

Definitions

Design Consultants Fee: the amount(s) declared in the Agreement as being payable by the Client to the Design Consultant for the Agreed Services. **Agreed Services:** the services to be provided by the Design Consultant to the Client as disclosed in Part 1 of this Agreement. **Agreement:** the agreement between the Client and the Design Consultant consisting of Parts 1, 2 and 3 of this document and all attachments listed. **Brief:** the statements and materials assembled by the Client in a Project requirement document, brief or a request for proposal document or any other similar document to summarize the Client's expressed requirements, to address the Client's preferences and priorities, and to summarize the impact of context, environment, and prevailing legislation, at the time of signing the Agreement. **Client:** The Person named as the Client in this Agreement. **Project:** the project identified in this Agreement. **Working Day:** any calendar day other than a Saturday, Sunday or a public holiday within the jurisdiction where the Project is located. **Works:** any permanent or temporary structure, building, fixture or access constructed or required to be constructed on the Site based on the Design Consultant's documents as part of the Project.

A. Obligations

- A.1** The Design Consultant shall perform the Agreed Services set out in this Agreement exercising a reasonable level of skill, care and diligence ordinarily provided by Design Consultants working in the same or similar locality under the same or similar circumstances.
- A.2** The Design Consultant undertakes to advise the Client of any matter that may affect the performance of the Agreed Services including circumstances or instructions that may require a variation of the service and a change to the Design Consultant's Fee.
- A.3** The Client agrees to directly appoint all other consultants required by the Project that are not part of this Agreement, including the sub-consultants presented to the Client by the Design Consultant in Part 1 of this Agreement. The Client will ensure that all other consultants/sub-consultants/ contractors/subcontracts maintain professional liability insurance as appropriate for the services provided.
- A.4** The Client agrees to provide the Design Consultant with a Brief and shall advise the Design Consultant of the relative priorities of the Brief, construction cost and Project schedule by way of meetings and written directions or communications as necessary to ensure complete understanding of such Project priorities by the Design Consultant.
- A.5** The Client will ensure that there is no change made at any time to the Design Consultant's Agreed Services, the Brief, construction cost or the Project Schedule without the prior written consent of the Design Consultant.
- A.6** The Client shall hold each sub-consultant/contractor/sub-contractor however appointed, and not the Design Consultant, responsible for the proper performance of their work.

B. Fees

- B.1** The Client must pay the Design Consultant in accordance with Part 1 of this Agreement all fees due plus applicable taxes and expenses. Payment of the Design Consultant's account must be made within fifteen (15) Working Days of the date of the invoice. All fees that remain unpaid thereafter will incur interest charges at a rate of 5% per annum. Fees are invoiced on a monthly interim basis.
- B.2** Where this Agreement has been entered into by an Agent (or a person purporting to be an Agent) on behalf of the Client, the Agent and the Client shall be jointly and severally liable for the payment of all fees due to the Design Consultant under this Agreement.
- B.3** The Client cannot deduct, withhold or reduce any sum payable to the Design Consultant under this Agreement by reason of claims or alleged claims against the Design Consultant.
- B.4** The Client must promptly notify the Design Consultant in writing of any dispute regarding fees, and give the Design Consultant sufficient details to be able to respond. The dispute resolution procedure in section F shall apply to any such disputes on fees.

- B.5** Where, for any reason, the Design Consultant provides only part of the Agreed Services as set out in Part 1 of the Agreement, the Design Consultant shall be entitled to payment in full for all services completed together with a fair and equitable proportion of the outstanding fee, to reflect the portion of partial services completed.

C. Insurance

- C.1** The Design Consultant shall take out and use reasonable endeavors to maintain professional indemnity insurance in the sum of not less than £1,000,000, subject to the various terms, exclusions and limitations of the policy such as; an exclusion for toxic material, leaky buildings, weathertightness claims.
- C.2** The Design Consultant will use all reasonable endeavors to maintain insurance for a period of 6 years from completion of the Design Consultants work.
- C.3** The Client must provide to the Design Consultant evidence of the separate consultants', sub-consultants, contractors and sub-contractors professional indemnity insurance.

D. Liability

- D.1** If the Design Consultant is liable to the Client (whether in contract, tort or otherwise), the Design Consultant will only be liable for any reasonable foreseeable and fully mitigated damage, loss or expense incurred by the Client, caused directly by a breach of the Design Consultant's legal obligations. The Design Consultant shall not be liable to the Client under this Agreement for the Client's indirect, consequential or special loss of profit, howsoever arising whether in contract tort or otherwise.
- D.2** The extent of the Design Consultant's liability (whether in contract tort or otherwise) is reduced proportionately to the extent that the Client and/or any other person, including any third party, has contributed to the claim, liability, damage, loss or expense and irrespective of whether such contribution arises in contract, tort or otherwise.
- D.3** Neither the Design Consultant nor the Client shall be liable to the other for any loss or damage unless a claim (whether in contract, tort or otherwise) has been filed in Court, or any Tribunal which has jurisdiction to determine a claim, within six years of the date of the act or omission giving rise to the claim or within the limitation period set by the applicable limitation of action statute to which the claim relates, whichever is the earlier provided always that nothing in this clause shall be construed to exclude any compulsory limitation of action provisions which cannot by law be excluded or restricted in any contracts made between the parties.
- D.4** In the circumstances where the Agreed Services (as described in this Agreement) are reduced, limited or varied by later agreement or the Agreement is ended prior to the completion of the Agreed Services, the Design Consultant's liability will attach only to those services actually performed and then only to the extent that the reduction of that part of the Agreed Services has not compromised or not denied the Design Consultant the opportunity to correct the performed services or to otherwise mitigate the Client's loss.
- D.5** The Design Consultant is not liable for any damage, loss or expense incurred by the Client as a consequence of any change that the Client or any other person makes to the Design Consultant's documents, or from any variation to the Works from the Design Consultant's documents or any variation to the Project resource consent or the Project building consent, made without prior written approval by the Design Consultant.
- D.6** The Design Consultant shall not be liable to any person other than the Client, and disclaims responsibility, in tort or otherwise, for any liability, damage, loss or expenses suffered or incurred by such person. In the event that the Project to which the Design Consultant's services relate is leased, transferred, sold, or otherwise disposed of in part or whole to other persons, then the Client warrants that such persons shall be advised in writing that the Design Consultant accepts no responsibility in law to them. In the event of breach of this clause, the Client and in the case of a company its directors, shall fully indemnify the Design Consultant against any claim by such persons, whether such claim is in tort or otherwise.

- D.7** The maximum aggregate amount payable by the Design Consultant, whether in contract, tort or otherwise, in relation to claims, liabilities, damages, losses or expenses is limited to £750,000 or five times the Design Consultant's fee for the Agreed Services, whichever is the lesser.
- D.8** The Client shall indemnify the Design Consultant against the adverse effects of all claims including claims by third parties which arise out of or have a connection with the Agreement and are made after the expiry of the period of liability referred to in clause D.3. For avoidance of doubt the indemnity includes claims in negligence made against the Design Consultant.
- D.9** The Client acknowledges that the Design Consultant operates through employees, directors, officers, agents and sub-consultants and agrees that no reliance has or will be placed on them personally by the Client in connection with this Agreement on the performances of the Agreed Services.
- D.10** The limitations of liability as described above will apply to the maximum extent permitted by law and will confer to any extent relevant a benefit on the employees, directors, officers, agents or sub-consultants of the Design Consultant.

E. Copyright and License

- E.1** The Design Consultant retains copyright in all designs, drawings, models, plans, specifications, design details, photographs, and any other materials provided by the Design Consultant in connection with the Project ("**the Materials**").
- E.2** The Design Consultant grants, subject to payment of all outstanding fees, to the Client a non-exclusive limited license to use and reproduce the Materials for all purposes relating to the Project.
- E.3** The Design Consultant shall have no liability for any use of the Materials other than that for which the same were originally prepared and provided.
- E.4** If the Design Consultant rightfully terminates the Agreement for causes as specified in section H, the license granted under section E will be revoked.
- E.5** If the Client wishes to use any parts of the Materials for any further stage or extension of the Project, any major alterations to the completed works or for any other project, and the Design Consultant is not appointed to provide related services, the Client must obtain the Design Consultant's prior written consent which may include conditions relating to each re-use including but not limited to the payment of a reasonable license fee.
- E.6** At the completion of the Agreed Services or in the event of the early ending of this Agreement, the Client will be entitled to retain one copy of the Materials in printed or passive electronic form such as PDF. The Design Consultant will not be required to provide any of the Materials in CAD or any other active electronic form.

F. Dispute Resolution

- F.1** Any disputes between the Client and the Design Consultant in relation to this Agreement must first be attempted to be settled in good faith. Failing resolution, the Client or the Design Consultant may by notice require that the matter in dispute be referred to mediation.
- F.2** If mediation has not occurred or settlement is not achieved within 30 Working Days of the written notice requiring mediation the Client and the Design Consultant may agree to refer the dispute to Arbitration or failing agreement, either party may refer the matters to the Courts for resolution. In the event of a dispute the Design Consultant may by notice in writing to the Client suspend its obligations under this Agreement. In that event the Design Consultant will not be liable to the Client or any other person for losses arising from such suspension of work.

G. Notice of Defects and Timelines

- G.1** If, during the term of this Agreement or after completion of it, the Client becomes aware of any problem with the design, fault or defect in the Project, or non-compliance with the Project's contract documents, the Client must promptly, but not later than 30 Working Days after becoming aware of it, notify the Design Consultant about it in writing. If the Client does not do this the Client will be treated as having waived any claim the Client may have against the Design Consultant (in contract, tort or otherwise) in relation to the problem, fault or non-compliance.
- G.2** Unless otherwise expressly agreed by the Design Consultant in writing, all timelines, schedules, milestones or dates provided by the Design Consultant or specified in the Brief or any of the Design Consultant's documents which relate to the performance of the Agreed Services by the Design Consultant are estimates only and the Design Consultant shall not be in any way liable for any loss or damage arising from, or incurred in respect of, a delay in the performance of any part of the Agreed Services if performance is prevented by any reason, including because of the negligence or fault of the Design Consultant, its employees, directors, officers, agents and sub-consultants.

H. Termination and Suspension

- H.1** The Client or the Design Consultant may end this Agreement by writing to the other at their last known address. This Agreement will end 20 Working Days after the date the written notice is sent.
- H.2** Without limiting any other rights the Design Consultant may have in this Agreement or in law or equity, the Design Consultant may suspend the performance of any part of the Agreed Services by way of a notice in writing to the Client if the Client fails to make full payment of all amounts due and payable by the Client under this Agreement within the due date(s) for the duration until such payment is made.

I. General

- I.1** The law applicable to this Agreement shall be the law of the state or territory of the Design Consultant's address stated in the Agreement.
- I.2** The Design Consultant shall be entitled to rely upon the accuracy and completeness of the information furnished by the Client.
- I.3** Neither party shall assign or transfer this Agreement without the prior written consent of the other party.
- I.4** The Client has the right to cancel this Agreement for any reason by delivering or sending (including by email) a cancellation notice to the Design Consultant at any time within the period of seven days starting from the date when this Agreement was made.

The notice of cancellation is deemed to be served as soon as it is posted or sent to the Design Consultant or in the case of an electronic communication on the day it is sent to the Architect.

If the Design Consultant was instructed to perform any services before the Agreement was made or before the end of the seven-day period and the instruction or instructions were confirmed in writing, the Design Consultant shall be entitled to any fees and expenses properly due before the Design Consultant receives the notice of cancellation.

The notice of cancellation is to be addressed to the Design Consultant shall state: - *The Client (name) hereby gives notice that the Agreement with the Design Consultant (name) dated XX XX XX is cancelled.*

- I.5** If for any reason whatsoever any provision of this Agreement is or becomes invalid or unenforceable or is declared by any court of competent jurisdiction or any other instrumentality to be invalid illegal or unenforceable, the validity, legality or unenforceability of the remaining provisions shall not be affected in any manner and the Parties shall negotiate in good faith with a view to agreeing upon one or more provisions which may be substituted for such invalid unenforceable or illegal provisions, as nearly as is practicable.