



Nicola Manning Design Ltd – Terms and 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 a reasonable standard of skill, care and diligence, 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 not make any material change to Design Works approved in writing by the Client except with the Client's instruction or agreement, or where site conditions or Project issues require the Designer to exercise urgent discretion, and the Client is promptly notified.
- (c) 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 the Agreement or claim remedies.
- (d) The Client agrees:
 - (i) To 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;
 - (ii) To 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 and Goods to be provided;
 - (iii) Not to purchase the Goods except through the Designer, unless otherwise agreed in writing by the parties;
 - (iv) Not to attempt to source goods or services directly from the suppliers or manufacturers of Third Party Goods;
 - (v) That it shall not, at any time after the commencement of the Agreement (including after termination for any reason), provide, display or disclose any Design Works to a supplier for quoting; and
 - (vi) That the Designer shall be entitled to place a lawn or fence sign on the property for the duration of the Project.
- (e) Except as expressly provided in the Proposal, the Designer shall have no project management or other duties or obligations in relation to the Project.

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, upon reasonable request, for a period of 6 months following completion of the Project, permit the Designer (and a

reasonable number of persons) to enter the property for the purpose of photographing and/or filming the Design Works.

- (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. DEFECTS

- (a) If, during the term of the Agreement or after completion of it, the Client becomes aware of any problem with the Design Works, or non-compliance with the 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.
- (b) Upon notification the Designer shall either, at its sole discretion, repair or replace any defective Design Works, provided that the Designer shall have no responsibility for any alleged defects in the Design Works that arise from the Designer's compliance with any designs, criteria or requirements provided by or through the Client.

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 the 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 on the due date specified on the invoice, or if there is no date specified, within seven (7) days of invoice.
- (b) The Designer may invoice the Client for Fees periodically, or at the outset or completion of a Project phase, or as the Project progresses and in the manner stipulated under the Proposal.
- (c) Any queries regarding Fees upon receipt of an invoice shall be raised by the Client within ten (10) working days. 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.
- (d) Where the 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 the Agreement.
- (e) Where the Fee is calculated on a quote, estimate or fixed-fee basis, the Fee is subject to reasonable upward adjustment in the event that:
 - (i) After the Agreement is entered into, the Client changes the scope of the Design Works required; or
 - (ii) After completion and approval of any Project 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; or
 - (iv) In the event that the supply price for Goods increases after estimation but before supply, the Designer reserves the right to adjust the price payable by the Client.

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.

- (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 the 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.

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 18.
- (c) Any monies paid may be allocated by the Designer toward any amount owed by the Client.

10. GOODS

10.1 Title and Risk

- (a) Title to Goods passes when the Designer receives full payment. Until full payment, the Designer reserves all ownership rights to the Goods.
- (b) Risk of any loss of, or damage to, Goods supplied by the Designer shall pass on delivery to the Client.

10.2 Security

Where delivery occurs before payment, the parties agree that:

- (a) The Designer has a registrable first-ranking security interest (for the purposes of the Personal Property Securities Act 1999 ("the PPSA") in the Goods and their proceeds to secure payment including all Fees and other amounts due from the Client from time to time;
- (b) Nothing in Sections 114(1)(a), 133 and 134 of the PPSA shall apply to the Agreement. The Client waives its rights pursuant to section 121, 125, 129, 131 and 132 of that Act and its rights to receive any verification statement relating to the security interests in the Goods; and
- (c) The Client shall ensure that the Goods are fully insured (replacement value) and that the Designer is recognised as an additional insured on the insurance policy,

until all Fees for the Project are paid in full.

11. THIRD PARTY GOODS

- (a) Unless otherwise expressly agreed in writing, the Designer does not provide any warranties for Third Party Goods sold, supplied or arranged by the Designer, and shall not be bound by nor responsible for any term, condition, representation or warranty applicable to the Third Party Goods. The Client acknowledges and agrees that:
 - (i) It relies solely on the manufacturer's or provider's warranty (if any);
 - (ii) The manufacturer's or provider's standard license/supply terms will apply; and
 - (iii) The Designer shall provide reasonable assistance with any Client warranty claims or resolution of other deficiencies arising, as required. In such instances, the Designer shall be the sole communicator between the Client and the manufacturer or provider. The Designer's hourly rate (as specified in the Proposal) shall be payable by the Client for this service.
- (b) In the event that Third Party Goods are delivered directly to the Client by the manufacturer or provider, the Client shall be solely responsible for the thorough inspection and acceptance of those Third Party Goods on delivery. Third Party Goods which are inspected and found to be damaged or defective shall be rejected by the Client. The Designer shall not be liable for:
 - (i) The inspection of Third Party Goods which are delivered directly to the Client by the manufacturer or provider; or
 - (ii) Failure by the Client or their nominee to thoroughly inspect (and where necessary, reject) Third Party Goods in accordance with this clause.
- (c) The Client acknowledges and agrees that the Designer may require:
 - (i) 50% deposit for Third Party Goods, payable by the Client within seven (7) days of invoice. Payment of that deposit shall constitute confirmation of the order for the Third Party Goods;

- (ii) Where a deposit has been paid in accordance with (i) above, the remaining 50% balance for the Third Party Goods, payable by the Client at the reasonable request of the Designer, prior to delivery of the Third Party Goods; and
- (iii) Where a deposit and subsequent payment is not required in accordance with (i)-(ii) above, full payment for Third Party Goods, payable by the Client upon ordering the Third Party Goods and at the reasonable request of the Designer, prior to delivery of the Third Party Goods.

12. MARGINS AND COMMISSIONS ON GOODS

The Designer shall endeavour to obtain Third Party Goods for the Client at discounted trade prices, made possible due to relationships that the Designer has built with third party suppliers over many years. The Designer may retain a proportion of the supplier discount (or impose a margin) by one of the following methods:

- (a) Goods such as furniture, furnishings and services shall be supplied at the recommended retail price, minus half of the Designer's discount obtained from the third party supplier, where a 10% or greater discount is available. For example, if the Designer obtains a 20% trade discount, the Client will receive a 10% discount from the Designer off the recommended retail price; or
- (b) Goods without a recommended retail price shall be supplied to the Client at cost, plus 15% and GST.

In addition, from time to time the Designer may receive commissions, rebates and other benefits from suppliers. The Client agrees that the Designer may retain these benefits.

13. 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 the Agreement through good faith without-prejudice negotiations.
- (b) If after five (5) Working Days the parties have not reached an agreed outcome, they shall cease discussions for two (2) Working Days before resuming discussions.
- (c) If, after a further discussion period of five (5) Working Days, the parties remain unable to reach an agreed outcome, the parties may take such further steps as they choose.

14. 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.

15. ELECTRONIC DESIGN WORKS

- (a) Subject to automatic backup mechanisms and the express terms of the Proposal, 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.

16. TERMINATION

16.1 Termination on Notice

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

16.2 Termination for Cause

Without prejudice to any other right or remedy it may have, whether under the Agreement, under statute or otherwise, either party may immediately terminate the Agreement by written notice to the other party if:

- (a) The other party is in breach of any term of the 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.

16.3. Consequences of Termination

- (a) Upon postponement or termination of the 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 the 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 the Agreement will not prejudice or affect the accrued right or liabilities of each party to the other.

17. 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, delays or non-performance by third party suppliers, weather or any other cause outside the Designer's control.

18. 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 the 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 the Agreement only and the Consumer Guarantees Act 1993 shall not apply.

19. DESIGNER NOT LIABLE FOR LOSSES

Subject to Clause 18, 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 and Goods; 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.

20. LIABILITY OF DESIGNER LIMITED

- (a) Subject to Clause 19, 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 Agreement or the performance or non-performance of any Design Works and Goods supplied by the Designer shall not exceed the full value of the payments made by the Client under the 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.

21. CONTRACTORS

- (a) The Designer may engage the services of 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.

22. ENTIRE AGREEMENT

The Proposal, 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.

23. WAIVER OR VARIATION

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

24. SURVIVAL OF AGREEMENT

The covenants, conditions and provisions of the 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.

25. SEVERABILITY

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

26. HEALTH AND SAFETY

If the Designer is present on the Client's or other third party's premises for the purpose of the Design Works:

- (a) The Client shall promptly notify the Designer of any health and safety policies in place on those premises; and
- (b) The Designer shall at all times comply with all reasonable health and safety requirements and safety-related instructions provided by the Client.

The Designer has not and will not during or after the term of the Agreement assume any obligation, as the Client's agent or otherwise, which may be imposed on the Client under the Health and Safety at Work Act 2015, and the parties agree that the Designer will not be deemed to be a PCBU or an officer of the Project under that Act.

27. 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 the 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 the Agreement shall be construed as evidence of a partnership between the parties or their successors or assigns, and no provision of the 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 Proposal and any provisions of these Terms and Conditions, the Proposal shall take precedence.
- (f) Notices under the Agreement can be delivered in person, or by email to the address notified in the Proposal (which may be updated from time to time by each party)

28. DEFINITIONS OF CAPITALISED WORDS

In these Terms and Conditions, the following meanings apply:

"Agreement" has the meaning described in clause 22;

"Client" means the client listed in the Proposal;

"Design Works" means the design services and design documentation to be provided by the Designer as detailed in the Agreement;

"Designer" means the designer listed in the Proposal;

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

"Goods" means all goods (including Third Party Goods) supplied by the Designer, including goods listed in the Proposal;

"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 Proposal;

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

"Proposal" means an estimate, engagement letter, proposal or statement of work provided by the Designer, setting out the Design Works and Goods to be supplied;

"Third Party Goods" means all Goods and services manufactured or provided by persons or entities other than the Designer;

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