

# 1 Terms and Conditions

1.1 **Definitions:** In this Agreement, unless the context otherwise requires:

## **Agreement**

means this agreement, together with the schedules and documents incorporated into the schedules by reference.

## **Client Material**

means any material owned by or licensed to Client to be used in relation to the Services and the production of the Material under this Agreement, including, without limitation, the items set out in schedule 3.

## **Commencement Date**

01 May 2010

## **Confidential Information**

means the provisions of this Agreement and all information disclosed to the recipient by or on behalf of the discloser which the discloser labels as confidential at the time of disclosure or which otherwise is by virtue of its nature, but not including information:

- a. that is now or becomes, through no act or omission of the recipient, publicly available;
- b. that is, at the date of its disclosure to the recipient, already lawfully in the possession of the recipient from sources other than the discloser free of any obligation to confidentiality;
- c. that, after the date of its disclosure to the recipient, lawfully becomes available to the recipient on a non-confidential basis from a third party having no obligation of confidentiality to the discloser with respect thereto; or
- d. is independently developed by an employee or officer engaged by the recipient having no knowledge of the Confidential Information.

## **Fees**

means the fees for the Services and Material as set out in paragraph 1 of schedule 2.

## **Force Majeure**

means a circumstance beyond the reasonable control of the affected party that results in that party being unable to observe or perform on time

an obligation under this Agreement. Such circumstances shall include but not be limited to acts of God, lightning strikes, earthquakes, floods, storms, explosions, fires and any natural disaster; acts of war, terrorism, riots, civil commotion, malicious damage, sabotage and revolution; and strikes, save for strikes by the affected party's employees.

**Intellectual Property**

means copyright, patents, designs, trade marks, trade names, goodwill rights, trade secrets, confidential information and any other intellectual proprietary right or form of intellectual property.

**Losses**

means all losses, claims, liabilities, costs, expenses and damages (including legal fees calculated on an attorney and client basis) of any nature whatsoever and whether or not reasonably foreseeable or avoidable.

**Material**

means the material developed from the Services provided by Essence specifically for the Client in accordance with the Specification and described in paragraph 3 of schedule 1.

**Services**

means the services set out in paragraph 1 of schedule 1.

**Specifications**

means the specifications described in paragraph 2 of schedule 1.

1.2 **Interpretation.** In the construction and interpretation of this Agreement, unless the context otherwise requires:

- (a) a document or agreement between the parties to this Agreement (including this Agreement) includes such document or agreement as modified varied, supplemented, novated, replaced or substituted from time to time; and
- (b) headings and the table of contents are included for convenience only and shall not affect the interpretation of this Agreement.

**2 Appointment and Scope of the Agreement**

2.1 **Appointment:** By The People shall provide the Services to the Client and the Client shall pay By The People in accordance with the terms and conditions of this Agreement.

2.2 **Precedence.** If there is any conflict between the parts of this Agreement, the following order of precedence shall apply:

- (a) the schedules;
- (b) the main body.

2.3 This Agreement contains the only conditions on which By The People will deal with the Client and governs the relationship between By The People and the Client to the entire exclusion of all other terms and conditions (other than any implied by law) and supersedes all proposals or prior agreements, oral or written, and all other communications between the parties relating to their subject matter.

### 3 Services

3.1 **Provision of the Services:** By The People shall provide the Services in accordance with the Specifications and the service levels set out in paragraph 4 of schedule 1 subject to unavoidable faults, downtime and requirements for system maintenance and the limitations set forth in this Agreement.

3.2 **Delivery:** By The People shall use reasonable endeavours to deliver the Services to the Client in accordance with the delivery timetable set out in paragraph 4 of schedule 1.

3.3 **Changes to Specifications:** Either party may suggest changes to the Specifications in accordance with paragraph 5 of schedule 1.

### 4 Acceptance

4.1 **Process Acceptance:** In By The People's performance of the Services, it may submit to the Client for its approval:

- (a) Copy, layouts, artwork, storyboards and/or scripts;
- (b) Schedules for the delivery, capabilities and technical requirements of the Material; and
- (c) Estimates of the cost of any additional work required which falls outside the scope of the Fees.

In addition, By The People shall submit any other Material or draft Material to the Client for approval at any time. The Client will respond within 3 days of receipt in writing to such approval requests, or within such time frame of receipt in writing as otherwise agreed.

4.2 **Acceptance:** By The People shall provide the Services and Material to the Client upon completion and the Client shall carry out a review of the Services and Materials for compliance with the Specifications ("Acceptance Process") within 7 days of receipt. Once the Services and Materials have completed the Acceptance Process to the Client's satisfaction, the Client shall accept the Services and Material in writing.

4.3 **Failed Acceptance:** If the Services or Material fail the Acceptance Process, the Client shall notify By The People of the failure promptly and By The People shall have a reasonable time to resubmit corrected materials upon receipt of which the Client shall carry out the Acceptance Process again.

4.4 **Deemed Acceptance:** The Client shall be deemed to have accepted the Material 7 days after completion of the Acceptance Process under clause 4.1 (unless the Client has provided written notice of failure in accordance with clause 4.3) or when the Client uses the Material commercially in the course of its business (whichever occurs first).

4.5 **Client Approval:** The Client acknowledges that the Services and Material provided by the Client involves creative elements over which the Client shall have overall subjective approval. Accordingly, once the Client accepts the Services and Materials in accordance with clause 4.1 or is deemed to have accepted under clause 4.4, the Client cannot (except for reasons of objective technical non-compliance with the Specifications) subsequently claim that the Services or Material is contrary to the Client's specified requirements, contains any offensive, defamatory, false or illegal statements about the Client or would impact on the Client in a negative and derogatory manner.

## 5 **Client Material**

5.1 The Client will, at its own expense, provide to By The People the Client Material in an electronic format agreed with the Client.

5.2 Client Material that consists of photographs and images shall, wherever possible, be provided electronically in one of the following formats (RAW, TIFF, BMP, PCD, PSD, EPS, EIF and JPG). By The People prefers to accept logos in Vector Graphics formats such as Adobe Illustrator, Macromedia Freehand, or Postscript.

- 5.3 Client Material shall be provided by e-mail, CD ROM DVD or secure electronic transfer. Any other deliverable formats are acceptable only by written agreement. All disks shall be clearly labelled and By The People shall not be liable for damage or loss of storage media of Client Material.
- 5.4 The Client Material shall be provided in accordance with any agreed delivery schedule, or otherwise, as soon as reasonably possible. Delivery after any agreed schedule will have a consequent impact on subsequent delivery dates in the schedule.
- 5.5 The Client will procure at its own expense all clearances and necessary rights, licences, permissions, and all other agreements and documentation ("Permits") to permit use (and/or placement in media) of all Client Material under this Agreement. The Client is solely responsible for all payments to third parties in relation to such use and/or placement. By The People may require documentary evidence of the Permits.

## 6 Client Obligations

- 6.1 **Assistance:** The Client shall make available to By The People in a timely manner all assistance, including access to premises, systems, personnel, information, facilities, services and equipment, reasonably required by By The People for the performance of its obligations under this Agreement.

- 6.2 **Third party materials:** The Client acknowledges that By The People obtains certain third party materials and services in order to perform the Services and produce the Materials. The Client shall accordingly comply with any specific third party terms in relation to such third party materials as notified to the Client by By The People in writing.

## 7 Charges and Payment

- 7.1 **Charges:** The Client shall pay By The People the Fees in accordance with the timing specified in schedule 2.
- 7.2 **Payment in Full:** All sums payable by the Client under this Agreement shall be made in full, without set-off or counterclaim and, except to the extent required by law, free and clear of any deduction on account of tax or otherwise;
- 7.3 **Delay:** In the event of any delays caused by the Client, By The People may invoice for incomplete jobs and work. Any additional time or other costs incurred as a result of any such delay may be invoiced by By The People.

7.4 **Unforeseen Design Requirements:** In the event that the nature of the Services and Material changes considerably from the original Specification and/or entails work not reasonably foreseeable by By The People, By The People may levy extra fees for additional work or re-work required but shall provide the Client with prior written notice of any anticipated increase in the fees.

## 8 **Protection of Intellectual Property**

8.1 **Ownership:** Subject to clause 8.2, upon full payment of the sums for the Material, the Client shall be the sole owner of all Intellectual Property rights in the Material supplied under this Agreement.

8.2 **Existing Material:** The vesting of title under clause 8.1 does not affect ownership of the Intellectual Property rights in any material existing as at the Commencement Date owned or licensed to either party, that is incorporated into or used with the Services or Material. Any material provided under this Agreement that is not specifically developed for the Client (such as By The People's pre-existing software and content) shall be licensed to the Client on a worldwide irrevocable basis upon payment of all fees due to By The People.

8.3 **Third Party Content:** By The People may from time to time contract with third parties for the provision or development of the Services or Material ("Third Party Content"). Once the Client has paid all relevant Fees in respect of an item of Third Party Content, the Intellectual Property rights in that item of Third Party Content are either:

- (a) where the Third Party Content was developed exclusively for the Client, assigned to the Client; or
- (b) in all other circumstances, irrevocably licensed to the Client for worldwide use.

8.4 **Client Material:** To the extent that any material is Client Material, the Client hereby grants By The People a non-exclusive, non-transferable, royalty-free, worldwide licence to use the Client Material for the purposes of Essence fulfilling its obligations under this Agreement.

8.5 **Design Identification:** By The People may at all times after the creation of the Material display any applicable proprietary notices and logo on the Material and hyperlink the Material to its own website and/or the websites of entities within its group, either directly or via a page held within the Client's website. By The People shall have the right to be identified as the designer of the material and the Client may only remove such identification with By The People's written consent or at By The People's written request.

## 9 Warranties

- 9.1 By The People undertakes that:
- (a) the Services will be provided with due care and skill;
  - (b) the Material will comply with the Specifications;
  - (c) the Material is free from any security interest, lien or other encumbrance; and
  - (d) to the best of By The People's knowledge and belief the Services and Materials do not infringe the Intellectual Property rights of any person.

9.2 **Excluded warranties:** Except as expressly provided in clause 9.1 and as permitted by law, all warranties, conditions, representations, indemnities and guaranties, whether express or implied, arising by law, equity, custom, oral or written statements of By The People or otherwise are hereby superseded, excluded and disclaimed.

9.3 **Third party warranties:** Subject to clause 9.4, Essence does not warrant or guarantee that any services or material it receives from third party suppliers will be consistent with the warranties provided by By The People under clause 9.1. By The People is also not responsible for any services provided by such third party suppliers indirectly to the Client through By The People, including, without limitation, the use by such third party suppliers of the Client's Material or the Material.

9.4 **Warranty pass through:** By The People shall, to the extent it is authorised and able, pass through any warranties, indemnities and guarantees provided by third party suppliers in respect of third party materials supplied by By The People to the Client. By The People shall use all reasonable efforts in assisting the Client to enforce such warranties, indemnities or guarantees as the Client requires and at the Client's cost.

## 10 Liability and Indemnities

10.1 **BY THE PEOPLE:** By The People will indemnify the Client against any and all Losses arising out of damage to a third party to the extent that such injury or damage is the result of:

- (a) the Services not complying with the Specification; or
- (b) any claim that the Services or Materials infringe any intellectual property of a third party,

in each case, provided that:

- (i) By The People has prompt notice from the Client;
- (ii) Services must be confirmed as not conforming to the Specification by By The People; and
- (iii) By The People must have the right and opportunity to defend or resolve the claim with its own legal advisers and with the cooperation of the Client at By The People's cost.

10.2 **Client:** By The People shall not be liable for any Losses, and the Client shall indemnify By The People for any and all Losses due to:

- (a) the use by By The People of the Client Materials or the placement by By The People in any media of any Client Material;

- (b) any Material produced or Services performed under the specific instructions of and/or specifications provided by the Client;

- (c) any Material that has been approved by the Client for publication or display;

- (d) Client's use of the Services or the Materials, including without limitation, the use of the Services or the Materials in a way that infringes third party rights, is defamatory, obscene, offensive or illegal; and

- (e) Client's negligence.

10.3

### **Exclusion of Liability:**

Notwithstanding any other provision of this Agreement, By The People is not liable for any Losses suffered or incurred by the Client to the extent that such Losses are caused by:

- (a) use of the Services and/or Material other than in accordance with the Specifications;

- (b) modifications to the Material by the Client or any party other than Essence;

- (c) failure of hardware or third party software to operate in accordance with their specifications;

- (d) any delays, acts or omissions of the Client or any third person, including, without limitation, third party suppliers to By The People; and/or

(e) failure or delay by the Client to meet or comply with any of its obligations under this Agreement.

10.4 **By The People's Limited Liability:** Notwithstanding any other provision of this Agreement, By The People shall not have any liability or responsibility to the Client for indirect, incidental and consequential or special losses, economic damage, lost turnover, revenue, sales or profits, loss of business, time or goodwill as a result of By The People's breach of any undertaking, warranty or other term of this Agreement (regardless of whether Essence has been advised, has other reason to know, or in fact knows of the possibility of such losses or damages).

10.5 **Capped Liability:** The maximum aggregate liability of By The People for any one or more claims under or relating to this Agreement (whether in contract, negligence, tort or otherwise) shall not exceed the sums paid by the Client under this Agreement.

## 11 Term and Termination

11.1 **Term:** This Agreement shall commence on the Commencement Date and will remain in effect for 1 year, thereafter it shall be renewed automatically for subsequent 1 yearly terms until terminated by either party by giving at least 6 months prior notice, or in accordance with clause 11.2.

11.2 **Termination:** Either party may terminate this Agreement immediately by notice in writing, upon:

- (a) the other party committing any breach of this Agreement that is incapable of remedy;
- (b) the other party failing to remedy any breach of this Agreement that is capable of remedy within 30 days of notice of that breach having been given by the non-defaulting party to the other party; and
- (c) the commencement of liquidation or the insolvency of the other party (except for the purposes of solvent amalgamation or reconstruction) or upon the appointment of a receiver, statutory manager or trustee of the other party's property or upon an assignment for the benefit of the other party's creditors or upon execution being levied against the other party or upon the other party compounding with its creditors or being unable to pay its debts in the ordinary course of business.

11.3 The exercise by either party to terminate the Agreement shall not limit any other rights or remedies that party may have, and shall not affect any accrued rights or obligations arising before the date of termination.

## 12 Data Protection

- 12.1 For the purposes of this clause 12, “data controller”, “data processor”, “data subject”, “personal data” and “processing” shall have the meanings ascribed to them in the Data Protection Act 1998 (“the Act”). The parties recognise that:
- (a) by accessing materials provided by the Client, By The People may have access to and shall process personal data that is subject to the provisions of the Act; and
  - (b) By The People’s provision of the Services may require By The People to process personal data.
- 12.2 Where a party processes personal data in the course of its performance of this Agreement, it is acknowledged that such party shall act in the capacity of data processor. Accordingly, both parties agree to comply with all applicable provisions of the Act.
- 12.3 Each party shall indemnify and hold harmless the other party against any Loses incurred by the other party arising out of any breach of this clause 12.

## 13 Confidentiality, Security and Publicity

- 13.1 **Confidentiality:** The parties recognise and acknowledge the confidential nature of the Confidential Information. Each party will keep the Confidential Information confidential, and not use it for any purpose other than performing their obligation or executing benefits under this Agreement or of any Confidential Information of the other party, except to the extent:
- (a) required by law, regulatory requirement or any stock exchange;
  - (b) that the parties otherwise agree in writing; or
  - (c) necessary to obtain the benefit of, or to carry out obligations under, this Agreement; including, without limitation disclosure to its employees, advisers and other consultants on a “need to know” basis provided those persons first agree to observe the confidentiality of the information.
- 13.2 **Security:** Each party agrees to implement such security arrangements as may be necessary to ensure that the secrecy of the Confidential Information is preserved.

13.3 **Publicity:** Neither party may advertise or publicly announce any matter relating to the existence nor the contents of this agreement without the other party's prior written consent, except to the extent that it is required to do so under applicable law.

## 14 Dispute resolution

14.1 Each of the parties involved will negotiate in good faith to resolve any dispute that arises. If such negotiations and meetings do not resolve the dispute within 60 days of written communication of the dispute then each party shall nominate one senior officer as its representatives. These representatives shall meet to attempt to resolve such dispute only. Only if the parties' senior officers or representatives are unable to resolve the dispute within 30 days may either party elect to institute legal proceedings.

## 15 General

15.1 **Force majeure:** No party shall be liable for any delay or failure to perform pursuant to this Agreement if such delay is due to Force Majeure. To the extent a delay or failure of a Party to perform its obligations is caused by Force Majeure:

- (a) the performance of that party's obligations will be suspended; and

- (b) where that delay or failure exceeds sixty (60) days, any party may immediately terminate this Agreement by providing notice in writing to the other party.

15.2 **Further assurances:** The parties shall from time to time, do or procure the doing of all such acts and/or execute or procure the execution of all such documents as are reasonably necessary for giving full effect to this Agreement.

15.3 **Contracts (Rights of Third Parties) Act 1999:** A person who is not a contracting party to this Agreement shall have no right to enforce any term of this Agreement under the Contracts (Rights of Third Parties) Act 1999.

15.4 **Relationship between the Parties:** Each party acknowledges that it is not a partner, agent, representative or employee of the other party and has no authority or power to bind, or enter into any agreement in the name of, or create any liability against, the other party, in any way or for any purpose

15.5 **Waiver:** No delay, grant of time, release, compromise, forbearance (whether partial or otherwise) or other indulgence by one party in respect of any breach of any other party's obligations under this Agreement is to:

- (a) operate as a waiver or prevent the subsequent enforcement of that obligation; or
  - (b) be deemed a delay, grant of time, release, compromise, forbearance (whether partial or otherwise) or other indulgence in respect of, or a waiver of, any subsequent or other breach.
- 15.6 **Remedies non-exclusive:** The rights, powers and remedies in this Agreement are cumulative and not exclusive of any rights, powers and remedies provided by law.
- 15.7 **Variation and Amendments:** No variation or amendment to the Agreement shall be effective unless it is in writing and signed by all the parties.
- 15.8 **Assignment:** Each party must notify the other party of any actual or potential change of control over the first party, and any such change of control will be deemed to be an assignment for the purposes of this clause.
- 15.9 **Employees and contractors:** Each party recognises that the employees of the other constitute a valuable asset. Accordingly, neither party will solicit for employment any person who is employed or contracted by the other party and has been actively engaged in the provision or receipt of the Services in a material way, whether directly or indirectly through an associated company or otherwise, during the term of this Agreement and for 12 months after the expiry or termination of this Agreement.
- 15.10 **Partial invalidity:** If any provision of this Agreement or its application to any party or circumstance is or becomes invalid or unenforceable to any extent, the remainder of this Agreement and its application will not be affected and will remain enforceable to the greatest extent permitted by law.
- 15.11 **Counterparts:** This Agreement may be executed in two or more counterparts each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. A party may enter into this Agreement by signing any counterpart. The parties acknowledge that this Agreement may be executed on the basis of an exchange of facsimile copies and confirm that their respective execution of this Agreement by such means shall be a valid and sufficient execution.

- 15.12 **Governing law and jurisdiction:** This Agreement shall be governed by English law, and the parties submit to the non-exclusive jurisdiction of the courts of England.
- 15.13 **Receipt of notices:** Notices under this Agreement:
- (a) must be sent to the addresses set out in this Agreement or any subsequent addresses notified by one party to the other party in writing; and
  - (b) is deemed received:
    - (i) if delivered by hand, on delivery;
    - (ii) if delivered by post, two working days after posting;
    - (iii) if delivered by facsimile, on production of a transmission report by the machine from which the facsimile was sent in its entirety to the facsimile number of the recipient, specifying the error free transmission to the correct number.

If delivery of a notice is not made on a working day or is made after 5.00 pm on a working day, then the notice or other communication will be deemed to have been delivered on the next working day.