the Design Works. Nothing in this clause prejudices or otherwise affects the Designer's rights under clause 12.
- (c) Any monies paid may be allocated by the Designer toward any amount owed by the Client.

## 9 DISPUTE RESOLUTION

- (a) Either party may raise a dispute by notice in writing to the other party. The parties agree to use their best efforts to resolve any dispute which may arise under this Agreement through good faith without-prejudice negotiations.
- (b) If the parties' nominated contact persons are unable to resolve the dispute within seven (7) Working Days following delivery of the dispute notice referred to in (a), the dispute shall be escalated to the Chief Executive Officer (or equivalent) of each party who shall conduct informal, off-the-record and without-prejudice discussions in good faith seeking to resolve the dispute.
- (c) If after five (5) Working Days the persons described in (b) have not reached an agreed outcome, they shall cease discussions for two (2) working days before resuming discussions.
- (d) If, after a further discussion period of two (2) Working Days, the parties remain unable to reach an agreed outcome, the dispute shall be referred to arbitration in accordance with the Arbitration Act 1996 (the "Act"). The decision of the arbitrator is final and binding on the parties.
- (e) Either party may refer a dispute to arbitration by giving written notice to the other party recording the details of the dispute and that party's desire to have the matter referred to arbitration.
- (f) The arbitration shall be heard and determined by one arbitrator, to be agreed upon by the Parties or, failing agreement within five (5) Working Days of the notice given pursuant to clause 9(e), to be nominated by the President for the time being of the New Zealand Law Society. The Arbitrator must have expertise in commercial law and the relevant design industry.
- (g) The arbitrator shall adopt, wherever possible, a simplified and expedited procedure, and shall endeavour to complete the arbitration as quickly as possible and, in every case, within four (4) months of the notice given pursuant to clause 9(e).
- (h) The arbitrator may appoint experts under Article 26 of the First Schedule of the Act or may rely on the arbitrator's own expertise.
- (i) The arbitrator may adopt inquisitorial processes;
- (j) The arbitration shall take place in the city / town of the registered office of the Designer in New Zealand.
- (k) The arbitrator shall decide the dispute in accordance with the laws of New Zealand and the arbitration shall otherwise be conducted in accordance with the Act.

## 10 INDEMNITY

The Client undertakes to indemnify the Designer against any and all loss, damage, liability or expense (including costs on a solicitor-client basis):

- (a) Suffered or incurred as a result of any breach by the Client of the Agreement or in recovering any moneys due; and
- (b) Arising out of a claim by a third party against the Designer alleging that the Design Works (excluding original material developed solely by the Designer) infringes any third-party Intellectual Property Rights,

and such loss, damage, liability or expense shall be moneys due under the Agreement.

#### **11 ELECTRONIC DESIGN WORKS**

- (a) Except as expressly permitted by this Agreement, and subject to automatic backup mechanisms, the Client shall not copy or reproduce the Design Works by any means or in any form without the Designer's written consent.
- (b) The Client's right to use the Design Works does not include the right to remove, alter or otherwise affect general rights information, including (without limitations) any notices or metadata accompanying or part of the Design Works which records creator details, copyright ownership or publication status of the Design Works.
- (c) The Client shall not alter or remove any notices attached to the Design Works, and shall take all reasonable steps to respect and preserve the Designer's copyright and other rights. Any notice which automatically appears on loading a Design Work shall not be made ineffective or non-displayable.
- (d) Where the Designer has placed restrictions on access to or use of the Design Works, the Client shall make no attempts to defeat such restrictions.

#### **12 TERMINATION**

- (a) Termination on Notice: The Client may terminate this Agreement at any time by giving four (4) weeks written notice and paying all costs owed incurred for work completed to date. Upon receipt of such notice from the Client, the Designer must take all reasonable steps to bring the services to a close.
- (b) Termination for Cause: Without prejudice to any other right or remedy it may have, whether under this Agreement, under statute or otherwise, either Party may immediately terminate this Agreement by written notice to the other Party if:
  - (i) The other Party is in breach of any term of this Agreement and such breach is not remedied within ten (10) Working Days of notifying the other Party;
  - (ii) The other Party commits an act of bankruptcy or makes any assignment or composition with its creditors;
  - (iii) Liquidation or bankruptcy proceedings are commenced for the other Party; or
  - (iv) The other Party has a receiver or manager or statutory manager appointed.
- (c) Consequences of Termination:
  - (i) Upon postponement or termination of this Agreement, the Designer shall be entitled to payment of all Fees up to the effective date of postponement or termination (including fees, disbursements and costs incidental to the orderly termination of the Agreement).
  - (ii) If the Client terminates this Agreement, other than through breach by the Designer, the Client shall indemnify the Designer against any loss, costs (including costs on a solicitor-client basis), expenses, demands, or liability, suffered or incurred in relation to the Project.
  - (iii) Early termination of this Agreement will not prejudice or affect the accrued right or liabilities of each party to the other.
- (d) Suspension: Where work is suspended on the Client's instructions for 30 days or more then the Client must, at the time of suspension, pay the Designer for all work completed on the project to date.

#### **13 FORCE MAJEURE**

The Designer shall not be liable for any loss or damage arising directly or indirectly due to an act of God, fire, armed conflict, labour disputes, civil commotion, intervention of a government, accidents, interruption to transportation or telecommunications, weather or any other cause outside the Designer's control.

#### **14 CONSUMER GUARANTEES**

- (a) The Consumer Guarantees Act 1993, or equivalent legislation, may apply to the Design Works provided by the Designer if the Client acquires the Design Works for personal, domestic or household use or consumption. If this Act applies, nothing in this Agreement will limit or exclude the Client's rights under that Act.
- (b) If the Client is acquiring the Design Works for business purposes, then the Client's rights are subject to this Agreement only and the Consumer Guarantees Act 1993 shall not apply.

#### **15 SECURITY INTEREST**

- (a) The Client grants to the Designer a security interest in the Design Works and all ancillary Goods supplied and their proceeds to secure payment of Fees and charges for ancillary Goods, and to secure payment of all Fees and other amounts due from the Client to the Designer from time to time.

- (b) Nothing in sections 114(1) (a), 133 and 134 of the Personal Property Securities Act 1999 shall apply to this Agreement. The Client waives its rights pursuant to sections 121, 125, 129, 131 and 132 of that Act and its rights to receive any verification statement relating to the security interests in the Design Works and any ancillary Goods.

#### **16 DESIGNER NOT LIABLE FOR LOSSES**

- (a) The Designer shall not be liable for:
  - (i) any loss or damage arising by reason of any delay in the completion or delivery of the Design Works; or
  - (ii) any loss of profits; or
  - (iii) any indirect or consequential loss of whatever nature; or
  - (iv) any loss resulting from any errors or omissions arising from incorrect information provided by the Client, or failure by the Client to provide information, or an oversight or a misinterpretation of a Client's verbal instructions.
- (b) Aside from as specifically provided in writing by the Project Details, the Designer accepts no responsibility and will not be liable under any circumstances for archiving, storage or backups of the Design Works or constituent/preliminary materials.

#### **17 LIABILITY OF DESIGNER LIMITED**

Subject to Clause 16, the Designer's liability to the Client for any and all costs, loss or damage suffered by the Client, however caused (including negligence), arising out of or connected with the performance or failure of performance of any Design Works supplied by the Designer shall not exceed the full value of the payments made by the Client under this Agreement.

#### **18 THIRD PARTY PROVIDERS, CONTRACTORS AND EMPLOYEES**

- (a) The Designer may engage contractors, employees and/or third party suppliers in order to complete the Design Works.
- (b) Where the Designer engages contractors at the Client's request, the Designer shall be acting as the agent of the Client, and is not liable for the performance or remuneration of those contractors.
- (c) Where third party goods and/or services are used for the Design Works, the Designer makes no representation as to, and takes no responsibility for, the quality or fitness for purpose of those goods and/or services (regardless of whether the third party services are brokered or arranged by the Designer). No responsibility is taken by the Designer for third party services (e.g. printers/chain of manufacture/web hosting etc.).
- (d) There shall be a non-solicitation period of 6 months following the delivery of the Design Works, during which the Client will not solicit or engage the contractors or employees of the Designer.

#### **19 REMEDIAL SERVICES**

Where the Client has engaged the Designer to take over the design services provided to the Client by a third party:

- (a) The Client shall enable the Designer to confer with the previous designer and review the previous services provided, and the Designer will notify the Client if it is necessary to remedy deficiencies in the previous services.
- (b) The Client acknowledges that the Designer is not responsible for any services and work carried out prior to the commencement of this Agreement, or carried out by other parties (at any time).
- (c) If the Client's former designer is a professional member of the Designers Institute of New Zealand Inc, then all of the former designer's fees and/or commissions must be settled before the Designer commences services under this Agreement.

#### **20 ENTIRE AGREEMENT**

The Project Details, together with these Terms & Conditions, Schedules 1-3, and all attachments, constitute the entire agreement ("Agreement") between the parties and supersedes all prior representations, agreements, statements and understandings, whether verbal or in writing, on the subject matter of this contract.

#### **21 WAIVER OR VARIATION**

- (a) No right or obligation under this Agreement shall be deemed to be waived except by notice in writing signed by each party.
- (b) The provisions of this Agreement shall not be varied, except by agreement in writing signed by the parties.

#### **22 SURVIVAL OF AGREEMENT**

The covenants, conditions and provisions of this Agreement which are capable of having effect after the expiration of the Agreement shall remain in full force and effect following the expiration of the Agreement.

#### **23 SEVERABILITY**

If any provision of this Agreement is held invalid, unenforceable or illegal for any reason, this Agreement shall remain otherwise in full force and effect apart from such provision.

## **24 ACCESS TO EQUIPMENT**

- (a) The Client will ensure that the Designer, and the employees, contractors and other representatives of the Designer have full and safe access to the Client's equipment, materials and information at all reasonable times for purposes associated with the supply of the Design Works.
- (b) The Client will provide on request a suitably qualified or informed representative, agent or employee, who shall be available to the Designer to advise on access, use of the Client's resources and any other matter within the Client's knowledge or control which may assist the Designer in complying with the Designer's obligations under this Agreement.

## **25 INSURANCE**

The Designer holds professional indemnity insurance for an amount no less than that stipulated in the Project Details (if any), subject to the various terms, exclusions and limitations of that policy, and the Designer shall maintain this insurance (or equivalent) for a period of six years following the conclusion of the Design Works.

## **26 MISCELLANEOUS**

- (a) This Agreement shall not be assigned or transferred without the prior written consent of the Designer.
- (b) This Agreement shall be construed in accordance with and governed by the laws of New Zealand and the Parties submit to the non-exclusive jurisdiction of the New Zealand courts in respect of all matters relating to this Agreement.
- (c) Currency amounts are in New Zealand dollars unless otherwise stated, and all communications between the parties must be in English.
- (d) Nothing in this Agreement shall be construed as evidence of a partnership between the parties or their successors or assigns, and no provision of this Agreement shall empower a party to act on behalf of the other in any way, or to incur any liability on behalf of the other.
- (e) If there is a conflict between the Project Details and any provisions of these Terms and Conditions, the Project Details shall take precedence.
- (f) Notices under the Agreement can be delivered in person, or by facsimile or email to the addressed notified in the Project Details (which may be updated from time to time by each party).

## **27 DEFINITIONS OF CAPITALISED WORDS**

In these Terms and Conditions, the following meanings apply:

"Agreement" has the meaning described in clause 20;

"Client" means the client listed in the Project Details;

"Designer" means the designer listed in the Project Details;

"Fee" means the total fee payable by the Client in consideration for the Design Works services and associated rights as detailed in this Agreement;

"Design Phase" means any of the Design Phases described in the Project Details (if any);

"Design Works" means the (singular and/or plural) design services and tasks to be performed, and deliverables to be provided, by the Designer as detailed in this Agreement;

"Goods" includes both tangibles and intangibles;

"Intellectual Property Rights" means any patents, copyright, designs, and any other right granted by the operation of law which confers protection on any written or artistic work created by intellectual effort and all associated intangible assets created as a by product;

"Project" means the project described in the Project Details;

"Project Details" means the variable terms and conditions recorded under this heading at the outset of the Agreement, Schedules 1 to 3 of this Agreement, and in any written documents appended to this Agreement;

"Working Days" means days other than Saturday, Sunday, public holidays, or days from 23 December – 6 January (inclusive).