

GENERAL TERMS & CONDITIONS

1. DEFINITIONS

As used herein and throughout this Agreement:

- 1.1 *Designer* shall mean the Graphic Design and Website Design business known as Swiwi Design Ltd. operated by Nicole Fehlmann and Joerg Agostini, their employees or agents.
- 1.2 *Client* shall mean the client, or any person acting on behalf of and with the authority of the Client, or any person purchasing Deliverables from the Designer.
- 1.3 *Agreement* means the entire content of this General Terms & Conditions document, the Proposal document(s), the Estimate, Schedule A, together with any other Supplements designated below, together with any exhibits, schedules or attachments hereto.
- 1.4 *Client Content* means all materials, information, factual, promotional, or other advertising claims, photography, writings and other creative content provided by Client for use in the preparation of and/or incorporation in the Deliverables.
- 1.5 *Copyrights* means the property rights in original works of authorship, expressed in a tangible medium of expression, as defined and enforceable under New Zealand Copyright law.
- 1.6 *Deliverables* means the services and work product specified in the Proposal/Estimate to be delivered by Designer to Client, in the form and media specified in the Proposal/Estimate.
- 1.7 *Designer Tools* means all design tools developed and/or utilized by Designer in performing the Services, including without limitation pre-existing and newly developed software including source code, web authoring tools, type fonts, and application tools, together with any other software, or other inventions whether or not patentable, and general non-copyrightable concepts such as website design, architecture, layout, navigational and functional elements.
- 1.8 *Final Works* means all creative content developed by Designer, or commissioned by Designer, exclusively for the Project and incorporated in the Final Deliverables, including, but not limited to, any and all visual elements, graphic design, illustration, photography, animation, motion design, audio-visual works, sounds, typographic treatments and text, modifications to Client Content, and Designer's selection, arrangement and coordination of such elements together with Client Content and/or Third Party Materials.
- 1.9 *Final Deliverables* means the final versions of Deliverables provided by Designer and accepted by Client.
- 1.10 *Preliminary Works* means all creative content including, but not limited to, concepts, sketches, visual presentations, or other alternate or preliminary designs and documents developed by Designer and which may or may not be shown and or delivered to Client for consideration but do not form part of the Final Works.
- 1.11 *Project* means the scope and purpose of the Client's identified usage of the work product as described in the Proposal/Estimate.
- 1.12 *Services* means all services and the work product to be provided to Client by Designer as described and otherwise further defined in the Proposal/Estimate.

1.13 *Third Party Materials/Services* means proprietary third party materials/services which are incorporated into the Final Deliverables, including without limitation stock photography or illustration.

1.14 *Trademarks* means trade names, words, symbols, designs, logos or other devices or designs used in the Final Deliverables to designate the origin or source of the goods or services of Client.

1.15 *Working Files* means all underlying work product and digital files utilized by Designer to create the Preliminary Works and Final Works other than the format comprising the Final Deliverables.

1.16 *GST* means goods and services tax properly chargeable under the New Zealand GST Act.

2. AGREEMENT / ACCEPTANCE

- 2.1 Any instructions received by the Designer from the Client for the supply of Final Deliverables shall:
(a) Constitute acceptance by the Client of these Terms & Conditions
(b) Be on the basis of the Proposal/Estimate for that supply and these Terms & Conditions.
- 2.2 In the event of any conflict between these general Terms & Conditions of any Proposal/Estimate, the Proposal/Estimate will prevail.
- 2.3 The acceptance by the Client of the Terms & Conditions of a Proposal/Estimate, or any part or variation, is sufficiently evidenced if either:
(a) A signed copy of a written agreement, or
(b) Any other form of written acceptance or acknowledgment (whether or not signed), is physically received by the Designer, or received by the Designer via fax, email or in other digital format. The foregoing shall not limit the ability of the Designer to establish evidence of any other form of acceptance by any other lawful means.
- 2.4 Any form of oral instruction is not a valid form of instruction unless it is sufficiently evidenced in writing and accepted by the Designer or the Designer elects to waive that requirement in any particular case.
- 2.5 Any variation to these Terms & Conditions or to any Proposal/Estimate ("Change Request") may only be made by an agreement in writing which is communicated to the Client by the Designer and acceptance of which is evidenced in the same manner as specified in clause.
- 2.6 Any Agreement for the supply of Final Deliverables by the Designer includes Third Party Materials/Services to be provided by third parties:
(a) The Designer gives no warranty and accepts no responsibility or liability whatsoever in respect of those Third Party Materials/Services as supplied by that third party;
(b) The Client is solely responsible to that third party for payment for those Third Party Materials/Services; and
(c) The Client hereby authorise the Designer to act as his agent to contract the provision of those Third Party Materials/Services as contemplated by the applicable Agreement.

3. COLLECTION & USE OF INFORMATION

3.1 The Client authorise the Designer to collect, retain, disclose and use any information about the Client for the purpose of assessing the Client's credit worthiness, enforcing any rights under these Terms & Conditions or any Agreement, or marketing any Final Deliverables provided by the Designer to any other party.

3.2 Where you are a natural person the authorities under clause 3.1 are authorities or consents for the purposes of the Privacy Act 1993.

4. PROPOSAL/ESTIMATE

The terms of the Proposal/Estimate shall be effective for 30 days after presentation to Client. In the event this Agreement is not executed by Client within the time identified, the Proposal/Estimate, together with any related Terms & Conditions and deliverables, may be subject to amendment, change or substitution.

5. FEES AND CHARGES

5.1 *Fees.* In consideration of the Services to be performed by Designer, Client shall pay to Designer fees in the amounts and according to the payment schedule set forth in the Proposal/Estimate, and all applicable sales, use or value added taxes, even if calculated or assessed subsequent to the payment schedule.

5.2 *Expenses.* Client shall pay Designer's expenses incurred in connection with this Agreement as follows:
 (a) incidental and out-of-pocket expenses including but not limited to costs for postage, shipping, overnight courier, service bureaus, typesetting, blueprints, models, presentation materials and photocopies, plus Designer's standard mark-up of fifteen percent (15%), and, if applicable, a mileage reimbursement at NZD \$0.29 per kilometre; and
 (b) travel expenses including transportation, meals, and lodging, incurred by Designer with Client's prior approval.

5.3 *Additional Costs.* The Project pricing includes Designer's fee only. Any and all outside costs including, but not limited to, equipment rental, photographer's costs and fees, photography and/or artwork licenses, prototype production costs, talent fees, music licenses and online access or hosting fees, will be billed to Client unless specifically otherwise provided for in the Proposal/Estimate.

5.4 *Invoices Clients.* Invoices will be sent out by the end of the month and are payable within thirty (30) days of receipt. Invoices include 15% GST. A monthly service charge of 2.5 percent (2.5%) is payable on all overdue balances. Payments will be credited first to late payment charges and next to the unpaid balance. Client shall be responsible for all collection or legal fees necessitated by lateness or default in payment. Designer reserves the right to withhold delivery and any transfer of ownership of any current work if accounts are not current or overdue invoices are not paid in full. All grants of any license to use or transfer of ownership of any intellectual property rights under this Agreement are conditioned upon receipt of payment in full which shall be inclusive of any and all outstanding Additional Costs, Taxes, Expenses, and Fees, Charges, or the costs of Changes.

5.5 *Invoices International Clients.* First 50% to be paid at project start. Final 50% to be paid before Final Deliverables will be delivered to the Client, unless otherwise agreed on by the Designer and the Client. Invoices for International Clients are GST free.

Client shall be responsible for all bank fees and currency conversion rates. Designer reserves the right to withhold delivery and any transfer of ownership of any current work if accounts are not current or overdue invoices are not paid in full.

All grants of any license to use or transfer of ownership of any intellectual property rights under this Agreement are conditioned upon receipt of payment in full which shall be inclusive of any and all outstanding Additional Costs, Taxes, Expenses, and Fees, Charges, or the costs of Changes.

6. CHANGES

6.1 *General Changes.* Unless otherwise provided in the Proposal/Estimate, and except as otherwise provided for herein, Client shall pay additional charges for changes requested by Client which are outside the scope of the Services on a time and materials basis. Such charges shall be in addition to all other amounts payable under the Proposal/Estimate, despite any maximum budget, contract price or final price identified therein. Designer may extend or modify any delivery schedule or deadlines in the Proposal/Estimate and Deliverables as may be required by such Changes.

6.2 *Timing.* Designer will prioritize performance of the Services as may be necessary or as identified in the Proposal/Estimate, and will undertake commercially reasonable efforts to perform the Services within the time(s) identified in the Proposal/Estimate. Client agrees to review Deliverables within the time identified for such reviews and to promptly either, (I) approve the Deliverables in writing or (II) provide written comments and/or corrections sufficient to identify the Client's concerns, objections or corrections to Designer. The Designer shall be entitled to request written clarification of any concern, objection or correction. Client acknowledges and agrees that Designer's ability to meet any and all schedules is entirely dependent upon Client's prompt performance of its obligations to provide materials and written approvals and/or instructions pursuant to the Proposal/Estimate and that any delays in Client's performance or Changes in the Services or Deliverables requested by Client may delay delivery of the Deliverables. Lengthy delays will result in a on a day-for-day extension of the project's deadline. Any such delay caused by Client shall not constitute a breach of any term, condition or Designer's obligations under this Agreement.

6.3 *Testing and Acceptance.* Designer will exercise commercially reasonable efforts to test Deliverables requiring testing and to make all necessary corrections prior to providing Deliverables to Client. Client, within five (5) business days of receipt of each Deliverable, shall notify Designer, in writing, of any failure of such Deliverable to comply with the specifications set forth in the Proposal/Estimate, or of any other objections, corrections, changes or amendments Client wishes made to such Deliverable. Any such written notice shall be sufficient to identify with clarity any objection, correction or change or amendment, and Designer will undertake to make the same in a commercially timely manner. Any and all objections, corrections, changes or amendments shall be subject to the Terms & Conditions of this Agreement. In the absence of such notice from Client, the Deliverable shall be deemed accepted.

7. CLIENT RESPONSIBILITIES

Client acknowledges that it shall be responsible for performing the following in a reasonable and timely manner:

- (a) coordination of any decision-making with parties other than the Designer;
- (b) provision of Client Content in a form suitable for reproduction or incorporation into the Deliverables without further preparation, unless otherwise expressly provided in the Proposal/Estimate;
- (c) final proofreading and in the event that Client has approved Deliverables but errors, such as, by way of example, not limitation, typographic errors or misspellings, remain in the finished product, Client shall incur the cost of correcting such errors ; and
- (d) ensuring that all information and claims comprising Client Content are accurate, legal and conform to applicable standards in Client's industry.

8. ACCREDITATION/PROMOTIONS

All displays or publications of the Deliverables shall bear accreditation and/or copyright notice in Designer's name in the form, size and location as incorporated by Designer in the Deliverables, or as otherwise directed by Designer. Designer retains the right to reproduce, publish and display the Deliverables in Designer's portfolios and websites, and in galleries, design periodicals and other media or exhibits for the purposes of recognition of creative excellence or professional advancement, and to be credited with authorship of the Deliverables in connection with such uses. Either party, subject to the other's reasonable approval, may describe its role in relation to the Project and, if applicable, the services provided to the other party on its website and in other promotional materials, and, if not expressly objected to, include a link to the other party's website.

9. CONFIDENTIAL INFORMATION

Each party acknowledges that in connection with this Agreement it may receive certain confidential or proprietary technical and business information and materials of the other party, including without limitation Preliminary Works ("Confidential Information"). Each party, its agents and employees shall hold and maintain in strict confidence all Confidential Information, shall not disclose Confidential Information to any third party, and shall not use any Confidential Information except as may be necessary to perform its obligations under the Proposal/Estimate except as may be required by a court or governmental authority. Notwithstanding the foregoing, Confidential Information shall not include any information that is in the public domain or becomes publicly known through no fault of the receiving party, or is otherwise properly received from a third party without an obligation of confidentiality.

10. RELATIONSHIP OF THE PARTIES

10.1 *Independent Contractor.* Designer is an independent contractor, not an employee of Client or any company affiliated with Client. Designer shall provide the Services under the general direction of Client, but Designer shall determine, in Designer's sole discretion, the manner and means by which the Services are accomplished. This Agreement does not create a partnership or joint venture and neither party is authorized to act as agent or bind the other party except as expressly stated in this Agreement. All rights, if any, granted to Client are contractual in nature and are wholly defined by the express written agreement of the parties and the various Terms & Conditions of this Agreement.

10.2 *Designer Agents.* Designer shall be permitted to engage and/or use third party designers or other service providers as independent contractors in connection with the Services ("Design Agents"). Notwithstanding, Designer shall remain fully responsible for such Design Agents' compliance with the various Terms & Conditions of this Agreement.

10.3 *No Exclusivity.* The parties expressly acknowledge that this Agreement does not create an exclusive relationship between the parties. Client is free to engage others to perform services of the same or similar nature to those provided by Designer, and Designer shall be entitled to offer and provide design services to others, solicit other clients and otherwise advertise the services offered by Designer.

11. WARRANTIES AND REPRESENTATIONS

11.1 *By Client.* Client represents, warrants and covenants to Designer that

- (a) Client owns all right, title, and interest in, or otherwise has full right and authority to permit the use of the Client Content,
- (b) to the best of Client's knowledge, the Client Content is accurate, legal, conforms to ethical standards of the Client's industry, does not infringe the rights of any third party, and use of the Client Content as well as any Trademarks in connection with the Project does not and will not violate the rights of any third parties,
- (c) Client shall comply with the Terms & Conditions of any licensing agreements which govern the use of Third Party Materials, and
- (d) Client shall comply with all laws and regulations as they relate to the Services and Deliverables.

11.2 *By Designer.*

- (a) Designer hereby represents, warrants and covenants to Client that Designer will provide the Services identified in the Agreement in a professional and workmanlike manner and in accordance with all reasonable professional standards for such services.
- (b) Designer further represents, warrants and covenants to Client that (I) except for Third Party Materials and Client Content, the Final Deliverables shall be the original work of Designer and/or its independent contractors, (II) in the event that the Final Deliverables include the work of independent contractors commissioned for the Project by Designer, Designer shall have secure agreements from such contractors granting all necessary rights, title, and interest in and to the Final Deliverables sufficient for Designer to grant the intellectual property rights provided in this Agreement, and (III) to the best of Designer's knowledge, the Final Works provided by Designer and Designer's subcontractors does not infringe the rights of any party, and use of same in connection with the Project will not violate the rights of any third parties. In the event Client or third parties modify or otherwise use the Deliverables outside of the scope or for any purpose not identified in the Proposal/Estimate or this Agreement or contrary to the Terms & Conditions noted herein, all representations and warranties of Designer shall be void.
- (c) Except for the express representations and warranties stated in this Agreement, Designer makes no warranties whatsoever. Designer explicitly disclaims any other warranties of any kind, either express or implied, including but not limited to warranties of merchantability or fitness for a particular purpose or compliance with laws or government rules or regulations applicable to the Project.

12. LIABILITY

12.1 *Limitation of Liability.* The services and the work product of Designer are sold “as is.” In all circumstances, the maximum liability of Designer, its directors, officers, employees, design agents and affiliates (“designer parties”), to Client for damages for any and all causes whatsoever, and Client’s maximum remedy, regardless of the form of action, whether in contract, tort or otherwise, shall be limited to the net profit of Designer. In no event shall Designer be liable for any lost data or content, lost profits, business interruption or for any indirect, incidental, special, consequential, exemplary or punitive damages arising out of or relating to the materials or the services provided by Designer, even if Designer has been advised of the possibility of such damages, and notwithstanding the failure of essential purpose of any limited remedy.

13. TERM AND TERMINATION

13.1 *Term.* This Agreement shall commence upon the Effective Date and shall remain effective until the Services are completed and delivered.

13.2 *Termination.* This Agreement may be terminated for convenience at any time by either party effective immediately upon notice, or the mutual agreement of the parties, or for cause if any party:

- (a) becomes insolvent, files a petition in bankruptcy, makes an assignment for the benefit of its creditors; or
- (b) breaches any of its material responsibilities or obligations under this Agreement, which breach is not remedied within ten (10) days from receipt of written notice of such breach.

13.3 *In the event of termination,* Designer shall be compensated for the Services performed through the date of termination in the amount of

- (a) any advance payment,
- (b) a prorated portion of the fees due, or
- (c) hourly fees for work performed by Designer or Designer’s agents as of the date of termination, whichever is greater; and Client shall pay all Expenses, fees, out of pockets together with any Additional Costs incurred through and up to, the date of cancellation. In the event of termination for convenience by Client, Client shall pay in addition to the above an early termination fee equal to 25% of the total project fee, Schedule A shall not be effective, and Client shall not have rights to use Deliverables except upon written consent from Designer provided after such termination.

13.4 In the event of termination for convenience by Designer or for cause by Client, and upon full payment of compensation as provided herein, Designer grants to Client such right and title as provided for in Schedule A of this Agreement with respect to those Deliverables provided to, and accepted by Client as of the date of termination.

13.5 Upon expiration or termination of this Agreement:

- (a) each party shall return or, at the disclosing party’s request, destroy the Confidential Information of the other party, and
- (b) other than as provided herein, all rights and obligations of each party under this Agreement, exclusive of the Services, shall survive.

14. GENERAL

14.1 *Force Majeure.* Designer shall not be deemed in breach of this Agreement if Designer is unable to complete the Services or any portion thereof by reason of fire, earthquake, flood, hurricane or other severe weather, labour dispute, act of war, terrorism, riot or other severe civil disturbance, death, illness or incapacity of Designer or any local, state, federal, national or international law, governmental order or regulation or any other event beyond Designer’s control (collectively, “Force Majeure Event”). Upon occurrence of any Force Majeure Event, Designer shall give notice to Client of its inability to perform or of delay in completing the Services and shall propose revisions to the schedule for completion of the Services.

14.2 *Governing Law and Dispute Resolution.* The formation, construction, performance and enforcement of this Agreement shall be in accordance with the laws of New Zealand .

The parties will use their best endeavours to amicably resolve any dispute between them which may arise concerning the interpretation of these Terms & Conditions or any Agreement or in relation to any matter arising under these Terms & Conditions or any Agreement. If the parties cannot settle amicably and in good faith any dispute between them within 20 working days, either party may submit the dispute to arbitration, which shall be governed by the Arbitration Act 1996, except to the extent modified by this agreement. The arbitration shall be conducted by a single arbitrator applying the laws of New Zealand, appointed by the parties.

For the avoidance of doubt, the existence of a dispute will not relieve any party from the requirement to perform its obligations under this agreement generally and, notwithstanding the dispute, each party will continue to perform such obligations in accordance with this agreement to the maximum extent possible (having regard to the nature of the dispute).

14.3 This Agreement comprises the entire understanding of the parties hereto on the subject matter herein contained, and supersedes and merges all prior and contemporaneous Agreements, understandings and discussions between the parties relating to the subject matter of this Agreement. In the event of a conflict between the Proposal/Estimate and any other Agreement documents, the terms of the Proposal/Estimate shall control. Any other ambiguities shall be resolved with the most reasonable and legally valid construction, without regard to authorship of such provisions. This Agreement comprises this General Terms & Conditions document, the Proposal/Estimate and Schedule A.

SCHEDULE A

INTELLECTUAL PROPERTY PROVISIONS

EXCLUSIVE LICENSE

IP 1. RIGHTS IN THE FINAL DELIVERABLES

IP 1.1 *Final Works*. Upon completion of the Services, and expressly conditioned upon full payment of all fees and costs due, Designer hereby grants to Client the exclusive, perpetual and worldwide right and license to use, reproduce and display the Final Works solely in connection with the Project as defined in the Proposal/Estimate. Any additional uses will require separate pricing. All other rights, including Copyrights, are reserved by Designer.

Modification:

The rights granted to Client are for usage of the Final Works in their original form only. Client may not crop, distort, manipulate, reconfigure, mimic, animate, edit, extract portions, intentionally alter the color of the Final Works, or otherwise create derivative works based on the Final Works.

IP 1.2 *Trademarks*. Upon completion of the Services, and expressly conditioned upon full payment of all fees and costs due, Designer assigns to Client all of Designer's rights, including trademark and Copyright, in and to Trademarks created by Designer. Designer shall cooperate with Client and shall execute any additional documents reasonably requested by Client to evidence such assignment. Client shall have sole responsibility for ensuring that Trademarks do not infringe the rights of third parties, and Client shall indemnify, save and hold harmless Designer from any and all damages, liabilities, costs, losses or expenses arising out of any claim, demand, or action by a third party alleging trademark infringement, or arising out of Client's failure to obtain trademark clearance or permissions, for use of Trademarks.

IP 1.3 *Client Content*. Client Content, including pre-existing Trademarks, shall remain the sole property of Client or its respective suppliers, and Client or its suppliers shall be the sole owner of all trademark, trade secrets, patents, Copyrights, and other rights in connection therewith. Client hereby grants to Designer a non-exclusive, non-transferable license to use, reproduce, modify, display and publish the Client Content solely in connection with Designer's performance of the Services and promotional uses of the Deliverables as authorized in this Agreement.

IP 1.4 *Third Party Materials*. Intellectual property rights in Third Party Materials shall be owned by the respective third parties. Designer shall inform Client of all Third Party Materials to be procured by Designer that Client may need to license at Client's own expense, and unless otherwise arranged by Client, Designer shall obtain a license for Client to use the Third Party Materials consistent with the usage rights granted herein. Client shall indemnify, save and hold harmless Designer from any and all damages, liabilities, costs, losses or expenses arising out of any claim, demand, or action by a third party arising out of Client's failure to obtain copyright, trademark, publicity, privacy, defamation or other releases or permissions with respect to materials included in the Final Works at Client's request.

IP 2. RIGHTS RESERVED TO DESIGNER

IP 2.1 *Preliminary Works/Working Files*. Designer retains all proprietary rights, including property ownership, intellectual property rights and Copyrights, in and to all Preliminary Works and Working Files, and Client shall return to Designer all Preliminary Works and Working Files in Client's possession within thirty (30) days of completion of the Services.

IP 2.2 *Original Artwork*. Designer retains property ownership in any original artwork comprising Final Works, including all rights to display or sell such artwork. Client shall return all original artwork to Designer within thirty (30) days of completion of the Services.

IP 2.3 *Designer Tools*. Designer Tools and all intellectual property rights therein, including Copyrights, shall be owned solely by Designer. Designer hereby grants to Client a non-exclusive, non-transferable (other than the right to sub-license such uses to Client's publisher, web hosting or Internet service providers), perpetual, worldwide license to use the Designer Tools solely with the Final Deliverables for the Project. Client may not directly or indirectly, in any form or manner, decompile, reverse engineer, or otherwise disassemble or modify any Designer Tools comprising software or technology.

IP 3. LIQUIDATION RIGHTS

IP 3.1 *Liquidation for Unlicensed Use*. Client's use of the Deliverables shall be limited to the usage rights granted herein for the Project only. In the event Client, or its agents, uses Final Works or other Deliverables, including Preliminary Works and Working Files, or any derivative works thereof, for another project or outside the scope of the rights granted herein, Designer shall be entitled to further compensation equal to three hundred percent (300%) of the original Project fee unless otherwise agreed in writing by both parties.