

FIREBRAND HOLDINGS LIMITED

TERMS AND CONDITIONS



February 2021

1. INTERPRETATION

1.1 Special Terms: Capitalised terms not defined in the General Terms have the meaning set out in the Special Terms.

1.2 Definitions: In this Agreement unless the context otherwise requires:

Agreement means the Special Terms and the General Terms.

Client Content means any information or material provided by the Client to be incorporated into the Deliverables.

Completion means, in relation to a Defined Project, the time when Firebrand, in its absolute discretion, gives written notice to the Client that the Services have been completed.

Deliverables means the services and work product delivered by Firebrand to the Client in accordance with this Agreement.

Final Budget means a detailed analysis of the likely time and cost to provide the Services for the Project Scope to Completion, which is included in the Proposal.

Initial Budget means the high level budget for a Project Scope which is included in the Proposal.

Firebrand means Firebrand Holdings Limited known as Firebrand.

Price has the meaning set out in the Proposal.

Proposal means the document provided to the Client by Firebrand which is headed "Proposal" and includes a description of the Services required and, where the Services are a Project Scope, includes the Initial Budget.

Project means a one off implementation of brand marketing and/or technology project.

Project Scope means the detailed scope and plans for delivering and implementing the Project and includes the Final Budget.

Ratecard means the hourly rates charged for Services based on the function and experience of Firebrand personnel who provide the Services.

Services means all services and the work product for either a Project Scope or SLA to be provided to the Client by Firebrand (as amended from time to time in accordance with clause 3.6).

SLA means an arrangement whereby Firebrand provides ongoing and recurring Services for the Term, for example search engine optimisation, digital marketing, maintenance and retained design and development.

Term has the meaning set out in the Proposal.

Third Party Materials means any material which are incorporated into the Deliverables, including without limitation stock photography or illustrations, and which are not owned by Firebrand or the Client.

Trademarks means trade names, words, symbols, designs, logos or other devices or designs used in the Deliverables to designate the origin or source of the goods or services of the Client owned by, or licensed to, the Client.

2. SERVICES

- 2.1 Services: Subject to clause 3, the Client agrees to acquire the Services from Firebrand and Firebrand agrees to provide the Services to the Client for the Term and in accordance with the terms and conditions in this Agreement.
- 2.2 Standard of Services: Firebrand will provide the Services in a professional and workmanlike manner and in accordance with all reasonable professional standards for such services.
- 2.3 Timing: Firebrand will undertake commercially reasonable efforts to perform the Services within any timeframe(s) identified in the Proposal. Firebrand will have no liability to the Client or any other person for any delay in performing the Services within the required timeframe(s).

3. DEFINED PROJECT – FINAL BUDGET

- 3.1 Detailed Scope and Final Budget: At the first stage of any Project, Firebrand shall, and based on the Proposal, prepare and confirm the final budget.
- 3.2 Approval to Proceed: The Client shall approve the project by written notice to Firebrand within 30 days of the Budget being submitted by Firebrand or by initiating the project as defined by way of the Proposal.
- 3.3 Termination: If the Client does not approve the Final Budget in writing within the timeframe set out in clause 3.2 then either party may terminate this Agreement in accordance with clause 11.4(a).
- 3.4 Services not to exceed Final Budget: Notwithstanding anything in this Agreement Firebrand shall not provide any Services where the value of the Services exceeds the Budget, without written approval from the Client.
- 3.5 Notice: If at any time during the Term it becomes apparent to Firebrand that the Services will not be completed within the Final Budget then Firebrand shall give written notice to the Client of the likely costs to Completion.
- 3.6 Variation: After receipt of the notice under clause 3.5, the Client shall either:
- (a) request Firebrand to amend the Final Budget; or
 - (b) reduce the Services required, such that the Services can be delivered within the Final Budget.

4. DEFINED PROJECT – INVOICING AND PAYMENT TERMS

- 4.1 Deposit Invoices: Where the Budget exceeds \$5,000 (excluding GST), Firebrand shall issue the Client with an invoice (Deposit Invoice) equal to 20% of the Budget prior to commencing the Services. Firebrand shall not be required to commence the Services until it has received payment of the Deposit Invoice in full.
- 4.2 Monthly Progress Invoices: Firebrand shall issue invoices (Monthly Progress Invoices) to the Client at the end of each month for an amount which, in Firebrand's absolute and unrestricted opinion, reflects a percentage of the Project's progress to date and progress anticipated for the upcoming coming month multiplied by the total Budget.
- 4.3 Completion Invoice: Where Firebrand, in its absolute and uncontrolled discretion, expects that the Services will be completed in the next month, Firebrand may issue an invoice (Final Invoice) to the Client which is calculated as follows:

- (a) All Services provided in respect of the Project Scope as at the date of the Completion Invoice for the time and at the cost set out in the final budget plus
- (b) Firebrand's reasonable estimate of time and costs for providing the Services to Completion; less
- (c) Amounts invoiced pursuant to clauses 4.1 and 4.2.

4.4 Payment: Subject to clause 4.6, the Client shall pay:

- (a) The Deposit Invoice upon receipt, the Monthly Progress Invoices before the 20th of the month following the date of the invoice;
- (b) The Completion Invoice on the date and time specified on that invoice.

4.5 Interest: The Client acknowledges that payment of all amounts due under this Agreement on time is essential to Firebrand. The Client will pay Firebrand interest, if demanded, on any amount due but not paid, from the due date until the date of payment at the rate of 10% per annum calculated daily and compounded monthly. Interest shall continue to accrue both before and after judgment. This clause is without prejudice to any other rights or remedies available to Firebrand under this Agreement or at law.

5. HOURLY RATES, ADDITIONAL CHARGES, EXTERNAL COSTS AND DISBURSEMENTS

5.1 Urgent work: Firebrand may charge at their discretion an increased hourly rate (Urgent work rate) to all accounts where it has had to prioritise the Client's work over other clients in order to meet a deadline not within a normal timeframe (5 business days) or otherwise contemplated by the Budget. The Client will be notified that this urgency premium applies prior to the work commencing.

5.2 Change of production schedule: The Client acknowledges that when a project production schedule is booked the Client is committed to pay for the use of those resources on those dates. If the Client does not comply with the agreed schedule in terms of feedback, comment, iterations, the supply of required content or any other Client input required by Firebrand or requests a change to the production schedule, without prejudice to any rights of Firebrand the Client shall pay for Firebrand's scheduled resource which cannot be re-allocated.

5.3 External Costs and Disbursements: Firebrand may issue invoices and require the Client to pay those invoices in advance for external costs and disbursements including but not limited to: photography services, videography services, hosting plans, SEO services, campaign services, media space, fonts, stock images and plugins. Any and all outside costs will be billed to Client unless specifically otherwise provided for in the Proposal. Firebrand will charge a standard 20% booking and management fee on all external cost and disbursements unless agreed otherwise in writing.

6. SLA (Service Level Agreement)

6.1 Price: In relation to all SLAs, the Client and Firebrand acknowledge and agree:

- (a) that the Price has been determined based on time budgeted for particular Firebrand staff or services during each month of the Term;
- (b) Firebrand shall invoice the Client monthly in advance on 20th of the following month terms;
- (c) hours allocated are not rolled over from month to month;
- (d) the Client shall not be entitled to any refund or credit of any Price;

- (e) all time in attendance spent outside of the agreed services will be charged additional at the end of each month; and
 - (f) if the actual cost of time (at the rates set out in the Rate card) spent by Firebrand in delivering the Services for two consecutive months is 20% or more than the amount paid by the Client for that period, Firebrand may adjust the Price and subsequent payments due by the Client to reflect the increased level of Services.
- 6.2 Automatic Renewal: Any SLA is deemed to automatically renew at the end of the Term for a further period equal to the first Term on the same terms and conditions.
- 6.3 Ratecard: At any time after the first renewal of the SLA Firebrand may give the Client 30 days' notice of changes to the Price for the SLA.
- 6.4 Termination: At any time after the first renewal of the SLA either party may give the other party 90 days' notice to terminate the SLA.

7. CLIENT OBLIGATIONS

- 7.1 The Client shall be responsible for performing the following in a reasonable and timely manner:
- (a) allocating at least one person in the Client organisation who is authorised to issue instructions, provide responses and request variations;
 - (b) responding to all Firebrand requests in a timely manner or by any date/time required by Firebrand;
 - (c) providing accurate and complete information and materials requested by Firebrand such as, without limitation, any layout and content requirements;
 - (d) providing Firebrand remote access to the Client's website and social media profiles for the purposes of providing the Services in accordance with the terms of the Agreement; and
 - (e) final proofreading and written approval of all Deliverables including, by way of example, without limitation, artwork and content. In the event that Client has approved work containing errors or omissions, such as, without limitation, typographic errors or misspellings, Client shall incur the cost of correcting such errors.

8. WARRANTIES

- 8.1 Client Warranties: The Client warrants to Firebrand that:
- (a) the Client owns all right, title, and interest in, or otherwise has full right and authority to permit the use of the Client Content for incorporation into the Deliverables;
 - (b) any material provided by the Client to Firebrand does not infringe the rights (including intellectual property rights) of any third party; and
 - (c) the Client shall comply with any licensing agreements governing the use of Third Party Materials to the extent applicable to it.
- 8.2 Reliance on Warranties: The Client acknowledges that Firebrand's ability to provide the Services is dependent upon the Client's warranties set out in clause 8.1 being true and correct at all times.
- 8.3 Firebrand Warranties: Firebrand represents and warrants to the Client that, to the best of its knowledge and belief:

- (a) except for Third Party Materials and Client Content, the Deliverables shall be the original work of Firebrand and/or its independent contractors; and
 - (b) without having made any enquiries, the Final Art does not infringe the rights (including intellectual property rights) of any other person.
- 8.4 Limit on Firebrand Warranties: Except for the express representations and warranties stated in this agreement, Firebrand makes no warranties whatsoever in respect of the Services or the Deliverables and excludes any and all warranties implied by law.

9. INTELLECTUAL PROPERTY RIGHTS

- 9.1 Client Content: Client Content, including all pre-existing Trademarks, shall remain the sole property of Client or its respective suppliers, and Client or its suppliers shall be the sole owner of all rights in connection therewith. The Client hereby grants to Firebrand a nonexclusive, non-transferable royalty free license to use, reproduce, modify, display and publish the Client Content (including the Trademarks) solely in connection with Firebrand's performance of the Services and limited promotional uses of the Deliverables provided for in clause 15.8.
- 9.2 Final Art: At the time when all payments under the Agreement have been made in full the copyright in any final artwork created or commissioned by Firebrand specifically for the purpose of delivering the Services are deemed to be assigned by Firebrand to the Client. Until such time ownership and rights to the final art are assigned to the Client those rights will remain owned by Firebrand. For the avoidance of doubt any other artwork shall be licenced to the Client under clause 9.4.
- 9.3 Firebrand Intellectual Property: Except for the Client Content (clause 9.1) and final art (clause 9.2), all intellectual property which is created, developed, licenced to or used by Firebrand in the Deliverables or performance of the Services (including, without limitation, concepts, designs, ideas, improvements, inventions, know how, procedures and systems) shall be the sole and exclusive property of Firebrand and the Client shall have no rights to that intellectual property except as provided in clause 9.4 (licence to use).
- 9.4 Licence to Use Firebrand's Intellectual Property: At the time when all payments under the Agreement have been made in full Firebrand grants to the Client an irrevocable and royalty free non-exclusive license to use, reproduce, modify, display and publish any other intellectual property which is created, developed, licenced to or used by Firebrand in the Deliverables or performance of the Services.
- 9.5 Goodwill: All goodwill resulting from Firebrand's use of the intellectual property rights licensed to the Client under this Agreement shall be owned exclusively by Firebrand.
- 9.6 Firebrand Working Files: Unless otherwise agreed in writing Firebrand retains all proprietary rights in and to any and all concept and preliminary works, project documents prepared by Firebrand and working files, including research documents, design files and any similar documents (Working Documents). Firebrand will consider any Client request to purchase any Working Documents and if Firebrand agrees to sell any Working Documents, Firebrand will specify the cost (as time and materials are required to prepare these files for distribution).
- 9.7 Third Party Materials: Third Party Materials are the exclusive property of their respective owners. Firebrand shall:
- (a) identify to the Client any Third Party Materials that may be required to perform the Services or otherwise integrated into the Deliverables;
 - (b) identify to the Client whether any licence is required for the Third Party Materials; and
 - (c) at the Client's expense, and unless otherwise provided for by the Client, Firebrand shall obtain the license(s) necessary to permit Client's use of the Third Party Materials consistent with the usage rights granted herein.

10. EXCLUSIONS AND LIMITATIONS OF LIABILITY AND CLIENT INDEMNITY

- 10.1 General Exclusion of Liability: Firebrand is not liable to the Client or any other person or entity (whether in contract, tort (including negligence) or otherwise) for the loss of any business opportunity, loss of profits, loss of revenue, loss of data, loss of website traffic or any consequential, indirect, or pure economic loss, damage, liability or costs incurred by the Client as a result of any defect in the Services or the Deliverables or any failure by Firebrand to perform its obligations under this Agreement, even if such loss was, or should have been, within its contemplation.
- 10.2 Specific Exclusion of Liability: Firebrand is not liable to the Client or any other person or entity and excludes all liability to those persons for any damage or loss, direct or indirect, incidental, special or consequential, whether or not that damage was foreseeable, which is related to or caused by:
- (a) reason of delay in delivery of any Services including the failure to achieve any dates specified in this Agreement, whatever the cause of the delay;
 - (b) circumstances beyond the control of Firebrand including, without limitation, war, civil disturbance, acts of terrorism, natural disasters, strikes, or the failure of a third party supplier approved by the Client to provide services to the level, quality or continuity required by Firebrand;
 - (c) any computer virus accidentally introduced to the Client's computer system;
 - (d) any third party act or attempt to:
 - (i) gain unauthorised access to any portion or feature of any website or interface developed by Firebrand;
 - (ii) obtain any materials, information or documents through any electronic means developed by Firebrand which was not purposely made available by the Client to that party, including without limitation, hacking, password mining or otherwise accessing any electronic information system without authorisation;
 - (iii) test the vulnerability of the information systems developed by Firebrand or any network connected to those information systems;
 - (iv) upload or use any software viruses or any other computer code, files or programs designed to interrupt, destroy or limit the functionality of any Client electronic system;
 - (v) use any Client system in any unlawful manner or in any other manner that could damage, disable, overburden or impair the system;
 - (vi) use automated scripts to collect information from or otherwise interact with the Client's systems.
- 10.3 Business Purposes: The Client agrees that to the extent that Services are for business purposes all provisions of the Consumer Guarantees Act 1993 are excluded to the maximum extent allowed under section 43(2) of that Act and that it is fair and reasonable for the parties to be bound by this clause.
- 10.4 Fair Trading Act: For the purposes of section 5D of the Fair Trading Act 1986, the parties acknowledge and agree that, to the maximum extent permitted by law:
- (a) the Services are being provided and acquired in trade;
 - (b) in respect of all matters covered by this Agreement, the parties are contracting out of sections 9, 12A and 13 of the Act; and
 - (c) it is fair and reasonable for the parties to be bound by this clause.

- 10.5 **Limitation of Liability:** Without restricting any other provision of this Agreement which limits or excludes liability to the Client, any claim which the Client may have against Firebrand, whether in contract, tort (including negligence) or otherwise as a result of the Services shall be limited, at the option of Firebrand, to either:
- (a) Firebrand remedying any defect by providing additional Services at its cost; or
 - (b) the amount paid by the Client to Firebrand in respect of the defective Services.
- 10.6 **Client Indemnity:** Without limiting any rights or remedies of Firebrand, the Client indemnifies Firebrand, as a continuing indemnity, against all costs, losses, liabilities, claims, demands, damages, fines, and penalties of or incurred by Firebrand arising directly or indirectly out of, or in connection with, any breach of this Agreement (including the warranties in clause 8.1) by the Client and any third party actions, claims or demands arising in connection with the provision of the Services. The indemnity in this clause includes any circumstance where the Client fails to properly secure or otherwise arrange for any necessary licenses in respect of any Third Party Materials and fails to obtain the necessary rights, releases or permissions.

11. SUSPENSION AND TERMINATION

- 11.1 **Suspension:** If the Client does not comply with any of its obligations under this Agreement, including paying any amount when that is due, Firebrand may by written notice immediately suspend performance of its obligations under this Agreement until such time as Firebrand is of the opinion that the Client has satisfactorily performed all of its obligations.
- 11.2 **Firebrand Right to Terminate:** Firebrand may immediately terminate this Agreement by written notice to the Client if any invoice issued is not paid when due, and for the avoidance of doubt any additional time Firebrand allows a Client to pay shall not prejudice its right to terminate under this clause at any time;
- 11.3 **Client Right to Terminate:** The Client may immediately terminate any Defined Project at any time by written notice to Firebrand. Notwithstanding the termination of the Defined Project, the Client will remain liable to Firebrand for all Services provided by it up to the date of termination.
- 11.4 **Either Party Termination:** This Agreement may be terminated immediately upon written notice by any party if:
- (a) a Final Budget for a Defined Project is not agreed under clause 3;
 - (b) the other party becomes insolvent, files a petition in bankruptcy, makes an assignment for the benefit of its creditors or goes into receivership or liquidation; or
 - (c) the other party breaches any of its material responsibilities or obligations under this Agreement, which breach is not remedied within ten (10) days from receipt of written notice of such breach if the material breach is capable of remedy.
- 11.5 **Consequences of Termination:** On the termination or expiry of this Agreement:
- (a) the Client shall return all Working Documents in its possession or control to Firebrand;
 - (b) the Client shall pay Firebrand:
 - (i) for all Services to the date of termination at the rates specified in the Ratecard
 - (ii) Firebrand's estimate of staff time at the costs specified in the Ratecard for work Firebrand forecasts would be carried out in the four weeks following any termination notice as liquidated damages and which the parties agree is a reasonable pre estimate of the loss suffered by Firebrand for the loss of billable production space; plus

- (iii) all third party costs and commitments that are not able to be cancelled.
- (c) any deposits and other amounts paid by the Client (including the amount described in clause 11.5(b)) are non-refundable and to the extent that any amount received by Firebrand does not relate to Services provided the parties agree that amount is a reasonable pre estimate of the loss suffered by Firebrand and is compensation to cover lost production space;
- (d) nothing shall affect any rights accrued or obligations owing as at the date of termination or expiry;
- (e) this clause and clauses 4.5, 8, 9, 10, 11, 12 and 15.7 to 15.9 and all other provisions of this Agreement that are expressed to, or intended by the parties to, continue in full force and effect will do so.

12. RESTRAINT OF TRADE

- 12.1 Covenants: In consideration for Firebrand agreeing to provide the Services the Client covenants with Firebrand that for a period of 24 months from the end of this Agreement that the Client will not on its own account or as an agent of any person:
- (a) acquire goods or services from any person who supplied goods or services to Firebrand for the purpose of delivering the Services;
 - (b) solicit or entice any of the employees or contractors of Firebrand to terminate their employment or contract with Firebrand.
- 12.2 Waiver: The provisions of this clause may from time to time be waived in writing in whole or in part by Firebrand either with or without conditions. To the extent of any such waiver and on compliance with such conditions (if any) the Client concerned will be relieved of their obligations under this clause.
- 12.3 Severability: While the covenants contained in clause 12.1 are considered by the parties to be reasonable in all circumstances if one or more should be held to be invalid as an unreasonable restraint of trade or for any other reason whatsoever but would have been held valid if part of the wording thereof had been deleted or the period thereof reduced or the range of activities or area dealt with thereby reduced in scope such covenants shall apply with such modifications as may be necessary to make them valid and effective.
- 12.4 Injunction: Irreparable damage may result to Firebrand in the event of a breach of clause 12.1 and in such event Firebrand shall be entitled, in addition to any other remedy available to an injunction to restrain any breach or reasonably anticipated breach by the Client.

13. DISPUTES

- 13.1 Negotiations: If a dispute arises between the parties in relation to this Agreement, then the parties shall endeavour to resolve the dispute by agreement between them through good faith negotiations and discussions.
- 13.2 Mediation: If the dispute is not resolved within ten Business Days of the date on which the parties in dispute commenced negotiations, then either party may, by written notice to the other party, refer the dispute to mediation in accordance with the following provisions:
- (a) The mediator will not be acting as an expert or arbitrator.
 - (b) The mediation shall be conducted by a mediator agreed by the parties or, if they fail to agree on a mediator within five Business Days of the reference of the dispute to mediation, the mediator will be appointed by the President for the time being of the New Zealand Law Society or his or her nominee.

- (c) The mediation shall be conducted in terms of the LEADR New Zealand Inc. Standard Mediation Agreement.
 - (d) The costs of the mediator shall be borne equally by the parties.
- 13.3 Other remedies: A party to a dispute will only be entitled to pursue other remedies available to it at law or otherwise, if the parties have failed to resolve the dispute within four weeks after commencement of the mediation.
- 13.4 Interlocutory relief: Nothing in this clause will prevent either party, at any time, from seeking any urgent interlocutory relief from a court of competent jurisdiction in relation to any matter that arises under this Agreement.

14. PERSONAL INFORMATION

- 14.1 Authorities: The Client authorises Firebrand (or Firebrand's agents) to:
- (a) access, collect, retain and use any information about the Client (including any overdue fines balance information held by the Ministry of Justice) for the purposes of assessing the Client's creditworthiness or marketing products and services to the Client; and
 - (b) disclose information about the Client, whether collected by Firebrand from the Client directly or obtained by Firebrand from any other source, to any other credit provider or any credit reporting agency for the purposes of providing or obtaining a credit reference, debt collection or notifying a default by the Client.
- 14.2 Individual: Where the Client is an individual, the authorities under clause 14.1 are authorities or consents for the purposes of the Privacy Act 1993.
- 14.3 Disclosure and Correction Rights: The Client shall have the right to request Firebrand for a copy of the information about the Client retained by Firebrand and the right to request Firebrand to correct any incorrect information about the Client held by Firebrand.

15. GENERAL

- 15.1 Entire Agreement: This Agreement, the Proposal and the Scope represents the whole or entire agreement between Firebrand and the Client relating to the provision of the Services.
- 15.2 Conflict of Terms: If there is any conflict between the Terms and the General Terms, any Special Terms have effect. If there is any conflict between the Proposal (outside of the Special Terms) and the General Terms, the General Terms have effect.
- 15.3 Assignment: Firebrand may, in its absolute discretion, assign or transfer all or any part of its rights and/or obligations under this Agreement without obtaining the Client's prior approval. The Client must not assign or transfer all or any of its rights and/or obligations under this Agreement without obtaining Firebrand's prior approval.
- 15.4 Subcontractors: Firebrand may, in its absolute discretion, subcontract any of the Services without obtaining the Client's prior approval.
- 15.5 No Set off: Payments required to be made by the Client under this Agreement shall be made in cleared funds and without any deduction or set off.
- 15.6 Amendments: No amendment of this Agreement will be effective unless it is in writing and signed by both parties.
- 15.7 No Partnership: Nothing in this Agreement or in the relationship between the parties to this Agreement shall be construed as creating a partnership or as giving to any party to this Agreement any of the rights or subjecting any party to any of the liabilities of a partner.

- 15.8 Promotion Rights: Firebrand retains the right to photograph, reproduce, publish and display the Deliverables, the Project and the Client's name and logo in Firebrand's portfolios and websites, and other media or exhibits for the promotion of Firebrand's business.
- 15.9 Confidential Information: Each party acknowledges that in connection with this Agreement it may receive certain confidential or proprietary technical and business information and materials of the other party (Confidential Information). Each party, shall hold and maintain in strict confidence all Confidential Information, shall not disclose Confidential Information to any third party, and shall not use any Confidential Information except as may be necessary to perform its obligations under this Agreement. Upon termination of this Agreement each party shall return or if requested destroy, the other party's Confidential Information.
- 15.10 Costs: Firebrand may recover from the Client any all costs incurred by it enforcing the provisions of this Agreement, including debt collection costs and any legal costs as between solicitor and client on an indemnity basis.
- 15.11 Conflict: The Client agrees that this Agreement takes precedence over any terms imposed by Client, whether before or after entry into this Agreement.
- 15.12 Exclusivity: Firebrand reserves the right, to work for or accept retainers from any other parties which compete directly or indirectly with the Client's business, unless specified otherwise in the Special Terms or Proposal.