

Spatial 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 Site conditions 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 Site and any other information reasonably requested by the Designer; and
 - (ii) 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 LICENCE GRANTED TO CLIENT

The Designer grants the Client a licence to use the Design Works for the Project only, including the use, maintenance, repair or disposal of the Property, and for no other purpose. This licence permits the Client to use the Design Works to create one (1) derivative work only, on the Conditions set out in clause 4 below.

The Client acknowledges that the Designer retains the right to:

- (a) enter the Design Works into design competitions or awards and for their use in any material published in connection with promoting those competitions or awards; and
- (b) use the Design Works to advertise or otherwise promote the Designer's work; and
- (c) use the Design Works for any other purpose within the Designer's business activities.

4 CONDITIONS OF LICENCE

- (a) The Client shall receive full copies of the completed Design Works once full payment of the Fee has been received, and the licence to use the Design Works begins from the date of full payment of the Fee (except where the Designer otherwise gives express written permission).
- (b) The Designer is not obliged to provide copies of the Design Works in electronic or editable formats, and full copies may (at the Designer's discretion) be provided in print or non-editable electronic form.
- (c) The licence does not apply to incomplete or draft Design Works.
- (d) The Client shall seek the Designer's prior written consent to re-use the Design Works for the purpose of any future Design Phase or extension to the Property or any other project, where that use falls outside the scope of the initial Agreement. The

Designer shall not unreasonably withhold consent, but may impose reasonable conditions governing the re-use of the Design Works, including (without limitation) the payment of a reasonable re-use fee.

- (e) The Designer may suspend or revoke the licence if the Client fails to make any payment when due.
- (f) This licence must not be assigned to any third party without the Designer's prior written permission.
- (g) The Client will on reasonable request for a period of 6 months following completion of the Project or any derivative work, permit the Designer (and a reasonable number of persons) to enter the Property for the purpose of photographing, filming or inspecting the Property.
- (h) The Client shall ensure that the Designer is credited in any brochure, advertising material and other promotional materials relating to the Design Works.

5 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 30 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 same.

6 INTELLECTUAL PROPERTY RIGHTS

- (a) All Intellectual Property Rights in the Design Works (with the exception of any pre-existing Intellectual Property Rights in materials supplied by the Client) shall remain the property of the Designer. The Designer does not accept commissions to create copyright works other than to agree to licence Design Works developed and selected by The Designer for delivery to the Client. This overrides section 21(3) of the Copyright Act 1994 in accordance with section 21(4) of that Act.
- (b) 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; and
 - (iii) It will ensure that the Design Works are not altered in any way, at any time, without prior written consent from the Designer.

7 PRIVACY AND PERSONAL INFORMATION

The Designer shall abide by the Privacy Act 1993 and shall take all practical steps to achieve privacy protection.

8 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 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 of specific Design Works will take longer or require more work than reasonably contemplated.

The Designer shall endeavour to provide advance notice of variations to Fee estimates pursuant to clause 2(b), but failure to do so will not prejudice or affect the Designer's rights under this clause.

- (e) 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.
- (f) 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.
- (g) The Client shall pay for all disbursements and expenses actually and properly incurred by the Designer in the course of producing the Design Works.
- (h) 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.
- (i) The Client may not deduct, withhold or offset any sum from the amounts owed to the Designer under this Agreement.
- (j) 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.

9 LATE PAYMENT

- (a) Any monies not paid in full in accordance with clause 8 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 13.
- (c) Any monies paid may be allocated by the Designer toward any amount owed by the Client.

10 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 10(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 spatial 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 10(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) (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.

11 INDEMNITY

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

- (i) Suffered or incurred as a result of any breach by the Client of the Agreement or in recovering any moneys due; and
- (ii) 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.

12 ELECTRONIC DESIGN WORKS

- (a) Subject to automatic backup mechanisms and the express terms of the Project Details, 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.
- (e) The Designer will follow its usual backup procedure (if any) upon the completion of the Design Works. The Designer shall not be liable under any circumstances if unable to produce backups upon the request of the Client.

13 TERMINATION

13.1 Termination on Notice

The Client may terminate this Agreement at any time by giving four (4) weeks written notice and paying all costs owed. Upon receipt of such notice from the Client, the Designer must take all reasonable steps to bring the services to a close.

13.2 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:

- (a) 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;
- (b) The other Party commits an act of bankruptcy or makes any assignment or composition with its creditors;
- (c) Liquidation or bankruptcy proceedings are commenced for the other Party; or
- (d) The other Party has a receiver or manager or statutory manager appointed.

13.3 Consequences of Termination

- (a) 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).
- (b) 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.
- (c) Early termination of this Agreement will not prejudice or affect the accrued right or liabilities of each party to the other.

14 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, weather or any other cause outside the Designer's control.

15 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.

16 DESIGNER NOT LIABLE FOR LOSSES

Subject to Clause 15, the Designer shall not be liable for:

- (a) any loss or damage arising by reason of any delay in the completion or delivery of the Design Works; or
- (b) any loss of profits; or
- (c) any indirect or consequential loss of whatever nature; or
- (d) 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.

17 LIABILITY OF DESIGNER LIMITED

- (a) 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.
- (b) The Designer is not responsible for the acquisition, or liable for the accuracy and validity, of any consents, licences, permits and authorisations required to lawfully undertake the Project and/or construct the Property, unless otherwise agreed between the parties in writing.

18 CONTRACTORS

- (a) The Designer may engage reputable contractors in order to assist in completing 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.

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 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 HEALTH AND SAFETY

The Designer has not and will not during the terms of this Agreement or at any time after it assume any obligation as the Client's agent or otherwise which may be imposed on the Client from time to time pursuant to the Health and Safety in Employment Act 1992, and the parties agree that for the purpose of the Act the Designer will not be the person who controls the place of work in terms of that Act.

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 Concept, Preliminary, Development, Detailed, and Construction Design Phases as detailed in this Agreement and (if applicable) further described in the appended Construction Industry Council Design Documentation Guidelines for Residential and Interiors;

"Design Works" means the design services and tasks to be performed, and deliverables to be provided, by the Designer as detailed in this Agreement and (if applicable) further described in the appended Construction Industry Council Design Documentation Guidelines for Residential and Interiors.

"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;

"Property" means the physical Project works completed using (partially or wholly) the Design Works;

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