



THE BRAND NURSERY

TERMS AND CONDITIONS JUNE 2008

I. INTERPRETATION

I.1 The definitions and rules of interpretation in this clause apply in these terms and conditions (**Conditions**).

Account Handler: the Agency's account handler for a Project

Contract: the Client's purchase order and the Agency's acceptance of it, or the Client's acceptance of a quotation for Services by the Agency under [condition 2.2](#).

Client's Manager: the Client's manager for the Project, appointed in accordance with [condition 6.1](#).

Document: includes, in addition to any document in writing, any drawing, map, plan, diagram, design, picture or other image, tape, disk or other device or record embodying information in any form.

In-put Material: all Documents, information and materials provided by the Client relating to the Services including, the in-put materials specified in the Project Plan.

Intellectual Property Rights: all patents, rights to inventions, utility models, copyright and related rights, trade marks, service marks, trade, business and domain names, rights in trade dress or get-up, rights in goodwill or to sue for passing off, unfair competition rights, rights in designs, rights in computer software, database right, topography rights, moral rights, rights in confidential information (including know-how and trade secrets) and any other intellectual property rights, in each case whether registered or unregistered and including all applications for and renewals or extensions of such rights, and all similar or equivalent rights or forms of protection in any part of the world.

Pre-existing Materials: all Documents, information and materials provided by the Agency relating to the Services which existed prior to the commencement of Contract including computer programs, data, reports and specifications and the pre-existing materials specified in the Project Plan.



Project: a project as described in a Project Plan.

Project Plan: the details describing the Project, the estimated timetable and responsibilities for the provision of the Services as contained within the Agency's interpretation of the Brief document, estimate and key stage schedules.

Services: the services to be provided by the Agency under a Project Plan together with any other services which the Agency provides or agrees to provide to the Client.

Agency's Manager: the Agency's manager for a Project appointed under [condition 5.3](#).

VAT: value added tax chargeable under English law for the time being and any similar additional tax.

1.2 Condition and paragraph headings shall not affect the interpretation of these conditions.

1.3 A **person** includes a natural person, corporate or unincorporated body (whether or not having separate legal personality) and that person's legal and personal representatives, successors and permitted assigns.

1.5 Words in the singular shall include the plural and vice versa.

1.6 A reference to a statute or statutory provision is a reference to it as it is in force for the time being, taking account of any amendment, extension, or re-enactment and includes any subordinate legislation for the time being in force made under it.

1.7 A reference to **writing** or **written** includes faxes but not e-mail.

1.8 Where the words **include(s)**, **including** or **in particular** are used in these terms and conditions, they are deemed to have the words **without limitation** following them and where the context permits, the words **other** and **otherwise** are illustrative and shall not limit the sense of the words preceding them.

1.9 Any obligation in the Contract on a person not to do something includes an obligation not to agree, allow, permit or acquiesce in that thing being done.

1.10 References to conditions are to the conditions of this agreement unless stated to the contrary.

2. APPLICATION OF CONDITIONS

2.1 These Conditions shall:

(a) apply to and be incorporated into the Contract; and

(b) prevail over any inconsistent terms or conditions contained, or referred to, in the Client's purchase order, confirmation of order, acceptance of a quotation or specification, or implied by law, trade custom, practice or course of dealing.



2.2 The Client's purchase order, or the Client's acceptance of a quotation for Services by the Agency, constitutes an offer by the Client to purchase the Services specified in it on these Conditions. No offer placed by the Client shall be accepted by the Agency other than:

- (a) by a written acknowledgement issued and executed by the Agency; or
- (b) (if earlier) by the Agency starting to provide the Services,

when a contract for the supply and purchase of those Services on these Conditions will be established. The Client's standard terms and conditions (if any) attached to, enclosed with or referred to in any purchase order or other Document shall not govern the Contract.

2.3 Quotations are given by the Agency on the basis that no Contract shall come into existence except in accordance with [condition 2.2](#). Any quotation is valid for a period of 30 days from its date, provided that the Agency has not previously withdrawn it.

3. COMMENCEMENT AND DURATION

3.1 The Services supplied under the Contract shall be provided by the Agency to the Client from the date of acceptance by the Agency of the Client's offer in accordance with the date specified in the Project Plan.

3.2 The Services supplied under the Contract shall continue to be supplied until the Project is completed in accordance with the Project Plan unless the Contract is terminated in accordance with [condition 13](#).

4. PROJECT PLAN

4.1 Project Plans shall be agreed in the following manner:

- (a) the Client shall provide the Agency with a project brief, setting out the requirements and specifications of the services which it is requesting from the Agency, including a description of what work is to be done, dates by which is requested to be started and finished, In-put Materials and such other information as the Agency may request to allow the Agency to prepare a draft Project Plan;
- (b) the Agency shall, as soon as reasonably practicable, provide the Client with a draft Project Plan; and
- (c) the Agency and the Client shall discuss and agree the draft Project Plan and when it has been agreed, they shall both sign a copy of it and it shall become a Schedule to and subject to these Conditions.

4.2 The Agency shall charge for the preparation of the Project Plan on a time and materials basis in accordance with [condition 8](#).



4.3 Once the Project Plan has been agreed and signed in accordance with [condition 4.1\(c\)](#), no amendment shall be made to it except in accordance with [condition 7](#) and [condition 15](#).

5. AGENCY'S OBLIGATIONS

5.1 The Agency shall use reasonable endeavours to provide the Services, to the Client, in accordance in all material respects with Project Plan.

5.2 The Agency shall appoint the Account Handler in respect of each Project who shall have authority contractually to bind the Agency on all matters relating to the Services. The Agency shall use reasonable endeavours to ensure that the same person acts as the Account Handler throughout the term of the Project, but may replace him from time to time where reasonably necessary in the interests of the Agency's business.

6. CLIENT'S OBLIGATIONS

6.1 The Client shall:

- (a) co-operate with the Agency in all matters relating to the Services and appoint the Client's Manager in relation to each Project, who shall have the authority contractually to bind the Client on matters relating to the Services;
- (b) provide, in a timely manner, such In-put Material and other information as the Agency may request and ensure that it is accurate in all material respects;
- (c) provide prompt and timely feedback in relation to the Services when so requested by the Agency.

6.2 If the Agency's performance of its obligations under the Contract is prevented or delayed by any act or omission of the Client, its agents, sub-contractors or employees, the Agency shall not be liable for any costs, charges or losses sustained or incurred by the Client arising directly or indirectly from such prevention or delay.

6.3 The Client shall be liable to pay to the Agency, on demand, all reasonable costs, charges or losses sustained or incurred by the Agency (including any direct, indirect or consequential losses, loss of profit and loss of reputation, loss or damage to property and those arising from injury to or death of any person and loss of opportunity to deploy resources elsewhere) arising directly or indirectly from the Client's fraud, negligence, failure to perform or delay in the performance of any of its obligations under the Contract, subject to the Agency confirming such costs, charges and losses to the Client in writing.

6.4 The Client shall not, without the prior written consent of the Agency, at any time from the date of the Contract to the expiry of six months after the last date of supply of the Services, solicit or entice away from the Agency or employ or attempt to employ any person who is, or has been, engaged as an employee or sub-contractor of the Agency in the provision of the Services.



6.5 Any consent given by the Agency in accordance with [condition 6.4](#) shall be subject to the Client paying to the Agency a sum equivalent to 20% of the then current annual remuneration of the Agency's employee or sub-contractor or, if higher, 20% of the annual remuneration to be paid by the Client to that employee or sub-contractor.

7. CHANGING THE SERVICES

7.1 If either party wishes to change the scope or execution of the Services, it shall submit details of the requested change to the other in writing.

7.2 If either party requests a change to the scope or execution of the Services, the Agency shall, within a reasonable time, provide a written estimate to the Client of:

- (a) the likely time required to implement the change;
- (b) any variations to the Agency's charges arising from the change;
- (c) the likely effect of the change on the Project Plan; and
- (d) any other impact of the change on the terms of the Contract.

7.3 The Agency may, from time to time and without notice, change the Services in order to comply with any applicable safety or statutory requirements, provided that such changes do not materially affect the nature, scope of, or the charges for the Services.

7.4 The Agency may, from time to time and subject to the Client's prior written consent, which shall not be unreasonably withheld or delayed change the Services.

7.5 If the Client wishes the Agency to proceed with the change, the Agency has no obligation to do so unless and until the parties have agreed in writing on the necessary variations to its charges, the Project Plan and any other relevant terms of the Contract to take account of the change.

7.6 The Agency may charge for its time spent in assessing a request for change from the Client on a time and materials basis in accordance with [condition 8](#).

8. CHARGES AND PAYMENT

8.1 [Condition 8.2](#) shall apply if the Agency provides the Services on a time and materials basis. [Condition 8.3](#) shall apply if the Agency provides the Services for a fixed price. The remainder of this [condition 8](#) shall apply in either case.

8.2 Where the Services are provided on a time and materials basis:

- (a) the charges payable for the Services shall be calculated in accordance with the Agency's standard daily fee rates, as amended from time to time by the Agency giving not less than three months written notice to the Client;

(b) the Agency's standard daily fee rates for each individual person are calculated on the basis of an eight-hour day, worked between 8.30 am and 5.30 pm on weekdays (excluding public holidays);

(c) the Agency shall be entitled to charge an overtime rate of 150% of the normal daily fee rate on a pro-rata basis for each part day or for any time worked by individuals whom it engages on the Services outside the hours referred to in [condition 8.2\(b\)](#);

(d) all charges quoted to the Client shall be exclusive of VAT which the Agency shall add to its invoices at the appropriate rate;

(e) the Agency shall ensure that every individual whom it engages on the Services completes time sheets recording time spent, and the Agency shall use such time sheets to calculate the charges covered by each monthly invoice referred to in [condition 8.2\(f\)](#); and

(f) the Agency shall invoice the Client monthly in arrears for its charges for time, expenses and materials (together with VAT where appropriate) for the month concerned, calculated as provided in this [condition 8.2](#).

8.3 Where the Services are provided for a fixed price, the total price for the Services shall be the amount set out in the Project Plan. The total price shall be paid to the Agency (without deduction or set-off) in instalments, as set out in the Project Plan. On achieving a Project milestone or at the end of the Project Plan, the Agency shall invoice the Client for the charges that are then payable, together with expenses, the costs of materials and VAT, where appropriate, calculated as provided in [condition 8.4](#).

8.4 Any fixed price and daily rate contained in the Project Plan excludes:

(a) the cost of hotel, subsistence, travelling and any other ancillary expenses reasonably incurred by the individuals whom the Agency engages in connection with the Services, the cost of any materials and the cost of services reasonably and properly provided by third parties and required by the Agency for the supply of the Services. Such expenses, materials and third party services shall be invoiced by the Agency; and

(b) VAT, which the Agency shall add to its invoices at the appropriate rate.

8.5 The Client shall pay each invoice submitted to it by the Agency, in full and in cleared funds, within 30 days of receipt.

8.6 Without prejudice to any other right or remedy that it may have, if the Client fails to pay the Agency on the due date, the Agency may:

(a) charge interest on such sum from the due date for payment at the annual rate of 5% above the base lending rate from time to time of Barclays Bank Plc, accruing on a daily basis and being compounded quarterly until payment is made, whether before or after any judgment and the Agency may claim interest under the Late Payment of Commercial Debts (Interest) Act 1998; and

(b) suspend all Services until payment has been made in full.



8.7 Time for payment shall be of the essence of the Contract.

8.8 All sums payable to the Agency under the Contract shall become due immediately on its termination, despite any other provision. This [condition 8.8](#) is without prejudice to any right to claim for interest under the law, or any such right under the Contract.

8.9 The Agency may, without prejudice to any other rights it may have, set off any liability of the Client to the Agency against any liability of the Agency to the Client.

9. INTELLECTUAL PROPERTY RIGHTS

9.1 On the payment of all sums payable by the Client under the Contract the Agency will assign to the Client the Intellectual Property Rights and all other rights in the products of the Services.

9.2 The Agency shall, at the Client's request, do or procure to be done all such further acts and things and the execution of all such other documents as the Client may from time to time require for the purpose of securing for the Client the full benefit of this agreement, including all right, title and interest in and to the Intellectual Property Rights and all other rights assigned to the Client in accordance with [condition 10.1](#).

10. CONFIDENTIALITY AND THE AGENCY'S PROPERTY

10.1 The Client shall keep in strict confidence all technical or commercial know-how, specifications, inventions, processes or initiatives which are of a confidential nature and have been disclosed to the Client by the Agency, its employees, agents or sub-contractors and any other confidential information concerning the Agency's business or its products which the Client may obtain. The Client shall restrict disclosure of such confidential material to such of its employees, agents or sub-contractors as need to know the same for the purpose of discharging the Client's obligations to the Agency, and shall ensure that such employees, agents or sub-contractors are subject to obligations of confidentiality corresponding to those which bind the Client.

10.2 All materials, equipment and tools, drawings, specifications and data supplied by the Agency to the Client (including Pre-existing Materials and the Agency's Equipment) shall, at all times, be and remain the exclusive property of the Agency, but shall be held by the Client in safe custody at its own risk and maintained and kept in good condition by the Client until returned to the Agency, and shall not be disposed of or used other than in accordance with the Agency's written instructions or authorisation.

10.3 This [condition 10](#) shall survive termination of the Contract, however arising.



11. LIMITATION OF LIABILITY - THE CLIENT'S ATTENTION IS PARTICULARLY DRAWN TO THE PROVISIONS OF THIS CONDITION

11.1 This [condition 11](#) sets out the entire financial liability of the Agency (including any liability for the acts or omissions of its employees, agents and sub-contractors) to the Client in respect of:

- (a) any breach of the Contract;
- (b) any use made by the Client of the Services, or any part of them; and
- (c) any representation, statement or tortious act or omission (including negligence) arising under or in connection with the Contract.

11.2 All warranties, conditions and other terms implied by statute or common law are, to the fullest extent permitted by law, excluded from the Contract.

11.3 Nothing in these Conditions limits or excludes the liability of the Agency:

- (a) for death or personal injury resulting from negligence; or
- (b) for any damage or liability incurred by the Client as a result of fraud or fraudulent misrepresentation by the Agency; or
- (c) for any liability incurred by the Client as a result of any breach by the Agency of the condition as to title or the warranty as to quiet possession implied by section 2 of the Supply of Goods and Services Act 1982.

11.4 Subject to [condition 11.2](#) and [condition 11.3](#)

- (a) the Agency shall not be liable for:
 - (i) loss of profits; or
 - (ii) loss of business; or
 - (iii) depletion of goodwill and/or similar losses; or
 - (iv) loss of anticipated savings; or
 - (v) loss of goods; or
 - (vi) loss of contract; or
 - (vii) loss of use; or
 - (viii) loss of corruption of data or information; or



(ix) any special, indirect, consequential or pure economic loss, costs, damages, charges or expenses.

(b) the Agency's total liability in contract, tort (including negligence or breach of statutory duty), misrepresentation, restitution or otherwise arising in connection with the performance or contemplated performance of the Contract shall be limited to the price paid for the Services.

12. DATA PROTECTION

The Client acknowledges and agrees that details of the Client's name, address and payment record may be submitted to a credit reference agency, and personal data will be processed by and on behalf of the Agency in connection with the Services.

13. TERMINATION

13.1 Subject to [condition 13.3](#), the Contract shall terminate automatically on completion of the Project in accordance with the Project Plan.

13.2 Without prejudice to any other rights or remedies which the parties may have, either party may terminate the Contract without liability to the other on giving the other not less than 3 months written notice or immediately on giving notice to the other if:

- (a) the other party commits a material breach of any of the terms of the Contract and (if such a breach is remediable) fails to remedy that breach within 30 days of that party being notified in writing of the breach; or
- (b) an order is made or a resolution is passed for the winding up of the other party, or circumstances arise which entitle a court of competent jurisdiction to make a winding-up order of the other party; or
- (c) an order is made for the appointment of an administrator to manage the affairs, business and property of the other party, or documents are filed with a court of competent jurisdiction for the appointment of an administrator of the other party, or notice of intention to appoint an administrator is given by the other party or its directors or by a qualifying floating charge holder (as defined in paragraph 14 of Schedule B1 to the Insolvency Act 1986); or
- (d) a receiver is appointed of any of the other party's assets or undertaking, or circumstances arise which entitle a court of competent jurisdiction or a creditor to appoint a receiver or manager of the other party, or if any other person takes possession of or sells the other party's assets; or
- (e) the other party makes any arrangement or composition with its creditors, or makes an application to a court of competent jurisdiction for the protection of its creditors in any way; or



- (f) the other party ceases, or threatens to cease, to trade; or
- (g) there is a change of control of the other party (as defined in section 574 of the Capital Allowances Act 2001); or
- (h) the other party takes or suffers any similar or analogous action in any jurisdiction in consequence of debt.

13.3 On termination of the Contract for any reason:

- (a) the Client shall immediately pay to the Agency all of the Agency's outstanding unpaid invoices and interest and, in respect of Services supplied but for which no invoice has been submitted, the Agency may submit an invoice, which shall be payable immediately on receipt;
- (b) the Client shall immediately return all Pre-existing Materials to the Agency. If the Client fails to do so, then the Agency may enter the Client's premises and take possession of them. Until they have been returned or repossessed, the Client shall be solely responsible for their safe keeping; and
- (c) the accrued rights of the parties as at termination and the continuation of any provision expressly stated to survive or implicitly surviving termination, shall not be affected.

14. FORCE MAJEURE

The Agency shall have no liability to the Client under the Contract if it is prevented from or delayed in performing its obligations under the Contract or from carrying on its business by acts, events, omissions or accidents beyond its reasonable control, including strikes, lock-outs or other industrial disputes (whether involving the workforce of the Agency or any other party), failure of a utility service or transport network, act of God, war, riot, civil commotion, act of terrorism, malicious damage, compliance with any law or governmental order, rule, regulation or direction, accident, breakdown of plant or machinery, fire, flood, storm or default of Agency or sub-contractors.

15. VARIATION

Subject to [condition 4](#) and [condition 7](#), no variation of the Contract or these Conditions or of any of the documents referred to in them shall be valid unless it is in writing and signed by or on behalf of each of the parties.

16. WAIVER

16.1 A waiver of any right under the Contract is only effective if it is in writing and it applies only to the party to whom the waiver is addressed and the circumstances for which it is given.

16.2 Unless specifically provided otherwise, rights arising under the Contract are cumulative and do not exclude rights provided by law.



17. SEVERANCE

17.1 If any provision (or part of a provision) of the Contract is found by any court or administrative body of competent jurisdiction to be invalid, unenforceable or illegal, the other provisions will remain in force.

17.2 If any invalid, unenforceable or illegal provision would be valid, enforceable or legal if some part of it were deleted, that provision will apply with whatever modification is necessary to make it valid, enforceable and legal.

17.3 The parties agree, in the circumstances referred to in [condition 17.1](#) and if [condition 17.2](#) does not apply, to attempt to substitute for any invalid, unenforceable or illegal provision a valid, enforceable and legal provision which achieves to the greatest extent possible the same effect as would have been achieved by the invalid or unenforceable provision. The obligations of the parties under any invalid or unenforceable provision of the Contract shall be suspended while an attempt at such substitution is made.

18. STATUS OF PRE-CONTRACTUAL STATEMENTS

Each of the parties acknowledges and agrees that, in entering into the Contract it does not rely on any undertaking, promise, assurance, statement, representation, warranty or understanding (whether in writing or not) of any person (whether party to these terms and conditions or not) relating to the subject matter of the Contract, other than as expressly set out in the Contract or within the Service Level Agreement between the parties ("the SLA"). For the avoidance of doubt, in the event of there being any contradiction between this Contract and the SLA the provisions of this Contract shall take precedence.

19. ASSIGNMENT

19.1 The Client shall not, without the prior written consent of the Agency, assign, transfer, charge, sub-contract or deal in any other manner with all or any of its rights or obligations under the Contract.

19.2 The Agency may at any time assign, transfer, charge, sub-contract or deal in any other manner with all or any of its rights or obligations under the Contract.

20. NO PARTNERSHIP OR AGENCY

Nothing in the Contract is intended to, or shall operate to, create a partnership between the parties, or to authorise either party to act as agent for the other, and neither party shall have authority to act in the name or on behalf of or otherwise to bind the other in any way (including the making of any representation or warranty, the assumption of any obligation or liability and the exercise of any right or power).



21. RIGHTS OF THIRD PARTIES

The Contract is made for the benefit of the parties to it and (where applicable) their successors and permitted assigns and is not intended to benefit, or be enforceable by, anyone else.

22. NOTICES

Notice given under the Contract shall be in writing, sent for the attention of the person, and to the address or fax number, given in the Contract (or such other address, fax number or person as the relevant party may notify to the other party) and shall be delivered personally, sent by fax or sent by pre-paid, first-class post or recorded delivery. A notice is deemed to have been received, if delivered personally, at the time of delivery, in the case of fax, at the time of transmission, in the case of pre-paid first class post or recorded delivery, 48 hours from the date of posting and, if deemed receipt under this [condition 22](#) is not within business hours (meaning 9.00 am to 5.30 pm Monday to Friday on a day that is a business day), at 9.00 am on the first business day following delivery. To prove service, it is sufficient to prove that the notice was transmitted by fax, to the fax number of the party or, in the case of post, that the envelope containing the notice was properly addressed and posted.

23. GOVERNING LAW AND JURISDICTION

23.1 The Contract and any dispute or claim arising out of or in connection with it or its subject matter, shall be governed by, and construed in accordance with, the law of England and Wales.

23.2 The parties irrevocably agree that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with the Contract or its subject matter.