

RED CACTUS DESIGN LIMITED

STANDARD TERMS AND CONDITIONS OF BUSINESS

These Terms and Conditions set out the terms and conditions upon which Red Cactus Design Limited (**Redcactus**) will perform design services for the **Client** named in any estimate or quotation form provided by Redcactus. These Terms and Conditions prevail over any additional or inconsistent terms and conditions provided by the Client.

- 1. DEFINITIONS**
 - 1.1 In these Terms and Conditions:
 - Agreement** means the legally binding agreement between Redcactus and the Client that is formed when the Client accepts a estimate or quotation form provided by Redcactus, of which these Terms and Conditions form a part;
 - Confidential Information** means all information of any kind relating to a party or its business affairs;
 - Deliverables** means the materials, designs or other outputs provided by Redcactus to the Client in the course of performing the Services;
 - Existing Material** means all documentation, designs and other materials that are owned by, or licensed by third parties to, either the Client or Redcactus before the date of commencement of the Services; and
 - Services** means the design services that Redcactus has agreed to perform as set out in the relevant estimate or quotation form, or that Redcactus has otherwise agreed in writing to perform.
- 2. QUOTATIONS AND ESTIMATES**
 - 2.1 No estimate or quotation for any Services will be binding on Redcactus if it is not given in writing, or if it is given based on incomplete, inaccurate or misleading information provided by the Client.
 - 2.2 The Client acknowledges that if Redcactus provides an estimate for Services, then unless expressly stated otherwise on the estimate form, that estimate represents a reasonable estimate by Redcactus of the cost to perform the Services and does not represent a fixed fee agreement.
 - 2.3 Any estimate or quotation given by Redcactus for Services will lapse and be invalid if it has not been accepted by the Client by the date for acceptance specified on the estimate or quotation form. If no date for acceptance is given, then the estimate or quotation will lapse and be invalid if it has not been accepted by the Client within 30 days following the date of issue of the estimate or quotation.
 - 2.4 Redcactus may, but is not required to, agree to extend the date for acceptance of any estimate or quotation. No extension will be binding on Redcactus unless it has been given in writing.
 - 2.5 Redcactus may withdraw a estimate or quotation at any time before acceptance by the Client.
 - 2.6 In the event of any conflict or inconsistency between any terms and conditions of any estimate or quotation and these Terms and Conditions, the relevant terms and conditions of the estimate or quotation will prevail.
 - 2.7 Redcactus reserves the right to alter any estimate or quotation as a result of circumstances beyond Redcactus' control.
 - 2.8 Where design services are required by the Client in addition to the Services the subject of the estimate or quotation, the Client agrees to pay for the additional cost of such additional services.
 - 2.9 Upon the Client accepting any estimate or quotation provided by Redcactus, a legally binding agreement will be formed between Redcactus and the Client for Redcactus to perform the Services on these Terms and Conditions.
- 3. SCOPE OF SERVICES**
 - 3.1 Redcactus agrees to perform the Services for the Client in the manner described in the relevant estimate or quotation form, or in the manner otherwise agreed by the parties in writing.
 - 3.2 Redcactus will use reasonable endeavours to perform the Services in accordance with any timeframes or dates for performance of the Services (if any) agreed in writing between Redcactus and the Client.
 - 3.3 To enable Redcactus to perform the Services, the Client will provide to Redcactus the Client resources (if any) that may be specified in the relevant estimate or quotation form or that the Client has otherwise agreed in writing to provide, together with all other information, assistance, co-operation and access to premises that Redcactus may reasonably require.
- 3.4 Redcactus will not be liable to the Client for any delay or failure in meeting any obligations with respect to the Services to the extent such delay or failure is attributable to delay or failure by the Client in complying with its obligations under clause 3.3. Redcactus may charge additional fees to the Client if its performance of the Services is delayed or made more difficult or costly as a result of any failure by the Client to comply with clause 3.3
 - 3.5 The Client and Redcactus agree that the Services will be performed primarily by Redcactus or its employees or contractors, and that Redcactus may sub-contract the performance of parts of the Services to other persons.
 - 3.6 Redcactus will deliver to the Client the completed Deliverables in the format or media specified in the relevant estimate or quotation form, or otherwise agreed by the parties in writing. Redcactus will be entitled to retain all drafts and early versions of the Deliverables, together with copies of the completed Deliverables. Risk in any physical materials comprising the Deliverables will pass to the Client upon delivery.
- 4. PAYMENT**
 - 4.1 The Client will pay Redcactus fees for the Services in the amounts specified in the relevant estimate or quotation form, or otherwise agreed by the parties in writing. Unless otherwise agreed by the parties in writing, Redcactus will invoice the Client following the end of each calendar month for Services performed during that calendar month.
 - 4.2 The Client will reimburse Redcactus those costs and expenses that are specified in the relevant estimate or quotation form, or that the Client has otherwise agreed in writing to reimburse. Redcactus will invoice the Client for them after they have been incurred.
 - 4.3 Unless otherwise specified in the relevant estimate or quotation form or agreed by the parties in writing, all invoices must be paid by the 20th day of the month following the date of the invoice.
 - 4.4 Despite clause 4.3, Redcactus may require some or all of the fees for the Services to be paid in advance if the Client has not been approved for credit by Redcactus, or if Redcactus determines that the Client may be a credit risk.
 - 4.5 Unless otherwise specified in the relevant estimate or quotation form or agreed by the parties in writing, all sums due under this clause 4:
 - (a) are exclusive of any goods or services taxes, value added taxes, sales taxes or any other business taxes (other than income taxes) which, where applicable, will be paid by the Client in addition;
 - (b) will be paid in the currency of the country in which the relevant estimate or quotation form is specified to the credit of a bank account nominated by Redcactus in writing;
 - (c) will be paid without setoff or deduction of any kind; and
 - (d) will be paid by the due date, failing which:
 - (i) Redcactus may elect to suspend the performance of any of the Services until such time as the failure to pay has been rectified;
 - (ii) Redcactus may charge the Client interest on any outstanding amount on a daily basis at an annual rate equivalent to the standard commercial overdraft interest rate charged by Redcactus' bankers plus 3%, from the due date until the date of actual payment; and
 - (iii) the Client will reimburse Redcactus for all costs and expenses that Redcactus incurs in connection with any actions or proceedings for recovery of amounts due, including all reasonable accounting costs, attorney costs (on a solicitor and own client basis), court costs and debt collection costs.

5. COPYRIGHT OWNERSHIP

- 5.1 Despite any other provision of this clause 5 to the contrary, each party or its third party licensors will retain ownership of all copyright and other intellectual property rights in Existing Material belonging to that party or its third party licensors.
- 5.2 Redcactus will have legal and beneficial ownership of the copyright and other intellectual property rights in or to the Deliverables immediately upon creation of the Deliverables.
- 5.3 Upon payment by the Client of the fees for the Services in full in accordance with clause 4, Redcactus will assign to the Client or its nominee notified to Redcactus all copyright and other intellectual property rights in or to the Deliverables.
- 5.4 Unless Redcactus agrees otherwise with the Client in writing, Redcactus will retain ownership of all copyright and other intellectual property rights in or to all materials, designs and other works created during the performance of the Services, that were rejected by the Client.
- 5.5 Unless otherwise agreed by Redcactus in writing, the Client have no right or licence to use, copy or reproduce the Deliverables until the Client has paid all fees for the Services in full in accordance with clause 4. If Redcactus grants the Client any such right or licence, Redcactus may terminate that right or licence with immediate effect if the Client fails to pay any amount of the fees by the due date.
- 5.6 The Client agrees that Redcactus may use, copy and reproduce the Deliverables for the purposes of:
- (a) advertising Redcactus' expertise to prospective customers; or
 - (b) participating in any design or art award, provided that Redcactus may not do so in relation to any Deliverables while those Deliverables remain confidential to the Client.

6. CONFIDENTIALITY

- 6.1 Each of the Client and Redcactus will maintain as secret and confidential all Confidential Information of the other party and will use such Confidential Information solely for the purpose of performing or taking the benefit of the Services.
- 6.2 Clause 6.1 will not apply to Confidential Information:
- (a) that was already in the receiving party's possession;
 - (b) that is subsequently disclosed to the receiving party by a third party who has not derived it from the disclosing party;
 - (c) that is or becomes generally available to the public through no act or default of the receiving party; or
 - (d) to the extent such Confidential Information is required to be disclosed by law.
- 6.3 The receiving party may not disclose the Confidential Information of the other party to any person other than to officers, employees, permitted sub-contractors or agents of the receiving party who have a need to know the Confidential Information for the purposes of performing or taking the benefit of the Services.

7. WARRANTY AND LIABILITY

- 7.1 Redcactus warrants that in performing the Services Redcactus will use reasonable skill and care.
- 7.2 The Client's sole remedy against Redcactus for any Services that do not comply with the warranty in clause 7.1 will be for Redcactus to re-perform such Services to the standard required under clause 7.1.
- 7.3 Redcactus warrants that the Client's use, copying and reproduction of the Deliverables will not infringe the copyright of any other person. No warranty is given to the extent any such infringement arises as a result of the Client's Existing Material being used or incorporated in the Deliverables, and the Client indemnifies Redcactus against any and all liabilities, losses, damages, costs and expenses awarded against, incurred or suffered by Redcactus arising from the use or incorporation of such Existing Material in the Deliverables.
- 7.4 The Client acknowledges and agrees that the Services are provided for the purposes of a business and that the guarantees provided under the Consumer Guarantees Act 1993 do not apply.
- 7.5 The Client acknowledges that, except as expressly provided in these Terms and Conditions, Redcactus gives no

warranties in relation to the Services, either express or implied, including but not limited to any implied warranties relating to quality, fitness for any particular purpose or ability to achieve a particular result.

- 7.6 The Client agrees that Redcactus' maximum liability to the Client in relation to the Services will not exceed in any circumstances the fees payable for those Services.

- 7.7 In no event will Redcactus be liable (whether in contract, tort including negligence, or otherwise) to the Client for:

- (a) loss of revenue or profit, loss of anticipated savings, loss of goodwill or opportunity, loss of production, loss or corruption of data or wasted management or staff time; or
- (b) loss, damage, cost or expense of any kind whatsoever that is indirect, consequential, or of a special nature, arising directly or indirectly out of these Terms and Conditions or the performance of the Services, even if Redcactus had been advised of the possibility of such loss, damage, cost or expense, and even if such loss, damage, cost or expense was reasonably foreseeable by Redcactus.

8. TERM AND TERMINATION

- 8.1 The Agreement will commence on the date of acceptance by the Client of the relevant estimate or quotation and, unless earlier terminated in accordance with this clause 8, will continue in full force and effect until Redcactus has completed the Services in the manner required under the Agreement.

- 8.2 The Client may only terminate the Agreement in the event that Redcactus is in material breach of the Agreement, and if such material breach has not been rectified within 30 days following receipt by Redcactus of notice from the Client notifying Redcactus of the material breach and requiring it to be remedied.

- 8.3 Redcactus may terminate the Agreement immediately upon giving written notice to the Client if the Client fails to pay any amount due to Redcactus by the due date, is in material breach of these Terms and Conditions, has a liquidator, administrator or receiver appointed, is unable to pay its debts as they fall due, ceases to carry on all or substantially all of its business or operations, is declared or become bankrupt or insolvent, or is subject to any similar action on account of debt.

- 8.4 If either party terminates the Agreement under clauses 8.2 or 8.3, each party will return to the other party all property and Confidential Information owned by the other party that the other party has provided during the course of the Services.

9. GENERAL

- 9.1 Redcactus will not be liable to the Client for any breach or failure to perform any of Redcactus' obligations under the Agreement where such breach or failure is caused by anything beyond Redcactus' reasonable control.

- 9.2 No amendment, variation or modification to the Agreement will be effective unless it is in writing and has been signed by duly authorised representatives of both the Client and Redcactus.

- 9.3 The Client may not assign or transfer any of its rights or obligations under the Agreement, without first obtaining Redcactus' written consent, not to be unreasonably withheld.

- 9.4 No failure or delay by either the Client or Redcactus to exercise any right or remedy under the Agreement will be treated as a waiver of such right or remedy. No single or partial exercise of any right or remedy will prevent the further exercise of such right or remedy.

- 9.5 The Agreement (incorporating these Terms and Conditions) contains the whole of the contract and understanding between the Client and Redcactus relating to the matters covered by it. It supersedes all prior representations, agreements, statements and understandings between the Client and Redcactus relating to those matters.

- 9.6 New Zealand law governs the formation, validity, construction and performance of the Agreement. The Agreement is subject to the non-exclusive jurisdiction of the New Zealand courts, and the parties submit to that jurisdiction.