

Terms and Conditions relating to the Supply of Services by Born Digital Limited

DEFINITIONS

'Agreement' means these Terms and Conditions together with the Quotation which sets out the Services to be carried out for the Client.

'Background Work' means any and all work owned or developed by Born Digital prior to or during the provision of the Services (including but not limited to methodology, know-how, images, illustrations, photographs, models and visualisations) which support (and may be incorporated in) the Deliverable, (but which is generic and may be used by Born Digital to provide services to third parties) but not including Client Foreground Work.

'Born Digital' means Born Digital Limited of 2 The Glade, Purley-on-Thames Reading Berkshire RG8 8HY (Company Number 04552015)

'Client' means the company, partnership, individual or body who or which engages the services of Born Digital.

'Client Foreground Work' means any information, data, plans, documents photographs, images and drawings supplied to Born Digital by the Client and/or third party on behalf of the Client.

'Confidential Information' means any information which is disclosed to the Client by Born Digital pursuant to, or in connection with, the Agreement (whether orally or in writing and whether or not such information is expressly stated to be confidential) or shall otherwise come into the hands of the Client in relation to the Services other than information which is already in the public domain.

'Deliverable' means the bespoke project work produced by Born Digital (including, but not limited to photographs, images, plans, reports, drawings, visualisations, documents, and other materials, in any format) in the course of the Services for delivery to the Client.

'Intellectual Property Rights' means any trade mark, patent registered design, copyright, design right, topography right, application to register any of the aforementioned rights, trade secret, unpatented know-how, methodology, ideas or other information of a confidential or proprietary nature and any other intellectual property right of any nature whatsoever in any part of the world.

'Quotation' means the description of the Services to be performed by Born Digital.

'Services' means the services to be provided by Born Digital to the Client as set out in the Quotation.

1. Terms and Conditions

These Terms and Conditions together with the Quotation and/or any agreed schedule constitutes the Agreement and is the entire agreement and understanding between Born Digital and the Client with respect to the subject matter hereof and supersedes any prior agreement, understanding or arrangement between them, whether oral or in writing. No representation, undertaking or promise shall be taken to have been given or be implied from anything said or written in negotiations between Born Digital and Client prior to the Agreement except as expressly stated in the Agreement.

- 1.2 No offer placed by the Client to purchase the Services shall be accepted by Born Digital other than:
- (a) by a written acknowledgement issued and executed by Born Digital (including but not limited to electronic acknowledgement); or
 - (b) (if earlier) by Born Digital starting to supply the Services,
- when a contract for the supply of those Services on these Terms and Conditions will be established. The Client's standard terms and conditions (if any) attached to, enclosed with or referred to in any purchase order or other document shall not govern this Agreement.

1.3 Words in the singular include the plural and in the plural include the singular.

2. Supply of the Services

- 2.1 Born Digital shall provide the Services subject to these Terms and Conditions.
- 2.2 Any amendments, alterations and/or additions to the Services must be agreed in writing by Born Digital and the Client. The Client acknowledges that Born Digital may need to review its charges and/or any agreed delivery timescales to accommodate any amendment, alterations and/or additions to the Services.
- 2.3 The Client acknowledges that this Agreement is not exclusive and nothing in these Terms and Conditions will operate to prevent Born Digital from engaging in other like and/or similar services for other clients.
- 2.4 The Services are provided at the Client's request and the Client acknowledges and accepts that it is responsible for checking and ensuring that the Deliverable meets the Client's requirements before the Deliverable is used by the Client.
- 2.5 Where Born Digital is required to work with the Client's architect and/or any other third party on behalf of the Client:
- (a) the Client acknowledges and accepts that any information and instructions given to Born Digital by such third parties shall be deemed as information and instructions from the Client; and
 - (b) Born Digital shall not be liable for any claim or any loss arising whatsoever in connection with Born Digital using information given by, or following instructions from a third party on behalf of the Client.
- 2.6 Born Digital cannot guarantee the accuracy of colours, shades, materials, textures and/or measurements represented and/or depicted in the Deliverable.
- 2.7 The Client acknowledges that where it requires Born Digital to make any amendments, alterations and/or to undertake any further work to the Deliverable after it has been delivered, Born Digital's costs in doing so shall be additional to the charges set out in the Agreement.

3. Born Digital's Obligations

- 3.1 Born Digital shall provide the Services in a timely and efficient manner, using reasonable care and skill and shall ensure that the Services are provided by and performed by suitably qualified and/or experienced personnel.
- 3.2 Except where the Deliverable is based on reference material or visuals supplied by the Client and/or a third party on behalf of the Client, Born Digital warrants that the Deliverable is original and does not infringe any existing copyright. For the avoidance of doubt Born Digital warrants that the Background Work is original, but makes no warranty that the Background Work has not, or will not be used in supplying services to other clients.
- 3.3 The Deliverable shall be available to the Client via the client webpage for a period of 6 months from the date of delivery and shall be held by Born Digital for a total period of 5 years from the date of delivery. The Client acknowledges that where it requires copies and/or access to the Deliverable after the initial 6 month period Born Digital shall be entitled to charge the applicable administration fee from time to time.

4. Client's Obligations

- 4.1 The Client shall:
 - (a) at its own expense, supply Born Digital with all necessary documents, plans, drawings, specifications and/or other materials, and all necessary data or other information reasonably required by Born Digital, within sufficient time to enable Born Digital to provide the Services in accordance with the Agreement; and
 - (b) be responsible for the accuracy, completeness and propriety of the information and documents provided to Born Digital by the Client and/or any third party on behalf of the Client; and
 - (c) arrange and provide safe access to any property and/or site required for the provision of the Services ;and
 - (d) provide contact details for any third parties the Client requires Born Digital to liaise with, and
 - (e) ensure that it has suitable software to allow Born Digital to deliver the Deliverable in the agreed format as set out in the Quotation; and
 - (f) pay for the Services together with any associated expenses under the terms of this Agreement.

5. Charges and Payment

- 5.1 Born Digital shall, subject to these Terms and Conditions, provide the Services to the Client and the Client shall pay to the Born Digital the charges set out in the Quotation.
- 5.2 Unless otherwise agreed, all charges set out in the Quotation for the provision of the Services are inclusive of Value Added Tax but exclusive of any postage and/or carriage costs.
- 5.3 The charges set out in the Quotation and any other additional sums payable shall be paid by the Client (together with any applicable postage and/or carriage costs, and without any set-off or other deduction) within [30] days of the date of Born Digital's invoice.

5.4 If the Client fails to pay Born Digital any sum due pursuant to the Agreement, Born Digital reserves the right to claim interest under the Late Payment of Commercial Debts (Interest) Act 1998, and/or any other statutory provision in force from time to time.

5.5 If any invoice submitted by Born Digital remains outstanding for more than 30 days after becoming due for payment, Born Digital shall be entitled to suspend provision of the Services until the invoice in question (together with any interest and other costs (including legal costs in recovering payment) which shall have become due in addition) has been paid in full.

6. Delivery and Service Access

6.1 The Deliverable shall be delivered to the Client in the format as agreed between the parties and/or the address provided by the Client.

6.2 Where the Services are to be delivered via Born Digital's Client web page, Born Digital will supply the Client with a username and password for access.

6.3 The Client acknowledges and accepts that the username and password are confidential and can only be used by the Client, or where the Client is a Company, by its employees (who shall also be subject to a duty of confidentiality) for the purposes of accessing the Deliverables.

6.4 The Client acknowledges that it must seek permission from Born Digital before releasing its username and/or password to any third party. The Client accepts that it shall indemnify Born Digital for any and all losses suffered by Born Digital as a result of the release of the username and password to a third party, whether or not permission was given.

6.5 The Client acknowledges that any timescales scheduled in any Quotation are estimates only of the time required by Born Digital to provide the Services.

6.6 Born Digital shall not be liable or responsible for any delays in the performance and/or delivery of the Services where the delay has been contributed to, or in any way results from, any act or omission of the Client and/or third party on behalf of the Client.

6.7 Whilst Born Digital shall use all reasonable endeavours to ensure that its client webpage is secure, it cannot guarantee that the webpage cannot be breached.

6.8 While Born Digital endeavours to ensure that its client webpage is available 24 hours a day, Born Digital shall not be liable if for any reason its client webpage is unavailable at any time for any period.

6.9 Access to the client webpage may be suspended temporarily and without notice in the case of system failure, maintenance or repair or for reasons beyond Born Digital's control.

7. Intellectual Property Rights and Confidentiality

7.1 The parties acknowledge that the Intellectual Property Rights in the Client Foreground Work shall belong to the Client and Intellectual Property Rights in the Background Work and the Deliverable shall belong to Born Digital.

- 7.2 The Client grants Born Digital a non-exclusive, irrevocable, world-wide, royalty free licence to use the Client Foreground Work to create and develop the Deliverables
- 7.3 Born Digital grants a non-exclusive, irrevocable, world-wide, royalty free licence to use the Deliverable only for the purposes set out in the Agreement. All other rights in the Deliverable are reserved to Born Digital.
- 7.4 For the avoidance of doubt, where any Client Foreground Work is modified and/or altered by Born Digital, the Intellectual Property Rights in the original Client Foreground Work remains the property of the Client, but the modifications and/or alterations made shall be the property of Born Digital. Born Digital will grant a non-exclusive, irrevocable, world-wide, royalty free licence to the Client to use such modifications and/or alterations for the purposes set out in the Agreement.
- 7.5 The Client acknowledges that it cannot use the Deliverable for a purpose other than that set out in the Agreement, without Born Digital's written consent in the form of a licence. Where a licence is granted, the Client accepts that Born Digital is entitled to charge the licence fee applicable from time to time.
- 7.6 The Client agrees that it shall at all times (both during the term of the Agreement and after its termination) keep confidential, and shall not use (other than strictly for the purposes of the Agreement) and shall not, without the prior written consent of Born Digital, disclose to any third party any Confidential Information, unless the information:
- (a) was public knowledge or already known to the Client at the time of disclosure; or
 - (b) subsequently becomes public knowledge other than by breach of the agreement; or
 - (c) subsequently comes lawfully into the possession of the Client from a third party.
- 7.7 All documents and other records (in whatever form) containing Confidential Information supplied to or acquired by the Client from the Born Digital shall be returned promptly to the Born Digital on termination of the Agreement, and no copies shall be kept.
- 7.8 The Client warrants that any Client Foreground Work and its use by Born Digital for the provision of the Services will not infringe the Intellectual Property Rights or other rights of any third party and the Client shall indemnify Born Digital fully against any loss, damage, costs, expenses or other claims arising from any such infringement.

8. Moral Rights

- 8.1 Born Digital asserts to the Client, its assigns, licensees and successors in title its moral right to be identified as the author of the Deliverable in accordance with the Copyright, Design and Patents Act 1988 sections 77 and 78.
- 8.2 The Client shall procure that every copy of the Deliverable published by it or by its assigns, licensees and/or successors in title shall identify Born Digital as the author of the Deliverable.

9. General Liabilities and Indemnity

- 9.1 The Deliverable provided to the Client by Born Digital is provided for the Client's sole use and no responsibility is accepted by Born Digital for any reliance that may be placed upon any such Deliverable by any third parties.
- 9.2 Nothing in these conditions excludes or limits the liability of Born Digital:
- (a) for death or personal injury caused by Born Digital's negligence; or
 - (b) for any matter which it would be illegal for Born Digital to exclude or attempt to exclude its liability; or
 - (c) for fraud or fraudulent misrepresentation.
- 9.3 Subject to condition 9.2:
- (a) Born Digital's total liability in contract, tort (including negligence or breach of statutory duty), misrepresentation, restitution or otherwise, arising in connection with the performance or contemplated performance of the Agreement shall be limited to the amount of fees payable to Born Digital in respect of the Services performed hereunder; and
 - (b) Born Digital shall not be liable to the Client for any pure economic loss, loss of profit, loss of business, depletion of goodwill or otherwise, in each case whether direct, indirect or consequential, or any claims for consequential compensation whatsoever (howsoever caused) which arise out of or in connection with the Agreement.

10. Force Majeure

Born Digital shall not be liable to Client or be deemed to be in breach of the Agreement by reason of any delay in performing or any failure to perform any of Born Digital's obligations if it is prevented from or delayed in the carrying on of its business due to circumstances beyond the reasonable control of Born Digital including, without limitation, acts of God, governmental actions, war or national emergency, acts of terrorism, protests, riot, civil commotion, fire, explosion, flood, epidemic, lock-outs, strikes or other labour disputes (whether or not relating to either party's workforce), or restraints or delays affecting carriers or inability or delay in obtaining supplies of adequate or suitable materials.

11. Termination

- 11.1 Both parties shall have the right at any time and for any reason to terminate the Agreement in whole or in part by giving the other [one weeks] written notice, provided always that Born Digital shall be paid for any work completed up to the date of notice being given on a time and materials basis.
- 11.2 Both parties shall have the right at any time by giving notice in writing to the other to terminate the Agreement forthwith if:
- (a) either party commits a material breach of any of the Terms and Conditions of the Agreement which if capable of remedy, is not remedied within 30 days of a notice requiring the same to be remedied; or
 - (b) any distress, execution or other process is levied upon any of the assets of either party; or

- (c) either party has a bankruptcy order made against him or makes an arrangement or composition with his creditors, or otherwise takes the benefit of any statutory provision for the time being in force for the relief of insolvent debtors, or (being a body corporate) convenes a meeting of creditors (whether formal or informal), or enters into liquidation (whether voluntary or compulsory) except a solvent voluntary liquidation for the purpose only of reconstruction or amalgamation, or has a receiver or manager, administrator or administrative receiver appointed of its undertaking or any part thereof, or documents are filed with the court for the appointment of an administrator of either party or notice of intention to appoint an administrator is given by either party or its directors or by a qualifying floating charge holder (as defined in paragraph 14 of Schedule B1 to the Insolvency Act 1986), or a resolution is passed or a petition presented to any court for the winding-up of either party or for the granting of an administration order in respect of either party, or any proceedings are commenced relating to the insolvency or possible insolvency of either party; or
- (d) either party ceases or threatens to cease to carry on its business; or
- (e) the financial position of either party deteriorates to such an extent that in the opinion of the other the capability of that party to adequately to fulfil its obligations under the Agreement has been placed in jeopardy.

12.3 The termination of the Agreement, however arising, shall be without prejudice to the rights and duties of Born Digital accrued prior to termination. The conditions which expressly or impliedly have effect after termination shall continue to be enforceable notwithstanding termination.

12. General

12.1 Each right or remedy of Born Digital under the Agreement is without prejudice to any other right or remedy of Born Digital whether under the Contract or not.

12.2 If any provision of the Agreement is found by any court, tribunal or administrative body of competent jurisdiction to be wholly or partly illegal, invalid, void, voidable, unenforceable or unreasonable it shall to the extent of such illegality, invalidity, voidness, voidability, unenforceability or unreasonableness be deemed severable and the remaining provisions of the Agreement and the remainder of such provision shall continue in full force and effect.

12.3 Failure or delay by the Born Digital in enforcing or partially enforcing any provision of the Agreement shall not be construed as a waiver of any of its rights under the Agreement.

12.4 Any waiver by Born Digital of any breach of, or any default under, any provision of the Agreement by the Client shall not be deemed a waiver of any subsequent breach or default and shall in no way affect the other terms of the Agreement.

12.5 The parties to the Contract do not intend that any term of the Contract shall be enforceable by virtue of the Contracts (Rights of Third Parties) Act 1999 by any person that is not a party to it.

- 12.6 Any notice required to be given pursuant to this Agreement shall be in writing and shall be given by registered letter to the address of the relevant party set out in the Agreement or such other address as either party notifies to the other from time to time. Any notice given according to the above procedure shall be deemed to have been given when received.
- 12.7 The formation, existence, construction, performance, validity and all aspects of the Agreement shall be governed by English law and the parties submit to the exclusive jurisdiction of the English courts.