

Standard Conditions of Contract for Services BPIF 2012

Model Terms and Conditions of Contract for the Supply of Digital Marketing Services

Provided by BPIF Legal for the use of Members of BPIF.

This Document is a suggested set of Terms and Conditions only and Members are free to use any other set of terms or adapt these terms as they feel appropriate. We strongly recommend that you read the terms and satisfy yourself that they reflect your normal terms of business and take your own legal advice where appropriate and also we recommend that you read the accompanying Guidance Notes.

1. Definitions and Interpretation

In these terms and conditions the following definitions apply:

- (a) "Seller" means [the party supplying the Services under these terms and conditions] [or the name of the seller].
- (b) "Business Day" means a day (other than a Saturday, Sunday or public holiday) when banks in London are open for business.
- (c) "Buyer" means the party contracting with the Seller to purchase the Services.
- (d) "Deliverables" means all products, materials, logos and art works developed, created or generated by the Seller or its agents, subcontractors, consultants and employees in relation to the performance of the Services including those set out in the Specification.
- (e) "Initial Term" means the initial period for the provision of Services as set out in the Specification.
- (f) "Commencement Date" means the start date for the provision of Services as set out in the Specification.
- (g) "Insolvent" means the Buyer is in a position where it is unable to pay its debts or has a winding up petition issued against it or has an administrator, a receiver or an administrative receiver appointed to it or being an individual enters into a voluntary arrangement, commits an act of bankruptcy or has a bankruptcy petition issued against him.
- (h) "Intellectual Property Rights" means all patents, rights to inventions, utility models, copyright and related rights, trademarks, service marks, trade, business and domain names, rights in trade dress or get-up, rights in goodwill or to sue for passing off, unfair competition rights, rights in designs, rights in computer software, database right, topography rights, moral rights, rights in confidential information (including know-how and trade secrets) and any other intellectual property rights in each case whether registered or unregistered and including all applications for and renewals or extensions of such rights in any part of the world.
- (i) "Materials" means all data, documents information and materials, including any branding guidelines, provided by the Buyer relating to the Services.
- (j) "Pre-Existing Materials" means the Seller's standard or pre-existing materials.
- (k) "Purpose" means the purpose for use of the Deliverable as set out in the Specification.
- (l) "Services" means the digital marketing services (or any part of them) listed in the Specification together with any additional services which the Seller provides or agrees to provide to the Buyer.
- (m) "Specification" means the specification of the Services provided by the Seller.
- (n) "Unsuitable Content" means any material or content that is obscene, indecent, pornographic, seditious, offensive, defamatory, threatening, liable to incite racial hatred, menacing, blasphemous or in breach of any third party's Intellectual Property Rights.
- (o) "Website" means the website specified in the Specification.

In these terms and conditions the following rules apply:

- (a) clause headings shall not affect the interpretation of the contract;
- (b) a person includes a natural person, corporate or unincorporated body (whether or not having separate legal personality);
- (c) a reference to a person includes his personal representatives, successors and permitted assigns;

- (d) the Specification and any documents referred to in the Specification form part of the contract and shall have effect as if set out in full in the body of the contract and any reference to this contract includes the Specification and those documents and in the event and to the extent only of any conflict between these terms and conditions, and the Specification, the terms set out in the Specification shall take priority;
- (e) unless the context otherwise requires, words in the singular shall include the plural and vice versa; and
- (f) a reference to writing or written includes faxes [but not e-mail] [and emails].

2. Contract

2.1 These terms and conditions apply to the contract to the exclusion of any other terms that the Buyer seeks to impose or incorporate, or which are implied by trade custom, practice or course of dealing.

2.2 The order from the Buyer constitutes an offer by the Buyer to purchase the Services in accordance with these terms and conditions.

2.3 No binding contract shall come into existence until the Seller has sent its written acceptance of the Buyer's order for the Services.

2.4 The contract constitutes the entire agreement between the Seller and the Buyer. The Buyer acknowledges that it has not relied on any statement, promise or representation made or given by or on behalf of the Seller which is not set out in the contract.

2.5 Any examples, descriptive matter, or advertising produced by the Seller and any descriptions or illustrations contained in the Seller's catalogues, brochures or website are produced for the sole purpose of giving an approximate idea of the Services and any Deliverables described in them. They shall not form part of the contract nor shall they have any contractual force.

2.6 A quotation for the Services and/or the Deliverables given by the Seller shall not constitute an offer. A quotation shall only be valid for a period of [20] Business Days from its date of issue.

3. Price and Payment

3.1 The price of the Services and any Deliverables shall be the price set out in the Specification.

3.2 The price of the Services and any Deliverables is exclusive of VAT and the Buyer will pay to the Seller any VAT and any similar replacement or additional tax payable in relation to the supply of the Services and any Deliverables.

3.3 Any additional [work required of the Seller] [and/or] [cost incurred by the Seller] by reason of the Buyer supplying inadequate, incomplete or incorrect instructions or Materials in relation to the Services or any Deliverables or being late in giving instructions or supplying any Materials shall be charged for by the Seller and any such charges shall be paid by the Buyer in addition to the price.

3.4 The Seller shall invoice the Buyer for the cost of the Services and any Deliverables at the times stated in the Specification and shall invoice any additional charges arising pursuant to Clauses 3.3 or 3.9 at the time the work is done or the cost is incurred.

3.5 Payment shall be made [upon receipt of the relevant invoice] [within • Business Days after the date of the relevant invoice]. **(Due Date)**,

3.6 If Credit Facilities have been granted in accordance with clause 4, payment of each invoice is due by the end of the month following the month of invoice.

3.7 If any sum remains unpaid by the Due Date, payment charges will apply, in accordance with Section 5A and/or Section 6 of the Late Payment Commercial Debt (Interest) Act 1998 or any subsequent enactment. [In addition, all invoices will become due and payable immediately upon default of the Buyer and will be treated as overdue with appropriate charges being applied and all costs reasonably incurred in collecting the debt being payable by the Buyer.]

[If the Buyer fails to make any payment due to the Seller under the contract by the Due Date, then the Buyer shall pay interest on the overdue amount at the rate of [4]% per annum above [FULL NAME OF BANK]'s base rate from time to time. Such interest shall accrue on a daily basis from the Due Date until the date of actual payment of the overdue amount, whether before or after judgment. The Buyer shall pay the interest together with the overdue amount.]

3.8 The Buyer shall pay all amounts due under the contract in full without any deduction or withholding except as required by law and the Buyer shall not be entitled to assert any credit, set-off or counterclaim against the Seller in order to justify withholding payment of any such amount in whole or in part.

3.9 If the provision of the Services should be suspended or delayed for any reason other than the Seller's default (but excluding any event of force majeure) the Seller shall be entitled to charge the Buyer for the costs it incurs by reason of such suspension or delay. If such suspension or delay extends beyond [10 Business Days] the Seller shall be entitled to terminate the contract forthwith by notice given to the Buyer.

3.10 If the Buyer fails to pay the Seller any sum on its Due Date the Seller may suspend its performance of the Services or the delivery of any of the Deliverables until the date of actual payment of the overdue amount.

3.11 If the Buyer disputes any invoice it shall immediately notify the Seller in writing and provide full details of the disputed matter. The parties shall negotiate in good faith to attempt to resolve the dispute promptly. If the parties have not resolved the dispute within [20 Business Days] of the Buyer giving notice to the Seller the dispute may be resolved by mediation or bringing legal proceedings in the courts. Where only part of an invoice is disputed, the undisputed amount shall be paid on the Due Date.

4. Credit Facilities

Credit facilities may be granted to applicants who complete the Seller's Credit Account Application Form and who satisfy the Seller's criteria as set out from time to time. Where credit facilities are granted the Seller reserves the right to withdraw them at any time, without having to give its reasons therefor and, in such a case, all outstanding invoices shall become due and payable immediately.

5. Delivery of the Services

5.1 The Seller shall use reasonable endeavours to meet any dates to provide the Services or any parts thereof and/or for the delivery of any Deliverables specified in the Specification but any such dates shall be estimates only and time for the performance of the Services or the delivery of any Deliverables by the Seller shall not be of the essence of the contract. The Seller shall not be liable to the Buyer for any loss of contract, loss of profit or loss of business or any indirect loss,

consequential loss or third party claims occasioned by delay in supplying the Services or delivering any Deliverables.

5.4 The supply of the Services shall commence on the Commencement Date and shall continue [until the date stated in the Specification] [until completion of the Initial Term] [until the contract is terminated by either the Seller or the Buyer giving to the other not less than [] [months] [weeks] notice of termination unless the contract is terminated earlier in accordance with clauses 3.9, 14 or 16.

5.5 Each party shall appoint a project manager who shall provide a professional and prompt liaison with the other party and have the necessary expertise and authority to commit the relevant party. The project managers shall meet regularly (and at least as frequently as set out in the Specification).

5.6 The Deliverables may include third party software. The Buyer accepts that third party software shall be supplied in accordance with the relevant licensor's standard terms. Any licence fee for those licences is included in the price set out in the Specification.

6. Buyer's Obligations

6.1 The Buyer shall: -

- (a) co-operate with the Seller in all matters relating to the Services, including providing access to servers and online accounts required by the Seller to provide the Services;
- (b) provide in a timely manner such Materials as the Seller may reasonably require and ensure that they are accurate and complete in all respects;
- (c) obtain and maintain all licences and consents necessary for the Seller to provide the Services and/or the Deliverables.

6.2 The Buyer shall not without the prior written consent of the Seller at any time from the date of the contract to the expiry of [6] months after the completion of the contract solicit or entice away from the Seller or employ or engage any person who is or has been employed or engaged by the Seller and has been involved in the provision of the Services and/or the Deliverables.

6.3 The Buyer shall ensure that any Materials which it supplies to the Seller in connection with the Services and/or the Deliverables will not have any Unsuitable Content. The Buyer shall indemnify and hold the Seller harmless against all damages, loss, costs and expenses suffered or incurred by the Seller as a result of any action or claim that any Materials supplied by the Buyer constitute Unsuitable Content.

6.4 The Buyer shall ensure that any Materials which it supplies to the Seller in connection with the Services and/or Deliverables will be provided in accordance with all applicable laws and regulations from time to time in force.

6.5 The Seller shall have no liability to the Buyer for any failure or delay in supplying the Services or delivering any Deliverables to the extent that such failure or delay is caused by the Buyer's failure to comply with its obligations under the contract.

6.6 The Buyer shall ensure in respect of any Materials containing personal data which it supplies to the Seller that such personal data has been collected, stored and processed at all times in accordance with the terms of the Data Protection Act 1998.

7. Change Procedure

7.1 If the Buyer requests a change to the scope or the manner of executing or the time of provision of the Services or the Deliverables the Seller shall within a [reasonable time] [a time not exceeding [5] Business Days] after receiving the request provide a written estimate to the Buyer of:

(a) the likely time required;

(b) any variation to the Seller's price of the Services and/or any Deliverables arising from the change;

(c) the likely affect of the change on the Specification; and

(d) any other impact of the change on the terms and conditions of the contract.

7.2 If the Buyer requires the Seller to proceed with the change the Seller shall have no obligation to do so unless and until the Seller has agreed in writing with the Buyer a variation to the contract including its prices.

7.3 Notwithstanding clauses 7.1 and 15.6 the Seller may vary the Services and/or any Deliverables in order to comply with any applicable safety or statutory requirements provided that such variations do not materially affect the nature, scope of or the price for the Services and any Deliverables.

8. Quality

8.1 The Seller shall use reasonable endeavours to perform the Services and [to] deliver any Deliverables to the Buyer in accordance with generally recognised commercial practices and standards in the industry for similar services and in accordance in all material respects with the Specification.

8.2 The Services and Deliverables will be provided in accordance with all applicable laws and regulations in the United Kingdom from time to time in force.

8.3 The contract sets out the full extent of the Seller's obligations and liabilities in respect of the supply of the Services and any Deliverables. All conditions, warranties or other terms concerning the Services or any Deliverables which might otherwise be implied into the contract (whether by statute or otherwise) are hereby expressly excluded.

9. Data Protection

9.1 The Buyer is hereby notified that the Seller may transfer personal information about the Buyer to a Credit Agency pursuant to clause 4 [and the Buyer consents to such transfer].

9.2 Both the Seller and the Buyer shall comply with their respective obligations under the Data Protection Act 1998.

10. Intellectual Property Rights

10.1 All Intellectual Property Rights in the Deliverables (excluding Materials) shall be the property of the Seller and the Seller hereby grants to the Buyer a [perpetual] non-exclusive licence [in the United Kingdom] to use the Deliverables for the Purpose.

10.2 The Seller shall procure that its employees shall waive any and all moral rights in and to any Deliverables resulting from the Services.

10.3 To the extent that any Deliverables consist of Pre-Existing Materials, the Intellectual Property Rights in the Pre-Existing Materials shall remain the property of the Seller or consist of any third party software the Intellectual Property Rights in such software shall remain the property of the third party who has licensed such software to the Seller. The Seller hereby grants (and if a licence from a third party is required it will procure the grant of such licence from the requisite third party) to the Buyer a non-exclusive [non-transferable] [worldwide] [United Kingdom] licence to use the Pre-Existing Materials and any third party software for the purpose of using the Deliverables for the Purpose.

10.4 The Buyer hereby grants to the Seller a non-exclusive, non-transferable, irrevocable and worldwide licence to use any Intellectual Property Rights owned by the Buyer including those contained or referred to in the Materials which are required for the performance of the Services and any Intellectual Property Rights which are licensed to the Buyer by any third party solely to provide the Services and the Deliverables to the Buyer in accordance with the contract.

10.5 The Buyer shall indemnify and hold the Seller harmless against all damages, loss, costs and expenses arising as a result of any claim or action that any Materials supplied by the Buyer to the Seller for the performance of the Services infringe the Intellectual Property Rights of a third party.

10.6 The Seller shall indemnify the Buyer against all damages, loss, costs and expenses arising as a result of any action or claim that the Services and/or the Deliverables infringe any Intellectual Property Rights of a third party in the United Kingdom, other than infringements referred to in clause 10.5.

10.7 The indemnity in clause 10.6 is subject to the following conditions:

- (a) the Buyer promptly notifies the Seller in writing of the action or claim;
- (b) the Buyer makes no admission or settlement of the action or claim without the Seller's prior written consent;
- (c) the Buyer gives the Seller all information and assistance that the Seller may reasonably require; and
- (d) the Buyer allows the Seller complete control over the litigation and settlement of any action or claim.

10.8 If any action or claim for infringement of any Intellectual Property Rights of a third party is made, or in the Seller's reasonable opinion is likely to be made, against the Buyer, the Seller may at its sole option and expense:

- (a) modify the Services or the Deliverables and/or any other infringing item created by the Seller so that it ceases to be infringing; or
- (b) obtain third party permissions and or licences permitting continued use of the Deliverables or the continued performance of the Services so that there is no longer any infringement; or
- (c) terminate the licence granted by the Seller under the contract immediately by notice in writing to the Buyer and refund any of the price paid by the Buyer as at the date of termination (less a reasonable sum in respect of the use of the Services and expenses

incurred from the Commencement Date to the date of termination) or refund the damages claimed against the Buyer whichever is the lesser sum.

10.9 Clause 10.8 constitutes the Buyer's exclusive remedy and the Seller's only liability in respect of such claims and, for the avoidance of doubt, is subject to clause 12.1.

10.10 [The Seller may include the statement "Designed by [NAME OF SELLER]" on the home page of the Website in its standard form.]

11. Liability

11.1 (a) All claims relating to the Services or any products (including any Deliverables) of the Services must be made in writing to the Seller within [3] Business Days of the acceptance or deemed acceptance of the Services and/or any part thereof by the Buyer. The Seller shall not be liable in respect of any claim unless such requirements have been complied with except in any particular case where the Buyer proves that (i) it was not possible to comply with such requirements and (ii) the claim was made as soon as reasonably possible.

(b) In the event of all or any claims the Seller reserves the right to inspect the relevant work or products (including any Deliverables) resulting from the Services within [5] Business Days of the claim being notified.

11.2 Insofar as is permitted by law where a claim is made by the Buyer against the Seller in respect of the Seller's breach of contract or negligence, the Seller's liability (if any) shall be limited at its option to re-performing the relative part of the Services and/or correcting or replacing any products (including any Deliverables) of the Services at its cost or crediting the price of such part of the Services or the products (including any Deliverables) of the Services against any invoice relating to such part of the Service or the products (including any Deliverables) of the Services and the Buyer shall not be entitled to any further claim in respect of such part of the Services and/or products (including any Deliverables) resulting from the Services nor shall the Buyer be entitled to repudiate the contract, refuse to pay for the such part of the Services and/or products (including any Deliverables) resulting from the Services or cancel further supplies of the Services or any products (including any Deliverables) of the Services. Where the Seller offers to re-perform such part of the Services and/or correct or replace any products (including Deliverables) resulting from the Services the Buyer must accept such an offer unless it can show clear cause for refusing so to do. If the Buyer opts to have any part of the Services re-done or any products (including Deliverables) resulting from the Services corrected or replaced by any third party without reference to the Seller the Buyer automatically revokes its right to any remedy from the Seller, including but not exclusively the right to any credit against sums which have been invoiced in respect of the such part of the Services or any products (including Deliverables) resulting from the Services.

12. Limitation of Liability

12.1 Nothing in these terms and conditions shall limit or exclude the liability of the Seller for:

- (a) death or personal injury resulting from its negligence; or
- (b) fraud or fraudulent misrepresentation; or

- (c) breach of the terms implied by section 12 of the Sale of Goods Act 1979 or section 2 of the Supply of Goods and Services Act 1982; or
- (d) losses for which it is prohibited by section 7 of the Consumer Protection Act 1987 to limit liability; or
- (e) any other liability which cannot be excluded or limited under applicable law.

12.2 Subject to clause 12.1 the Seller shall under no circumstances whatsoever be liable to the Buyer, whether in contract, tort (including negligence), or for breach of statutory duty or otherwise, for any:

- (a) [loss or damage to software]
- (b) [loss or damage to data]
- (c) [loss of profit; or]
- (d) [loss of contract; or]
- (e) [loss of goodwill; or]
- (f) [loss of business; or]
- (g) [loss of business opportunity; or]
- (h) [loss of anticipated saving; or]
- (i) [loss or corruption of data or information]

or any indirect or consequential loss arising under or in connection with the contract.

The Seller's total liability to the Buyer in respect of all other losses arising under or in connection with the contract, whether in contract, tort (including negligence), breach of statutory duty, or otherwise, shall in no circumstances exceed [£[AMOUNT] [[PERCENT]]% of] the price which has been paid for the defective Services and/or the defective Deliverables.

13. Insolvency

Without prejudice to any other rights or remedies, if the Buyer becomes Insolvent, the Seller shall have the right not to proceed further with the contract and shall be entitled to charge and invoice the Buyer for all Services already performed and Deliverables already delivered (whether or not the contract has been fully performed) and such charges shall be an immediate debt due to the Seller. Any unpaid invoices issued by the Seller shall become immediately due for payment.

14. Force majeure

The Seller shall not be in breach of the contract nor have any liability for any failure or delay in carrying out the contract due to any reason beyond its reasonable control including (without limiting the foregoing): Act of God; legislation; war; fire; flood; drought; inadequacy or unsuitability of any instructions, electronic file or other data or materials supplied by the Buyer; failure of power supply; lock-out, strike or other action taken by employees in contemplation or furtherance of a dispute; or owing to any inability to procure materials required for the performance of the contract and in such circumstances the Seller will be entitled to a reasonable extension of the time for performing such obligations. If such circumstances continue for more than [8] weeks the Seller shall be entitled to terminate the contract forthwith by giving written notice to the Buyer.

15. General

15.1 The Seller may at any time assign, transfer, charge, subcontract or deal in any other manner with all or any of its rights or obligations under the contract.

15.2 No person other than the Seller and the Buyer shall have any rights to enforce any term of the contract under the Contracts (Rights of Third Parties) Act 1999.

15.3 All clauses of these terms and conditions are severable and if any provision or identifiable part thereof is held to be unenforceable by any court of competent jurisdiction then such enforceability shall not affect the enforceability of the remaining provisions or identifiable parts thereof in the contract. If any invalid, unenforceable or illegal provision of the contract would be valid, enforceable and legal if some part of it were deleted, the provision shall apply with the minimum modification necessary to make it legal, valid and enforceable.

15.4 The Seller and the Buyer shall keep in strict confidence all technical or commercial know-how, specifications, inventions, processes or initiatives which are of a confidential nature and have been disclosed to it by the other. The Seller and the Buyer may disclose the other's confidential information:

(a) only to its employees, officers, agents, consultants or sub-contractors (**Representatives**) who need to know such information for the purposes of carrying out the party's obligations under the contract, provided that the disclosing party takes all reasonable steps to ensure that its Representatives comply with the confidentiality obligations contained in this clause 15.4 as though they were a party to the contract and provided that the confidential information is used only for the purposes of carrying out the party's obligations under the contract. The disclosing party shall be responsible for its Representatives' compliance with the confidentiality obligations set out in this clause; and

(b) as may be required by law, court order or any governmental or regulatory authority.

15.5 Any waiver by the Seller of any right under the contract is only effective if it is in writing and it applies only to the circumstances for which it is given. No failure to exercise or delay in exercising any right or remedy provided under the contract or by law constitutes a waiver of such right or remedy nor shall it prevent any future exercise or enforcement of such right or remedy. No single or partial exercise of any right or remedy under the contract shall prevent or restrict the further exercise of that or any other right or remedy.

15.6 Except as otherwise set out in the contract, any variation to the contract shall only be binding when agreed in writing and signed by the Seller.

16. **Termination**

16.1 The Seller shall be entitled to terminate the contract with immediate effect by giving written notice to the Buyer if:

(a) the Buyer fails to pay any undisputed amount due under the contract on the due date and remains in default not less than [5 Business Days] after being notified in writing to make such payment; or

(b) the Buyer commits a material breach of its obligations under the contract (other than a breach of the nature stated in sub-clause (a)) and (if such breach is remediable) fails to remedy

that breach within a period of [30 days] [5/10 Business Days] after receipt of notice in writing requiring it to do so; or

(c) the Buyer commits a series of persistent minor breaches which when taken together amount to a material breach; or

(d) the Buyer is Insolvent; or

(e) the Buyer ceases, or threatens to cease, to carry on all or substantially the whole of its business.

16.2 Termination of the contract shall not prejudice any of the Sellers rights or remedies which have accrued against the Buyer as at termination.

16.3 On termination of the contract by the Seller pursuant to clauses 16.1 [3.9 or 14] all licences granted by the Seller to the Buyer under the contract shall terminate immediately.

17. Notices

Any notice or other communication required to be given by the Seller or the Buyer to the other shall be in writing and delivered or sent to the address set out [in the contract] [overleaf] [in the Specification]. Such notice or communication shall be deemed to be duly given or made: when delivered (in the case of personal delivery); on the second Business Day after posting (in the case of pre-paid first class post); [or in the case of email, at the time of sending provided that the email is received by the other party. A reply or a read receipt to such email shall (in the absence of evidence to the contrary) be deemed to confirm receipt.] The provisions of this clause shall not apply to the service of any proceedings or other documents in any legal action.

18. Law

The contract shall be governed by and construed in accordance with English law and the Seller and the Buyer agree to submit to the jurisdiction of the courts of England and Wales.

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