

RF.

TERMS
OF
TRADE

PREAMBLE

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These general term and conditions (" **Terms** "):
apply to all graphic design, website design and build and related work undertaken by **ROARING FORK** (" **RF** ", "**we**" and "**us**") for or at the request of you as its' instructing client (including your agents, employees or contractors, "you"), and any goods supplied to you in connection with that work;

- are in addition and subject to any other specific terms agreed between us, including as comprised in our quotes or estimates, any exchange of emails or other correspondence between us in respect of a specific instruction or any connected or related series of instructions (such other terms in relation to each specific instruction or series instructions, together, a "Contract "); and
- are intended to create mutual rights and obligations and a clear, fair framework so as to enable our relationship to proceed smoothly.

1. INTERPRETATION

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1.1 In these Terms and any Contract, unless the context otherwise requires:

"**Additional Services**" means any additional services described in the Fees Schedule.

"**Client Materials**" means any materials provided by you for incorporation in the Deliverables, including, but not limited to, any images, photographs, illustrations, graphics, audio clips, video clips or text and any other materials that are created by Roaring Fork specifically and uniquely for you and contained in the final work product delivered to you under these Terms or any Contract, including software, software designs, code, data and technical components, and creative designs, images, artwork and text.

"**Change Request**" is any variation to these Terms or to any Contract.

"**Commencement Date**" means the date specified.

"**Deliverables**" means the products and/or services to be provided to you set out in the applicable contract

"**Design Concept**" means the design concept, including any information architecture, design and static web site image designed by Roaring Fork.

"**Design Product**" means web ready page/s, print and/or production ready files designed by Roaring Fork in accordance with these Terms or any Contract.

"**Design Specifications**" means the design specifications for the Design Product agreed between the parties. Also known as the design brief.

"**Fees Schedule**" means the schedule of fees agreed between us in respect of any Contract or series of Contracts, including any fees specified in or calculated by reference to any estimate or quotation from Roaring Fork.

"**GST**" means goods and services tax payable under the Goods and Services Tax Act 1985.

"**Roaring Fork Materials**" means any designs, design materials, software, routines, know-how, methodologies, user interface conventions or design patterns, interfaces to third party products and other development and design tools (and all enhancements and derivatives thereto) which Roaring Fork (i) developed prior to or otherwise than in the course of any Contract or (ii) develops during the course of any Contract but which are developed either at Roaring Fork's cost or which are not uniquely applicable to the particular specifications, characteristics or functions of the Deliverables.

"**Intellectual Property**" means, in respect of any person, all intellectual property and industrial property rights and interests (including common

law rights and interests) owned or held by that person, or lawfully used by that person, including, without limitation:

- (i) patents, trade marks, service marks, copyright, registered designs, trade names, symbols and logos;
- (ii) patent applications and applications to register trademarks, service marks and designs;
- (iii) all formulae, methods, plans, data, drawings, specifications, characteristics, equipment, designs, inventions, discoveries, improvements, know-how, experience, software products, trade secrets, price lists, castings, brochures and other information used by that person.

"**Payment Terms**" means the payment terms set out in the Fees Schedule.

"**Related Companies**" means the related companies of Roaring Fork within the meaning of section 2(3) of the Companies Act 1993.

"**Services**" shall mean all services provided by Roaring Fork to you and shall include, without limitation, the provision of all graphic design, magazine and web design, communication services and supplies, all charges for labour and work, hire charges, insurance charges, or any fee or charge associated with the supply of services by Roaring Fork to you.

"**Scripts**" means any content management software provided by Roaring Fork under this agreement (where applicable), and includes any enhancement, modification, correction or upgrade relating to the software.

"**Scripts User Manual**" means any documentation provided by us, which contains instructions on the use of Scripts.

1.2 In these Terms or any Contract, unless the context otherwise requires:

- (a) the singular includes the plural and vice versa; and
- (b) reference to a part, section or clause is a reference to that part, section or clause in these Terms, unless specifically stated otherwise.

1.3 To the extent that there is any inconsistency or conflict between any Contract and these Terms, the Contract will prevail.

1.4 Any reference to an agreement or communication in 'writing' or as being 'written' shall include a fax, email or other form of digital communication.

2. AGREEMENT/ACCEPTANCE

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2.1 Any instructions received by Roaring Fork from you for the supply of goods and/or services shall: (a) constitute acceptance by you of these Terms; and (b) be on the basis of the Contract for that supply and these Terms.

2.2 In the event of any conflict between these general Terms and the terms and conditions of any Contract, the Contract will prevail.

2.3 The acceptance by you of the terms and conditions of a Contract, 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 acknowledgement (whether or not signed), is physically received by us, or received by us via fax, email or in other digital format. The foregoing shall not limit the ability of Roaring Fork 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 us or we elect to waive that requirement in any particular case.

2.5 Any variation to these Terms or to any Contract (" **Change Request** ") may only be made by an agreement in writing which is communicated to you by us and acceptance of which is evidenced in the same manner as

specified in clause 2.3.

2.6 Where any Contract for the supply of goods or services by Roaring Fork includes goods or services to be provided by third parties:

- (a) RF gives no warranty and accepts no responsibility or liability whatsoever in respect of those goods or services as supplied by that third party;
- (b) you are solely responsible to that third party for payment for those goods and services; and
- (c) you here by authorize Roaring Fork to act as your agent to contract the provision of those goods and services as contemplated by the applicable Contract.

3. COLLECTION AND USE OF INFORMATION

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3.1 You authorise Roaring Fork to collect, retain, disclose and use any information about you for the purpose of assessing your credit worthiness, enforcing any rights under these Terms or any Contract, or marketing any goods and services provided by Roaring Fork 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. PRICE

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4.1 Where no price is stated or agreed to in writing, the goods or services shall be deemed to be sold or provided at the current price such goods or services are sold or provided by Roaring Fork at the time they are sold or provided.

4.2 The price of the supply of the goods or services provided by Roaring Fork may be increased by the amount of any reasonable increase in the cost of supply of the goods or services that is beyond the control of Roaring Fork between the date of the contract and delivery of the goods or providing of the service.

5. PAYMENT

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5.1 Unless otherwise arranged between the parties prior to the provision of goods or services commencing, payment shall be made within 14 days following the date of the invoice.

5.2 Interest may be charged on any amount owing after the due date at the rate of 2% per month or part month.

5.3 Any expenses, disbursements and legal costs incurred by Roaring Fork in the enforcement of any rights contained in these Terms (or any Contract) shall be paid by the customer, including any reasonable solicitor's fees or debt collection agency fees.

5.4 Receipt of a cheque, bill of exchange, or other negotiable instrument shall not constitute payment until such negotiable instrument is paid in full in cleared funds.

6. QUOTATIONS / ESTIMATES

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6.1 Where a quotation or estimate is given by Roaring Fork for goods or services:

6.1.1 The quotation is an estimate of the cost of the services provided by Roaring Fork exclusive of other costs involved; including but not limited to: any and all third party costs, costs associated with the purchase of stock images (to be chosen at the discretion of Roaring Fork), monthly fees incurred through the use of any and all services required for fulfillment of the Contract to the standard required by Roaring Fork.

6.1.2 The quotation or estimate shall be valid for 14 days from the date of issue; and

6.1.3 The quotation or estimate shall be exclusive of Goods and Services Tax unless specifically stated to the contrary.

6.2 Where goods or services are required in addition to the quotation or estimate the customer agrees to pay for the additional cost of goods or services.

7. DESIGN CONCEPT

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7.1 Upon agreement of design specifications of the Design Product, and upon receipt of any Client Materials and any fees payable as set out in the Agreement, we will commence work to develop the Design Concept.

7.2 You will have 10 business days, or such other time as we and you agree in writing, from the date of notification of completion of the Design Concept from us to review and request in writing from us revisions to the Design Concept. We will use commercially reasonable efforts to implement such revision request that are within the scope of, and consistent with, the Design Specifications.

7.3 If you wish to depart in any material respect from the design specifications, the parties will, in good faith, agree to additional fees to cover those revisions.

7.4 If you have not made any requests for revisions by the end of 10 business days from the date of written notice of completion of the Design Concept from us, or upon completion of implementation of such request which were mutually agreed upon by you and us under the revised Design Specifications under clause 7.3, then the Design Concept shall be deemed to be accepted by you.

8. DESIGN PRODUCT

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8.1 You will provide us with any Client Materials required by the Design Specifications in an electronic file format specified and accessible by us or as otherwise specified in the Design Specifications. Any services required to convert or input Client Materials not set forth in the Design Specifications shall be charged as Additional Services.

8.2 Upon acceptance of the Design Concept under clause 7, and provision of any required Client Materials, we will commence work to develop the Design Product. We will notify you of the URL (Uniform Resource Locator) or other address of any Design Product comprising a web site. We may use combinations of technology, as we, in consultation with you, deem appropriate to develop any Design Product comprising a web site.

8.3 You will have 10 business days, or such other time as we and you agree in writing, from the date of notification of completion of the Design Product from us to review and request in writing from us revisions to the Design Product. We will use commercially reasonable efforts to implement such revision request that are within the scope of, and consistent with, the Design Specifications.

8.4 If you wish to implement any revisions to the Design Product that depart in any material respect from the design specifications, the parties will, in good faith, agree to additional fees to cover those revisions.

8.5 If you have not made any requests for revisions by the end of 10 business days from the date of written notice of completion of the Design Product from us, or by such time as otherwise agreed by you and us in writing, or upon completion of implementation of such request which were mutually agreed upon by you and us under the revised Design Specifications under clause 8.4, then the Design Product shall be

deemed to be accepted by you ("Acceptance").

8.6 Upon Acceptance of the Design Product, we shall transfer any Design Product comprising a web site to the computer system owned and operated by you or your designated third party contractor.

9. INTELLECTUAL PROPERTY RIGHTS

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9.1 The Client Materials you provide to us in order for us to carry out our obligations under this agreement are owned by you. You grant us a licence to modify, reproduce, create derivative works from, and otherwise use such Intellectual Property to provide any services or products in connection with this agreement.

9.2 All materials including, but not limited to any computer software (in object code and source code form), script, programming code, data, information or HTML script developed or provided by us under this agreement, and any trade secrets, know-how, methodologies and processes related to our products or services, shall remain our sole and exclusive property, including, without limitation, all copyrights, trade marks, patents, trade secrets, and any other proprietary rights inherent in the Roaring Fork Materials. To the extent, if any, that ownership of the Roaring Fork Materials does not automatically vest in us by virtue of this agreement or otherwise, you hereby transfer and assign to us all rights, title and interest which you may have in and to the Roaring Fork Design Materials.

9.3 We will have no liability for any claim of infringement based on the use of a superseded or altered release of Scripts if the infringement would have been avoided by the use of a current or unaltered release of Scripts, which we provided to you; the unauthorised modification of Scripts; or the use of Scripts other than in accordance with the Scripts User Manual.

9.4 You acknowledge and agree that Roaring Fork is the sole and exclusive owner of all Intellectual Property in and relating to the Deliverables and that you have no rights in or relating to the Deliverables other than are expressly provided for in this agreement.

9.5 The provisions of this clause 4 shall survive the expiry or termination of this agreement.

10. LICENCES

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10.1 We grant to you, and you accept from us, an exclusive, nontransferable, perpetual licence to use the Client Materials that are created by Roaring Fork in the Deliverables for use as, or incorporation into, a web site on the Internet, printed matter or exclusive use on any other medium agreed in the Contract. We also grant you a non-exclusive, non-transferable, perpetual licence to use the Roaring Fork Materials in the Deliverables for use as, or incorporation into, a web site on the Internet, printed matter or exclusive use on any other medium agreed in the Contract. Any portrayal or use of the Deliverables that does not take place in accordance with this section shall be in breach of this clause 11.1.

10.2 In consideration of the licence to use the Client Materials and Roaring Fork Materials in the Deliverables you agree to pay Roaring Fork the fees specified in the Fees Schedule.

10.3 Where Scripts is included in the Deliverables, we also grant to you, and you accept, a non-exclusive non-transferable licence to use Scripts solely in connection with the Design Product for the term specified in Part A. This licence may be renewed for any subsequent periods where both parties expressly agree. In consideration of the licence to use Scripts you agree to pay Roaring Fork the fees specified in the Fee

Schedule.

10.4 You acknowledge that any licence granted by us under this clause 11 is granted subject to third party licensors (if any).

11. OUR OBLIGATIONS

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11.1 We make the following warranties to you in respect of the products and services provided under this agreement:

- (a) We have the right to grant the licences in respect of the Deliverables under this agreement to you without violating any rights of any third party;
- (b) The Deliverables will, in all substantial respects, conform with the Design Specifications, or as otherwise agreed in writing by the parties;
- (c) We will use reasonable means to ensure the Deliverables comprising a website do not contain any known virus or computer software code, routines or devices (other than as provided for in the Design Specifications) designed to disable, damage or impair the Deliverables, or other software or data; and
- (d) Any services provided under this agreement shall be performed in a workmanlike manner.

11.2 Our representations in clause 12.1 will not apply where you have used the Deliverables in a manner or for a purpose not reasonably contemplated or not authorised by us or in combination with other goods not specifically approved by us, or where you have made any adaptations, extensions or modifications to the Deliverables.

11.3 Your sole remedy in the event of a representation in clause 12.1 being breached, at our option, is replacement of the defective Deliverables or refund of the licence fee paid for the Deliverables.

12. YOUR OBLIGATIONS

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12.1 You acknowledge that we do not transfer any ownership rights in the Deliverables, and that we reserve all rights not expressly granted.

12.2 You are responsible for the use and management of Scripts, and agree not to copy, alter, modify or reproduce Scripts. You also agree not to sell, transfer, publish, disclose, display or otherwise make available Scripts to others.

12.3 You agree not to reverse engineer, decompile, disassemble, vary, modify, adapt, create derivative works, or otherwise attempt to derive the source code of any Design Product comprising a web site or Scripts.

12.4 You acknowledge that we are in the business of graphic design, including designing web sites and web site concepts, and that we shall have the right to provide to third parties services which are the same or similar to the services we provide to you and to use or otherwise exploit any Roaring Fork Materials in providing such services.

12.5 You are responsible for any faults, which occur, in your computer or communication equipment.

12.6 You agree that the Deliverables comprising a web site are not warranted to operate on computer systems and networks, which do not meet any minimum specifications, set out in the relevant Design Specifications.

12.7 You warrant that to the best of your knowledge you own, or are validly licensed to provide under this agreement, all copyright and all other intellectual property rights in and to your Client Materials and our use of your Client Materials will not infringe the intellectual property or other rights of any third party or breach any applicable law, statute or regulation.

12.8 You agree to indemnify us against all losses, costs, expenses, demands, or liabilities (including all legal costs and expenses) incurred

by us relating to any claim that the provision of your Client Materials, or the use of your Client Materials by us, infringes the intellectual property rights of any third party or any breach of your obligations under this agreement or any willful, unlawful or negligent act or omission by you.

12.9 You agree to give reasonable consideration to any Roaring Fork request to place our proprietary notices on the Deliverables, including Roaring Fork attribution and hypertext links to Roaring Fork's web sites.

12.10 You assume sole responsibility for acquiring any authorisations necessary for hypertext links to third party websites in relation to Deliverables comprising a web site and the accuracy of the Client Materials.

12.11 You shall provide Client Materials that do not contain obscene, threatening or malicious content and do not infringe any law, or third party right or which may otherwise expose us to civil or criminal liability. Provision of any Client Materials, which do not satisfy this clause, shall be deemed to be a material breach of this agreement.

12.12 Any provision of maintenance, which is not covered in the Design Specifications, shall be paid for by you as Additional Services at the rate set out in the Fees Schedule.

13. DISCLAIMER AND LIMITATION OF LIABILITY

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13.1 We disclaim all warranties and conditions, whether express, implied or statutory, other than those identified expressly in this agreement, including but not limited to warranties of title, non-infringement, merchantability and fitness for a particular purpose. We will not be liable for any services or products provided by third party vendors, developers or consultants referred to you by us unless such third party products or services are provided under written agreement between you and us, and then only to the extent expressly provided in those agreements.

13.2 Under no circumstances (including, but not limited to negligence) shall we, or any of our Related Companies or our or their officers, employees, partners, agents or suppliers, be liable for:

(a) your reliance on the Deliverables; or

(b) any direct, incidental, special, consequential, indirect or punitive damages (including loss of use, loss of data, loss of profits, loss of anticipated savings, or loss of goodwill) that result from the use of, or the inability to use, or relating to the Deliverables.

13.3 If you are using the Deliverables for the purposes of a business, then you agree that the provisions of the Consumer Guarantees Act 1993 shall not apply to you.

13.4 You agree that the total liability of us, our Related Companies, our or their officers, employees, agents, partners or suppliers (together) to you or anyone else using the products or services we provide to you (together) or damages, losses, and causes of action (whether in contract, tort, including negligence, under statute or otherwise) shall not exceed the total cost of providing the Deliverables or \$10,000 whichever is the lesser amount.

14. RESOLUTION OF DISPUTES

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14.1 The parties will use their best endeavours to amicably resolve any dispute between them, which may arise concerning the interpretation of these Terms or any Contract or in relation to any matter arising under these Terms or any Contract. 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 or by the President of the Arbitrators' Institute of New Zealand Inc. if the parties fail to agree on such appointment.

14.2 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).

15. BREACH AND TERMINATION

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15.1 Either party may terminate any Contract on 60 days' prior written notice to the other party at any time.

15.2 If you breach any term of these Terms or any Contract, we may, at our discretion, terminate that Contract.

15.3 If you commit an act of bankruptcy, or, where you are a company, if a receiver is appointed or you do anything which would render you liable to be liquidated we may terminate all or any Contracts upon written notice to you.

16. EFFECT OF TERMINATION

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16.1 If any Contract is terminated by you or us under clauses 15.1 to 15.3, that Contract will terminate and the following will apply:

(a) any licence granted under or pursuant to that Contract or these Terms will end and you will not be authorised to use the Deliverables after expiry or termination of that Contract;

(b) you agree to pay us for any unpaid fees arising from your use of the Deliverables up to the date of termination;

(c) you agree to return to us, on our demand, any information to which clause relates which includes, but is not limited to, any manuals, specifications, designs or other information relating to the business of Roaring Fork, or the services or products provided under these Terms or any Contract ;

(d) termination of any Contract shall be without prejudice to the rights of any party which have accrued prior to, or which arise in connection with, such termination; and

(e) the provisions of these Terms or any Contract intended to apply after termination shall continue to apply

17. GENERAL PROVISIONS

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17.1 Notices to you may be given by email or by regular mail. Notices will be deemed delivered in the case of regular mail two working days after (but exclusive of) the day of mailing and in the case of email notice on the date shown on our system's email confirmation of delivery (where it is our notice to you) or receipt (where it is your notice to us).

17.2 We will not be liable for any failure to perform these Terms or any Contract if it is due to a cause beyond our reasonable control.

17.3 The provisions of these Terms or any Contract shall not be varied, except by agreement in writing signed by the Parties.

17.4 The parties agree that New Zealand law governs these Terms and any Contract and that New Zealand courts have non-exclusive jurisdiction.