

# Master Services Agreement

**This Agreement for services is between Distinction Limited ("Agency"), and the Client. Both parties agree as follows:**

## 1. Definitions

1.1 In this Agreement the following words and expressions shall have the meaning set out below:

"Client" means any person or corporate body, for itself and on behalf of its subsidiary companies, wishing to purchase products or services in relation to its business from the Agency;

"Agency" means Distinction Limited (registered in England and Wales under company registration number 04241374) whose registered office is at 4-6 Broadway, The Lace Market, Nottingham, NG1 1PS;

"Project" means any Project to be undertaken by the Agency, further described (i) in the Project's Statement of Work document, and (ii) in any supplementary documents referenced therein;

"Statement of Work", "SOW" is the document that defines a Project;

"Specification" is the specification of work to be delivered, as defined in the Project's Statement of Work;

"Services" refers to the services provided to the Client by the Agency in undertaking the Project, and include but are not necessarily limited to digital strategy and consultancy, creative services, technical services, marketing services, hosting, maintenance and support services, and software products;

"Project Plan" refers to the timelines for delivery of the Project as defined in the Project's Statement of Work;

"Acceptance" is the acceptance by the Client of the Services for the Client's use in accordance with Clause 2;

"Fees" means all amounts charged to the Client by the Agency for delivering the Services;

"Client Content" is the information, data and software provided to the Agency by the Client for incorporation into the Project;

"Error" means any failure which is not of a trivial nature of the Project or part to comply with the Specification;

"Intellectual Property Rights" means any and all registered and unregistered copyright patents, design rights, database and compilation rights, Marks (and related goodwill), trade secrets and other intellectual property rights, howsoever arising and in whatever media, and any applications for their protection or registration and all renewals and extensions anywhere in the world; and

"Marks" means any and all names, brands, logos, trademarks, service marks, trade names and domain names.

1.2 Except where the context otherwise requires, words denoting the singular include the plural and vice versa, words denoting any gender include any other genders, and words denoting persons include firms and corporations and vice versa.

1.3 Unless otherwise stated, a reference to: (a) a clause or a Schedule is a reference to a clause or schedule to this Agreement. Clause headings are for ease of reference only and do not affect the construction of this Agreement; (b) "include" and "including"

shall be construed without limitation; and (c) any Act of Parliament shall be deemed to include any amendment, replacement or re-enactment thereof then in force and to include any bye-laws, statutory instruments, rules, regulations, orders, notices, directions, consents, licences, conditions or permissions made thereunder.

## **2. Services and Acceptance**

- 2.1 Subject to the meeting of the Client Obligations by the Client as set out in Clause 5 below, the Agency agrees to complete the Project using all reasonable commercial endeavours in accordance with the Specification.
- 2.2 The Agency will use all reasonable endeavours to complete the Project by the estimated completion date, as defined within the Project Plan.
- 2.3 The Agency shall notify the Client when the Project or any agreed part is available for acceptance testing. Unless otherwise provided by the Client, as soon as reasonably practicable and in any event within 10 working days, the Client shall test the Project or part and report all the results to the Agency. The Client shall notify the Agency of any Errors in that version of the Project.
- 2.4 If the Client notifies the Agency of any Errors, the Agency shall use all reasonable endeavours to correct such Errors promptly and, subject to clause 2.6, clause 2.3 shall apply again to such Project or part.
- 2.5 If the Client notifies the Agency that there are no Errors which it has discovered in that version, then the Project or the relevant part shall be Accepted. Unless otherwise agreed, the Project shall not be Accepted until all the parts of the Project are Accepted.
- 2.6 If clause 2.3 has been repeated five (5) times in relation to any Project or part of this Project and the Client again notifies the Agency of any Errors then this shall be a material breach of the agreement by the Agency and the Client has the right to terminate this Agreement as set out in Clause 14.

## **3. Amendments to Specification**

- 3.1 The parties agree that amendments to the Specification or Project Plan can only be made and agreed in writing or by e-mail. If at any time the Client wishes to amend the Specification, Project Plan or any aspect of the implementation of the Project, the Client shall provide such details to the Agency in writing or by e-mail, together with such further information as the Agency may reasonably require in order to assess the impact of the proposed amendments.
- 3.2 The Agency shall, within a reasonable time of receipt of all of the information specified in clause 3.1, submit to the Client a revised Specification, Project Plan and quotation for any additional Fees required in order to implement the amendments proposed by the Client (the "response"). The quotation shall be reasonable and shall be calculated using the same hourly or daily rates as detailed in the Project's Statement of Work.
- 3.3 If the Client wishes to accept the response, then it shall do so in writing or by e-mail within 10 working days of receipt of the response unless agreed otherwise by the parties, in which case the relevant aspects of the Specification, Project Plan and the Fees shall be amended in accordance with the response otherwise work shall continue by the Agency without amendment. For the avoidance of doubt, any change to the Specification, Project Plan or Fees shall only be binding where recorded in writing.

## **4. Support**

- 4.1 If agreed in writing through a separate Support Retainer Agreement, the Agency will provide ongoing support services as defined in that Agreement. If no such Agreement exists, the Client may contact the Agency to provide ad-hoc support services, with each request being quoted individually.

## **5 Client Obligations**

- 5.1 The Client agrees:
- (a) that this Agreement does not include the provision of equipment, telecommunications or other services necessary to host or access the Project and the Client is responsible for providing and maintaining suitable equipment, telecommunications and support services to facilitate access to the Project;
  - (b) to keep all passwords belonging to the Agency secret at all times in accordance with the provisions of clause 13;
  - (c) to ensure that its employees and other independent contractors co-operate promptly and reasonably with the Agency and its employees throughout;
  - (d) to provide Client Content as expressly set out in the Specification and Project Plan and comply with any of its other obligations under the Specification; and
  - (e) to pay all Fees promptly and in accordance with Clause 6.

## **6. Payment**

- 6.1 The Agency shall invoice the Client in accordance with the Project Plan and, subject to clauses 6.3 and 6.4, the Client shall pay all undisputed invoices due to the Agency within thirty (30) days of receipt of each undisputed invoice. All Fees and other charges are subject to UK VAT.
- 6.2 If any sum due to the Agency remains outstanding after the due date then, without prejudice to any other rights and remedies of the Agency, the Agency may charge the Client simple interest calculated on a daily basis at 2% above the Bank of England base rate, before and after any judgment, from the undisputed invoice date until payment is made in full. Subject to Clause 6.3, the Agency may suspend all work on the Project until payment is made in full.
- 6.3 The Client may withhold any payment or part payment to the extent it is subject to a bona fide dispute. For the avoidance of doubt, no interest shall be payable on sums where the Client successfully shows that the sum was not due pursuant to clause 6.3.
- 6.4 The Client shall pay all invoices due to the Agency which relate to deposits or staged payments upon receipt of the date the invoice is received by the Client.

## **7. Warranties**

- 7.1 Each party warrants to the other that it has the full right, power and authority to enter into and perform this Agreement and has not entered into any arrangement which in any way conflicts with this Agreement or inhibits, restricts or impairs its ability to perform its obligations under this Agreement.
- 7.2 The Client warrants that it has sufficient rights (including Intellectual Property Rights) in the Client Content to grant to the Agency the rights set out in this Agreement in respect of the Client Content and has obtained and will maintain and renew, as appropriate, all necessary licences, authorisations and consents which are necessary for the Agency to use the Client Content in the completion of the Project.
- 7.3 The Agency warrants that it has sufficient rights (including Intellectual Property Rights) in and relating to the Project to grant to the Client the rights set out in this Agreement and has obtained and will maintain and renew, as appropriate, all necessary licences, authorisations and consents which are necessary for the Client to make commercial use of the Project.
- 7.4 The Agency warrants and represents that it shall provide the Project and all services connected with or ancillary to the Project with reasonable skill and care and in accordance with all applicable standards.

7.5 Except as expressly provided in this Agreement, each party expressly disclaims any further representations, warranties, conditions or other terms, express or implied, by statute, collaterally or otherwise, including but not limited to implied warranties, conditions or other terms of satisfactory quality or fitness for a particular purpose.

## **8 Intellectual Property Rights**

8.1 The copyright in any methodologies and technologies provided by the Agency for the Project shall remain in the Agency or its licensors. All Intellectual Property rights created, whether alone or jointly, by the Agency in connection with the Project shall by way of present and future assignment be assigned with full title guarantee to the Client.

8.2 The Agency grants the Client a royalty-free, worldwide, non-exclusive license to use, sub-licence and modify any methodologies and technologies provided by the Agency.

8.3 The Agency shall procure the worldwide waiver of any moral rights (of or similar to the type defined in sections 77 to 83 of the Copyright, Designs and Patents Act 1988) subsisting in any copyright work created for the Client under this Agreement.

8.4 Nothing in this Agreement shall be taken to prevent the Agency from using any expertise acquired or developed during the performance of this Agreement in the provision of services for other companies or on its own behalf.

8.5 The Agency may, in writing, request the Client to permit to the reproduction, publication or display of certain of the Deliverables in the Agency'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. The Client shall not unreasonably withhold the granting of such a permission.

## **9 Term**

This Agreement shall commence on the date signed by both parties, and shall continue until Acceptance of all parts of the Project in accordance with clause 2, unless and until terminated in accordance with clause 14.

## **10 Indemnities and Insurance**

10.1 Each party shall indemnify and keep the other party fully and effectively indemnified on demand against any liability, damage, expense, claim or cost (including reasonable legal costs and expenses) suffered by the other party as a result of any breach by the first party of the warranties set out in clause 7 of this Agreement. The party claiming the benefit of this clause 10.1 shall act to mitigate its loss.

10.2 The party wishing to take the benefit of the indemnity shall: (i) notify the other party as soon as reasonably practicable after first learning of any such claim, lawsuit, action or proceeding; (ii) consent to the other party having the sole authority to control the defence and settlement of any such claim, lawsuit, action or proceeding (provided that the same are in the name of the other party) taking into account the other party's preferences in terms of defending or settling; and (iii) provide reasonable co-operation and assistance to the other party, at that party's expense, in defending any such claim, lawsuit, action or proceeding.

10.3 The Agency must have in force and maintain with a reputable insurance Agency professional indemnity insurance of at least £1,000,000. The Agency shall at the Client's request supply a copy of the current certificate for and details of the said insurance.

## **11 Limitation of Liability**

11.1 Save as provided in clauses 10.1, 11.2 and 11.3, neither party shall be liable in contract, tort (including negligence) or otherwise arising in connection with this Agreement for: (i) indirect or special loss or damage; or (ii) any loss of goodwill or reputation or like consequential loss; or (iii) any economic losses (including loss of revenues, profits, contracts, business or anticipated savings) in each case, even if the relevant party has been advised of the possibility of such loss or damage and howsoever incurred.

- 11.2 Save for clauses 10.1 and 11.3, both parties agree that the maximum liability of either party in contract, tort (including negligence) or otherwise arising in connection with this Agreement shall be limited to the sum of £1,000,000.
- 11.3 Nothing in this Agreement shall exclude or limit liability for death or personal injury resulting from the negligence of either party or their servants, agents or employees acting in the course of their duties.

## **12 Force Majeure**

- 12.1 A party will not be liable for any failure or delay in performing its obligations under this Agreement to the extent that this failure or delay is the result of any cause or circumstance beyond the reasonable control of that party including acts of god, war, civil commotion or industrial dispute and that failure could not have been prevented or overcome by that party acting reasonably and prudently. If either party is prevented from performing its obligations for a period exceeding one (1) month due to Force Majeure then the other party may terminate this Agreement on five (5) working day's written notice. The party otherwise in default shall take and continue to take all reasonable steps to circumvent and mitigate the effect of such event and to reduce any delay in the performance of such obligation. The party otherwise in default shall inform the other party of the existence of the relevant event as soon as reasonably practicable.

## **13 Confidentiality and Data**

- 13.1 During the term of this Agreement and for two (2) years thereafter, each party will treat as confidential all information that it obtains concerning, but not limited to, the business, finances, technology and affairs of the other, ("Confidential Information").
- 13.2 Each of the parties will use at least the same degree of care (and not less than a reasonable degree of care) it uses to prevent the disclosure of its own confidential information of like importance, to prevent the disclosure of Confidential Information of the other party.
- 13.3 Each party will promptly notify the other party of any actual or suspected misuse or unauthorised disclosure of the other party's Confidential Information.
- 13.4 The provisions of this clause 13 shall cease to apply to: (i) information that has come into the public domain other than by breach of this clause or breach of any other duty of confidence; (ii) information that is obtained without restriction from a third party without breach of this clause or breach of any other duty of confidence; and (iii) information that is required to be disclosed by a regulatory or government body or court of competent jurisdiction with power to compel the disclosure.
- 13.5 In the event of termination or expiration of this Agreement, each party shall return or on request of the other party, destroy physical records and media containing recordings of the Confidential Information of that party. In the event this is not possible for practical reasons, the obligations of confidentiality in this Clause 13 shall not be effected by the termination or expiration of this Agreement.
- 13.6 Each party will comply with its obligations pursuant to the Data Protection Act 1998. The parties agree that it is not the present intention of this agreement or the parties to permit access for the Agency to the personal data of customers or potential customers of the Client. The Agency agrees that should access be required, before any such access is permitted the Agency shall enter into a separate obligation regulating the access to that personal data, as reasonably specified by the Client and in compliance with the provisions of the Data Protection Act 1998.

## **14 Termination**

- 14.1 Either party may terminate this Agreement on 30 days' prior written notice.
- 14.2 Each party have the right to terminate this Agreement forthwith on written notice in the event that the other:

- (a) commits any material breach of the terms of this Agreement which, in the case of a breach capable of remedy, is not remedied within thirty (30) days of service of a notice specifying the breach and stating the intention to terminate the Agreement if not remedied;
- (b) holds any meeting with or proposes to enter into or has proposed to enter into any arrangement or composition with its creditors with a view to rescheduling its debts other than for the sole purpose of a scheme for a solvent amalgamation of that other party or the solvent reconstruction of that other party;
- (c) has a receiver, administrator, or other encumbrancer take possession of, or appointed over, or has any distress, execution or other process levied or enforced (and not discharged within 7 days) upon the whole or substantially all of its assets; or
- (d) ceases or threatens to cease to carry on business or becomes unable to pay its debts within the meaning of Section 123 of the Insolvency Act 1986.

14.3 Forthwith upon the termination or expiry of this Agreement, each party shall return to the other party all physical materials and other media containing the Confidential Information of the other party, and all copies in whole or part, or if requested by the other party, shall destroy them to the extent feasible and certifying in writing to the Licensor that they have been destroyed.

14.4 In the event of termination of this Agreement by the Client, at any time, other than where such termination is pursuant to clause 14.2, the Agency will invoice the Client in accordance with clause 6 all outstanding undisputed Fees that pertain to this Project, and the Client will become liable to pay them within thirty (30) days of receipt.

14.5 Termination or expiry of this Agreement shall be without prejudice to any rights, liabilities or remedies of a party accrued before termination, nor shall it affect any provision of this Agreement which is expressly intended to come into or continue in force after termination or expiry.

## **15. General**

15.1 Nothing in this Agreement shall be deemed to create a partnership or joint venture or contract of employment of any kind between the parties nor shall it be deemed to grant any authority not expressly set out in the Agreement or create any agency between the parties.

15.2 Each party confirms that this Agreement sets out the entire agreement and understanding between the parties and that it supersedes all previous agreements, arrangements and understandings between them relating to the subject matter of the Agreement. Each party confirms that it has not relied upon any statement, representation or understanding that is not an express term of this Agreement and shall not have any remedy in respect of any statement, representation or understanding which is not an express term. The provisions of the previous sentence shall not apply to a statement, representation or understanding made fraudulently.

15.3 Save in respect of a waiver recorded in writing, no failure or delay by any party in exercising any right, power or remedy under this Agreement will operate as a waiver of that or any other right, power or remedy, nor will any single or partial exercise by either party of any right, power or remedy preclude any further exercise of any other right, power or remedy.

15.4 To the extent that any provision of this Agreement is found by any court or competent authority to be invalid, unlawful or unenforceable in any jurisdiction, then that provision shall be deemed not to be a part of this Agreement, and it shall not affect the validity, lawfulness or enforceability of the remainder of this Agreement.

15.5 Any times, dates or periods specified in the Agreement may be extended or altered by agreement in writing between the parties. However, time shall not be of the essence, except where it is expressly stated to be or otherwise made of the essence.

15.6 A Third Party who is not a Party to this Agreement shall have no right pursuant to the Contracts (Rights of Third Parties) Act 1999 to enforce any provision of this Agreement.

- 15.7 Each party shall, at the cost and expense of the other party, use all reasonable endeavours to do all such further acts and things and execute or procure the execution of all such other documents as that other party may from time to time reasonably require, for the purpose of giving that party the full benefit of the assets, rights and benefits to be transferred to the other party under this Agreement.
- 15.8 Each party shall not be entitled to assign, transfer, charge or licence the whole or any part of its rights or obligations under this Agreement to any third party without consent of the other party. Notwithstanding the foregoing, either of the parties may assign the whole of its rights and obligations under this Agreement to any acquirer of the whole or a substantial part of its business. In such an event the relevant party shall notify the other party of the new acquirer.
- 15.9 This Agreement and any non-contractual disputes or claims arising in connection with it shall be construed in accordance with the laws of England and each party hereby irrevocably submits to the non-exclusive jurisdiction of the courts of England.
- 15.10 The rights and remedies of the parties under this Agreement are cumulative and in addition to any rights and remedies provided by law. Save as provided for in clause 3.3 above, any variation to this Agreement must be agreed in writing by the parties. This Agreement may be executed in counterpart.

*Last updated: November 2015*