

# Full Terms & Conditions

## DEFINITIONS

**Agreement** means the Project Proposal, Proposed Work Description, Terms and Conditions, Hosting Agreement and any other attached documents.

**Project** means the scope and purpose of the Client's identified usage of the work product as described in the Project Proposal.

**Services** means all services and the work product to be provided to Client by Designer as described and otherwise further defined in the Project Proposal.

**Final Deliverables** means the final versions of Deliverables provided by Designer and accepted by Client.

**Deliverables** means the services and work product specified in the Project Proposal to be delivered by Designer to Client.

**Client Content** means all materials, writing, images or other creative content provided by Client used in preparing or creating the Deliverables.

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

**Designer Tools** means all design tools developed and/or used by Designer in performing the Services, including 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.

## Authorization

The Client is engaging Leap Frog Group, Inc. as an independent contractor for the specific purpose of designing a World Wide Web site (herein after referred to as "Web Design Project") to be published on an Internet Service Provider (ISP) /

Web Presence Provider (WPP) computer account, herein after refer to as "Hosting Service", or provided on diskette or CD at the Client's option. The Client hereby authorizes Leap Frog Group, Inc. to access any computer account associated with this project and under the control of Leap Frog Group, Inc. or the Client, and authorizes the Hosting Service and others required in the course of the project to provide Leap Frog Group, Inc., with full access to the Client's account, and any other programs needed for this Web Design Project that are included as part of the Client's service agreement. If the Client does not have a Hosting Service and/or Domain Name, then the Client hereby authorizes Leap Frog Group, Inc. to purchase these services on behalf of the Client. The Client will hold harmless, protect, and defend Leap Frog Group, Inc. and its subcontractors from any claim, suit, penalty, tax, fine, penalty, or tariff arising from the content and operation of the Web Design Project.

## **DESIGNER SERVICES**

Designer shall perform the services listed the Scope of Work according to the Work Plan and Milestones schedule.

## **EVALUATION AND ACCEPTANCE**

**Testing:** Designer will test and correct Deliverables using commercially reasonable efforts before providing Deliverables to Client.

**Approval Periods:** Client shall, within *ten* business days after receiving each Deliverable, notify Designer in writing of any failure to comply with the specification of the Project Proposal or of any other objections, corrections or changes required. Designer shall, within *ten* business days of receiving Clients notification, correct and submit a revised Deliverable to Client. Client shall, within *ten* business days of receiving a revised Deliverable, either approve the corrected version or make further changes. If after *five* corrections by Designer, Client finds the Deliverables are not acceptable, Client may terminate this agreement subject to the termination clauses of this Agreement. If Client fails to

provide approval or comments during any approval period, those Deliverables will be considered approved and accepted. All objections, corrections and changes shall be subject to the terms and conditions of this Agreement.

## **CLIENT RESPONSIBILITIES**

Client acknowledges that it is responsible for performing the following in a reasonable and timely manner: (a) Provide Client Content in a form suitable for use in the Deliverables without further preparation by Designer, unless otherwise specified in the Project Proposal; (b) Proof read all Deliverables. Client will be charged for correcting errors after the acceptance of any Deliverable.

## **ACCREDITATION AND PROMOTION**

**Accreditation:** Designer shall be entitled to place accreditation, as a hyperlink, image or otherwise, in the form, size and location as incorporated by Designer in the Deliverables on each page of the Final Deliverables.

**Promotion:** Designer retains the right to reproduce, publish and display the Deliverables in Designer's portfolios and websites, 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.

**Promotional Approval:** Either party, subject to the other's reasonable approval, may describe its role in the Project on its website and in other promotional and marketing materials, and, if not expressly objected to, include a link to the other party's website.

## **CONFIDENTIAL INFORMATION**

Client's "Confidential Information" includes information that Designer should reasonably believe to be confidential. Designer's "Confidential Information" includes the source code of any Designer Tools. All material considered confidential by either party shall be designated as confidential. Confidential

Information shall not be disclosed to third parties and shall only used as needed to perform this Agreement. Confidential Information shall not include any information that is already known by the recipient, becomes publicly known through no fault of the recipient, or is received from a third party without a restriction on disclosure.

## **RELATIONSHIP OF THE PARTIES**

**Independent Contractor:** Designer is an independent contractor. Designer shall determine, in its sole discretion, the manner and means by which the Services are accomplished. No agency, partnership, joint venture, or employee-employer relationship is intended or created by this Agreement. Neither party is authorized to act as agent or bind the other party except as expressly stated in this Agreement. Designer and the work product or Deliverables prepared by Designer shall not be deemed a work for hire as defined under Copyright Law. All rights granted to Client are contractual in nature and are expressly defined by this Agreement.

**Design Agents:** Designer shall be allowed to use third parties as independent contractors in connection with the Services (“Design Agents”). Designer shall remain fully responsible for Design Agents’ compliance with this Agreement.

**No Exclusivity:** 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.

## **REPRESENTATIONS AND WARRANTIES**

**By Client:** Client represents and warrants to Designer that: (a) To the best of Client’s knowledge, use of the Client Content does not infringe the rights of any third party; (b) Client shall comply with the terms and conditions of any licensing agreements which govern the use of Third Party Materials. Client will obtain all

necessary and appropriate rights and licenses to grant license to Designer to use Third Party Materials.

**By Designer:** Designer represents and warranty to Client that: (a) Designer will provide the Services identified in the Agreement in a professional and workmanlike manner; (b) Designer shall secure all necessary rights, title, and interest in and to the Final Deliverables, including Designer Tools, sufficient for Designer to grant the intellectual property rights provided in this Agreement. To the best of Designer's knowledge, the Deliverables will not violate the rights of any third parties; (d) If Client or third parties modify the Deliverables or use the Deliverables outside of the scope or purpose of this Agreement, all representations and warranties of Designer shall be void.

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.

#### **INDEMNIFICATION AND LIABILITY**

**By Client:** Client shall indemnify Designer from any and all damages, liabilities, costs, losses, expenses or attorney fees arising out of any claim, demand, or action by a third party arising out of any breach of Client's responsibilities or obligations, representations or warranties under this Agreement. Designer shall promptly notify Client in writing of any third party claim or suit. Client shall have the right to fully control the defense and any settlement of such claim or suit.

**By Developer:** In the case of a third party lawsuit or proceeding based on a claim that Deliverables breach the third party's intellectual property rights, and it is determined that such infringement has occurred, Designer may at its own expense, replace any infringing content with non-infringing content.

**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.

## **COMPENSATION**

**Fees:** Client agrees to pay Designer the fees listed in the Project Proposal, including all applicable taxes.

## **PAYMENT**

**Payment Schedule:** Payment is due when Designer completes each ‘deliverable’ specified in the Project Proposal.

**Invoices:** All invoices are payable upon receipt. Invoices shall list any expenses and additional costs as separate items.

## **LATE PAYMENT**

**Late Fee:** A monthly service fee of 1.5 percent, or the maximum allowed by law, is payable on all overdue balances.

**Crediting Late Payments:** Payments will be credited to late payments first, then to unpaid balances.

**Collection Expenses:** Client shall pay all collection or legal fees caused by late payments.

**Withholding Delivery:** Designer may withhold delivery and transfer of ownership of any current work if accounts are not current or overdue invoices are not paid in full.

**Withholding License:** All grants of any license to use or transfer ownership of any intellectual property rights under this Agreement are conditioned on full payment, including all outstanding Additional Costs, Expenses, Fees, or any other charges.

## **TERM AND TERMINATION**

**Term:** This agreement shall begin when both parties sign and shall continue until all Services are complete and delivered, or until the Agreement is Terminated.

**Termination for Cause:** Either party may terminate this agreement at any time, on 30 days prior written notice if the other party breaches any of its material responsibilities or obligations under this Agreement and fails to cure that breach during that 30 day period.

**Termination for Insolvency:** Either party may terminate this agreement at any time, on written notice to the other party, if the other party ceases to conduct business in its normal course; makes an assignment for the benefit of creditors; is liquidated or otherwise dissolved; becomes insolvent; files a petition in bankruptcy; or a receiver, trustee, or custodian is appointed for it.

**Termination by Mutual Agreement:** This agreement maybe terminated by the mutual agreement of the parties.

**Termination for Convenience:** Either party may terminate this agreement at any time and for any reason on 30 days prior written notice to the other party. If Client terminates the Agreement under this section, Designer shall, at Clients reasonable discretion, complete any work assigned or scheduled during the notice period in accordance with the terms and conditions of this Agreement.

**Termination Fees:** In the event of termination, Client shall pay Designer for the Services performed through the date of termination in the amount of a prorated portion of the fees due. Client shall pay all Expenses, Fees, and Additional Costs incurred through the date of termination.

**Intellectual Property:** If Client terminates and on full payment of compensation, Designer grants Client right and title as provided by this Agreement with respect to those Deliverables provided and accepted by Client as of the date of termination.

**Confidential Information:** On 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) all rights and obligations regarding Confidential Information shall survive.

#### **RIGHTS TO FINAL ART**

**License:** Designer grants to Client a non-exclusive, perpetual and worldwide license to use and display the Final Deliverables in accordance with this Agreement. The rights granted to Client are for use of the Final Deliverables in its original form only. Client may not change, create derivative works or extract portions of the Final Deliverables.

**Liquidation for unlicensed use:** Additional use of any Deliverables by Client outside the scope of the license granted above requires additional fees. Compensation agreed in writing by both parties. In the event of non-payment, Designer shall be entitled to pursue all remedies under law and equity.

#### **RIGHTS TO DELIVERABLES OTHER THAN FINAL ART**

**Client Content:** Client Content is the exclusive property of the Client. Client grants Designer a nonexclusive, nontransferable license to use, reproduce, modify, display and publish the Client Content solely in connection with Designer's performance of the Services and limited promotional uses of the Deliverables as authorized in this Agreement.



**Preliminary Works:** Designer retains all rights in and to all Preliminary Works. Client shall return all Preliminary Works to Designer within thirty (30) days of completion of the Services.

**Designer Tools:** All Designer Tools are and shall remain the exclusive property of Designer. Designer grants Client a nonexclusive, nontransferable, perpetual, worldwide license to use the Designer Tools solely to the extent necessary with the Final Deliverables for the Project.

## **SUPPORT SERVICES**

**Warranty Period:** During the first *week* following expiration of this Agreement, Designer shall provide up to *three* hours of Support Services at no additional cost to Client to correct any errors or Deficiencies. Support Services means commercially reasonable technical support and assistance. Requests for additional support will be billed on a time and materials basis at Designers standard rate.

**No Enhancements:** The services in the Warranty Period and the Maintenance Period do not include enhancements to the Project or other services outside the scope of the Proposal.

## **ENHANCEMENTS**

During the Maintenance Period, Client may request that Designer develop enhancements to the Deliverables. Designer shall exercise commercially reasonable efforts to prioritize Designer's resources to create such enhancements. Client understands Designer may have preexisting obligations that may delay requested enhancements. Designer shall provide any enhancements shall be provided on a time and materials basis at Designers standard rate.

**Alterations:** Alteration of any Deliverable is prohibited without the express permission of Designer. Designer will be given the first opportunity to make the

required alterations. Unauthorized alterations shall constitute additional use and will be billed accordingly.

## **DISPUTE RESOLUTION**

**Negotiation:** Parties agree to attempt to resolve any dispute by negotiation between the parties.

**Arbitration/Mediation:** If parties are unable to resolve the dispute by negotiation, either party may start mediation and/or binding arbitration in a forum mutually agreed to by the parties.

**Litigation:** In all other circumstances, the parties specifically consent to the local, state and federal courts located in the state of Florida. The parties waive any jurisdictional or venue defenses available to them and further consent to service of process by mail.

## **GENERAL**

**Modification/Waiver:** Modifications to this Agreement must be in writing and signed by both parties. Failure by either party to enforce any right or seek to remedy any breach under this Agreement shall not be construed as a waiver of such rights nor shall a waiver by either party of default in one or more instances be construed as constituting a continuing waiver or as a waiver of any other breach.

**Notices:** All notices under this Agreement shall be given in writing either by: (a) Fax or Email, with return confirmation of receipt; (b) Certified or Registered mail, with return receipt requested. Notice will be effective when received, or in the case of email or fax, on confirmation of receipt.

**No Assignment:** Rights or obligations under this Agreement shall not be transferred, assigned or encumbered without the prior written consent of the other party.

**Governing Law:** This Agreement shall be governed by the law of the state of Florida.

**Severability:** If any provision of this Agreement is held invalid or unenforceable, the remainder of this Agreement shall remain in full force and effect. Where possible the invalid or unenforceable provision shall be interpreted in such manner as to be effective and valid under applicable law.

**Headings:** Headings and numbering used in this Agreement are for convenience and reference only and shall not affect the scope, meaning, intent or interpretation of this Agreement, and shall not have any legal effect.

**Complete Agreement:** This Agreement is the entire understanding of the parties and supersedes all prior understandings and documents relating to the subject matter of this Agreement.