

Terms of Trade 170603

1. DEFINED TERMS

1.1 **Definitions:** In these Standard Terms, unless the context otherwise requires:

“you” and “your” mean you as a client for which Design Services and/or Hosting Services will be provided by us;

“our”, “we” or “us” mean **Blue River Creative Limited**;

“Design Services” means the Product and other design services that we will provide to you under the terms of the Proposal and these Standard Terms;

“Hosting Services” means the website hosting services that we will provide to you under the terms of the Proposal and these Standard Terms;

“Product” means the end product or products resulting from the Design Services or otherwise to be provided by us to you under the terms of the Proposal and these Standard Terms;

“Proposal” means the proposal in respect of the provision of the Design Services and/or Hosting Services to which these Standard Terms are attached.

2. ACCEPTANCE OF PROPOSAL

2.1 Acceptance:

(a) You may accept the Proposal at any time within one month of the date of the Proposal. We reserve the right to change any terms of the Proposal (including the prices or scope of services) if you wish to accept the Proposal at any time after this one month period.

(b) In order to accept the Proposal, you must sign and date the Proposal (in its unamended form) at the appropriate places and deliver or fax the signed copy back to us.

2.2 **Legal contract:** Notwithstanding your acceptance of the Proposal, a legally binding contract shall only arise as between us when we counter-sign and date the Proposal (as accepted by you in the manner set out in clause 2.1) and notify you accordingly.

3. DESIGN SERVICES

3.1 **Provision of Design Services:** Upon a legally binding contract arising as between us and our receipt of the payment required under clause 3.5(a)(i), we will commence the provision of the Design Services.

3.2 **Scope and minimum specifications:** The scope of the Design Services and the specifications of the Product are as set out in the Proposal. You agree to accept any minor variations to such scope of the Design Services and/or specifications of the Product that we may reasonably require. We may at our discretion accept any variation to the scope and specifications that you may request, in which case the provisions of clause 3.4(b) will apply.

3.3 Time for completion:

(a) Subject to subclauses (b) and (c), we will complete the Design Services within the timeframe for completion set out in the Proposal (“Timeframe”).

(b) The Timeframe is based on the date we provide the Proposal to you. We retain the right to extend the Timeframe to take into account the date on which you finally accept the Proposal.

(c) The Timeframe will automatically be extended if any delay or failure to complete on time is directly or indirectly caused by or results from:

(i) our acceptance, at your request, of any variation to the scope of the Design Services and/or specifications of the Product;

(ii) us being required to provide the Design Services in circumstances other than those reasonably anticipated as at the date of the Proposal;

(iii) any act or omission on your part and/or any breach by you of the terms of the Proposal or these Standard Terms;

(iv) an exercise of our right to suspend the provision of the Design Services and/or Hosting Services under clause 6.5; or

(v) the occurrence of an Unforeseen Event (as defined in clause 8.4).

3.4 Design and Product Fee:

(a) Subject to clause 2.1 and subclause (b), the fee payable for the Design Services and Product(s) (“Fee”) is as set out in the Proposal.

(b) We retain the right to vary the Fee if any of the circumstances set out in clause 3.3(c) occurs, provided that the relevant circumstances do not directly result from any breach of the Proposal or these Standard Terms by us.

3.5 Payment:

(a) You agree to pay the Fee (in full and without deduction) in the following manner:

(i) 50% of the Fee [together with all value added tax/goods and services tax for the whole amount of the Fee], due and payable on the date you accept the Proposal in the manner set out in clause 2.1(b); and

(ii) the remaining 50% of the Fee, due and payable within 5 Business Days upon receiving our notice of the completion of the Design Services. If our Design Services are, for whatever reason, not completed within 3 months of the date that a legally binding contract arises as between us, we may require you to make progress payments to us on a fair and reasonable basis.

3.6 Your obligations:

(a) Unless otherwise agreed in the Proposal, you agree (at your sole cost) to provide us in a format reasonably required by us:

(i) all data, information and text to be incorporated in, on or into the Product (including data, information or text set out in PDF, MS Word or .txt files or contained in MS Access or MS Excel spreadsheets with predetermined fields); and

(ii) all logos, designs, images, graphics, video sequences and any other related materials to be incorporated in, on or into the Product (including any images stored in Quality Jpeg, EPS or tiff files or video sequences digitised on CD-ROM).

(b) You agree to fully cooperate with us to enable us to complete the Design Services and produce and deliver the Product to you within the Timeframe (as defined in clause 3.3). You also agree to make your input available when requested, and to respond to our queries or requests, in respect of any matter or thing related to the Design Services and/or the Product in a promptly and timely manner.

3.7 Credits: We are entitled to:

(a) place a discreet credit statement, hyperlink or other similar acknowledgment indicating the Product design source on or within the Product (including incorporating the words “Product design by www.blueriver.co.nz” on or within the Product). Any such credit will be incorporated within our design submissions and will be submitted to you for prior approval (such approval not to be unreasonably withheld or delayed); and

(b) where the Product is generally available to the public or is not of a confidential nature, utilise any part or all of the Product (or any image or reproduction of it) in order to demonstrate our services to any person.

4. HOSTING SERVICES

4.1 **Application:** The provisions of this clause 4 are applicable only where the Product is or includes a website and the Proposal contemplates the provision of Hosting Services.

4.2 **Provision of Hosting Services:** Upon a legally binding contract arising as between us and our receipt of payment of the first monthly Hosting Fee required under clause 4.6(a), we will provide you with the Hosting Services.

4.3 Scope:

(a) The scope of the Hosting Services is as set out in the Proposal. We reserve the right to change the scope of the

Hosting Services from time to time, provided that no less than 30 days’ prior written notice is given to you about the change.

(b) We will notify you if any additional storage/memory space within our server is required to host your website as part of the Hosting Services.

4.4 **Term:** We will provide you with the Hosting Services from the date we commence the provision of the Design Services in respect of the website as contemplated in clause 3.2 until the date the Hosting Services are terminated under clause 6.

4.5 Hosting Fee:

(a) Subject to clause 2.1 and subclause (b), the fee payable for the Hosting Services (“Hosting Fee”) is as set out in the Proposal.

(b) We retain the right to vary the rates of the Hosting Fee from time to time, provided that no less than 30 days’ prior written notice is given to you about the change.

(c) We may revise the monthly Hosting Fee if the amount of storage/memory space within our server required to host your website as part of the Hosting Services is increased or decreased.

4.6 Payment:

(a) You agree to pay the monthly Hosting Fee (in full and without deduction) monthly in advance, no less than 5 Business Days prior to the commencement of each month. The first of such monthly payment shall be made on the date you accept the Proposal in the manner set out in clause 2.1(b).

(b) We may require you to pay the monthly Hosting Fee by way of direct debit or automatic payment into our nominated bank account.

(c) You agree that if the monthly Hosting Fee is revised under clause 4.5(b) and/or clause 4.5(c), upon receiving our notification of such revision, you shall promptly change your direct debit or automatic payment arrangement to provide for payment of the revised monthly Hosting Fee. Where the revised monthly Hosting Fee is more than the monthly Hosting Fee applicable prior to the revision, we will invoice you for any additional monthly Hosting Fee until the direct debit or automatic payment arrangement is changed to provide for the revision. Such invoice shall be payable by you to us in the manner set out in subclause (a) above.

4.7 **Your obligations:** When using the Hosting Services, you agree:

(a) to comply with any instruction, policy or usage terms issued by us from time to time in respect of such use;

(b) to keep confidential any password or security code issued by us to you;

(c) that you are fully responsible for the ongoing development, modification, content and maintenance (where applicable) of the website; and

(d) that we have no responsibility for the nature, quality and/or content of any material of any type which you may make available in, on or through the website and/or through using the Design Services and/or Hosting Services and we undertake no responsibility to exercise any editorial content over any such material.

4.8 **Use for own purposes:** You agree to use our Hosting Services only for your own purposes and shall not sublet, license or allow the use of, any storage/memory space on our server to or by any other person.

5. INTELLECTUAL PROPERTY

5.1 **Intellectual Property:** Notwithstanding any contained elsewhere in these Standard Terms, we respectively agree that:

(a) you will retain ownership of the copyright and all other intellectual property rights in or associated with any material

- provided by you to us in the course of our provision of the Design Services and/or Hosting Services and the Product; and
- (b) we will retain ownership of all source codes, originating files or concepts, design or print templates or moulds, and any other thing related or connected to the creation, design or development of the Product. Nothing in this clause shall affect your ability to use the Product where such use is not in breach of the terms of the Proposal or these Standard Terms.
- 6. TERMINATION AND SUSPENSION**
- 6.1 Termination of Design Services:** You may terminate the Design Services at any time by:
- (a) giving us no less than 10 Business Day's prior written notice; and
- (b) paying us the Fee and/or Hosting Fee (as defined in clauses 3.4 and 4.4 respectively) for the Design Services and/or Hosting Services provided up to the date of termination together with all incidental and associated costs of early termination (including any costs of terminating subcontracting arrangements and other pre-incurred costs due to other persons).
- 6.2 Termination of Hosting Services:**
- (a) The Hosting Services may be terminated by either you or us giving no less than 30 days' prior written notice to the other person.
- (b) The Hosting Services shall automatically be terminated upon the termination of that part of the Design Services relating to a website.
- 6.3 Termination of all services:** We may immediately terminate the Design Services and/or Hosting Services if:
- (a) you fail to comply with any of your obligations imposed under the Proposal or these Standard Terms and such failure is:
- (i) not capable of being remedied; or
- (ii) capable of being remedied, but:
- in respect of any obligation to pay any fee or other amount due to us, has not been paid within 2 Business Days of the due date for payment; or
- in respect of any other obligation, has not been remedied prior to the date which is 10 Business Days after the date on which we give you notice requiring the failure to be remedied (or such longer period as we may allow);
- (b) you go into liquidation (other than a voluntary liquidation for the purpose of solvent reconstruction or amalgamation) or is wound up or dissolved, or is declared bankrupt, or in our opinion, any such event is likely to occur;
- (c) an Unforeseen Event prevents us from performing the Design Services and/or the Hosting Services for more than 30 days.
- 6.4 Prior breaches:** Any termination of the Design Services and/or Hosting Services shall be without prejudice to the rights either of us may have against the other in respect of any prior breach of any of the provisions contained or implied in the Proposal or these Standard Terms.
- 6.5 Suspension:** If you fail to comply with any obligation under the Proposal or these Standard Terms, we are entitled (at our sole discretion) to suspend the provision of the Design Services and/or Hosting Services until that breach has been remedied.
- 7. OTHER OBLIGATIONS AND EXCLUSION OF LIABILITY**
- 7.1 Your warranties:** You shall ensure and warrant that:
- (a) all material provided by you to us in relation to the Design Services; and
- (b) all material contained in, on or through the Product, do not and will not:
- (c) infringe any copyright and any other intellectual property right of any person;
- (d) breach, or result in a breach, of any law, statute, regulations, ordinance and/or bylaw;
- (e) contain any material which is obscene, offensive, upsetting or defamatory; or
- (f) be used for any purpose or activity of any illegal, fraudulent and/or defamatory nature.
- 7.2 Other representations and warranties:** Except as expressly provided in the Proposal, you agree that in respect of the provision of the Design Services and/or Hosting Services, to the fullest extent permitted by applicable law:
- (a) all contractual representations and/or warranties (either express or implied) are excluded; and
- (b) all representations and/or warranties (whether express or implied by law or otherwise) are excluded, including any implied warranties in relation to merchantability and/or fitness for purpose.
- 7.3 Consumer Guarantees Act:** Except as expressly provided in the Proposal and to the fullest extent permitted by law, you agree that if the Design Services and/or Hosting Services are provided to you for the purposes of a business in terms of sections 2 and 43 of the Consumer Guarantees Act 1993, the provisions of that Act shall not apply to such provision.
- 7.4 Exclusion of liability:** We are not liable for any actions, claims, suits, demands, liabilities, loss of profit, costs and/or expenses (direct, indirect, special, consequential or otherwise) arising directly or indirectly from or in connection with the Proposal and/or these Standard Terms:
- 7.5 Maximum liability:** If, for any reason, the exclusion of liability in clauses 7.2 and 7.4 are not effective as intended and/or cannot be relied upon by us, then our maximum total liability to you under or in connection with the Proposal and these Standard Terms shall not exceed the total amount of the Fee and Hosting Fee actually received by us from you for the 12 month period preceding the date of any claim made by you against us.
- 7.6 Indemnity:** In the event that you act inconsistently with your acknowledgments, restrictions or obligations, or otherwise breach of any of your warranties, as set out in clause 7, you agree to indemnify us, our directors, employees, agents and/or any other related party, from all actions, damages, claims, suits, demands, liabilities, costs and/or expenses (including legal expenses on a client and own solicitor basis) directly or indirectly arising out of or connected with such breach.
- 8. MISCELLANEOUS**
- 8.1 Value added tax:** Unless expressly stated, amounts stated in and payable under the Proposal or these Standard Terms do not include any value added tax (or in the case of a supply in New Zealand, any goods and services tax). All amounts so payable must be increased for value added tax/goods and services tax if and to the extent that the supply in respect of which the amounts is payable is subject to value added tax/goods and services tax and a valid value added tax/goods and services tax invoice is issued to the person required to pay the amount.
- 8.2 Notice:** A notice required or authorised to be given or served on a party under the Proposal or these Standard Terms must be in writing and may be given or served by e-mail, facsimile, post or hand to that party at its facsimile number or address advised by that party to the other from time to time. The provisions of this clause are in addition to any other mode of service permitted by law.
- 8.3 Deemed Receipt:** A notice shall be deemed to be received by the addressee:
- (a) in the case of a facsimile, on the Business Day on which it is despatched or, if despatched after 5.00 p.m. (in the place of receipt) on a Business Day or, if despatched on a non-Business Day, on the next Business Day, after the date of despatch;
- (b) in the case of personal delivery, when delivered; and
- (c) in the case of a letter, on the third Business Day after posting.
- 8.4 Unforeseen Event:**
- (a) We are not liable for any failure or delay in complying with any obligation imposed on us under the Proposal or these Standard Terms if the failure or delay arises from a cause or an event beyond our control and without our fault ("Unforeseen Event").
- (b) We will use our reasonable endeavours to perform our obligations under the Proposal or these Standard Terms despite the Unforeseen Event.
- (c) Performance under the Proposal or these Standard Terms shall resume as soon as possible to the greatest extent possible following the Unforeseen Event coming to an end.
- 8.5 Confidentiality:** We respectively agree to keep confidential at all times the Proposal and these Standard Terms and their terms, and any confidential information obtained during the course of negotiations relating to the Proposal and these Standard Terms, and neither of us shall make any public disclosure or announcement of the Proposal and these Standard Terms and their terms, or any confidential information, without the prior written consent of the other party unless otherwise required by law.
- 8.6 No agency:** Nothing in the Proposal or these Standard Terms shall create or constitute, or be deemed to create or constitute, either of us as a partner, or as an agent or principal, of the other.
- 8.7 Subcontract:** We retain the right to subcontract any person to provide any part or all of the Design Services and/or Hosting Services.
- 8.8 Unlawful or voidable provision:** If any provision in these Standard Terms is at any time considered not to be valid or enforceable, such provision shall no longer form part of these Standard Terms, provided that this does not materially affect the purpose of these Standard Terms.
- 8.9 No amendment:** No amendment to these Standard Terms shall be effective unless it is in writing and signed by the both of us.
- 8.10 Jurisdiction:** The Proposal and these Standard Terms shall be governed by, and construed in accordance with, the laws of New Zealand. We respectively accept the non-exclusive jurisdiction of the Courts of New Zealand.
- 8.11 Interpretation:** In these Standard Terms, unless the context otherwise requires:
- (a) "Business Day" means any day (other than a Saturday or a Sunday) on which registered banks are open for business in Auckland;
- (b) words denoting the singular shall include the plural and vice versa;
- (c) any covenant or agreement on the part of two or more persons shall bind those persons jointly and severally;
- (d) references to these Standard Terms or any document or statement (however described) shall include references to that document as modified, novated, supplemented, varied or replaced from time to time; and
- (e) reference to any statute, regulation, ordinance or bylaw shall be deemed to extend to all statutes, regulations, ordinances or bylaws amending, consolidating or replacing the same.
- 8.12 Proposal prevails:** If any provision of these Standard Terms are directly inconsistent with anything set out in the Proposal, the provisions of the Proposal shall apply.