

# Born Digital Limited – Terms of Trade

October 2020

You have agreed to engage Born Digital Limited (**BDL**) to provide Services as initially set out in a Project Proposal. These general terms are BDL's standard operating terms and will, together with the Project Proposal, be the contractual terms that apply in respect of BDL's provision of the Services to you. By instructing and/or engaging BDL to provide the Services you agree that these general terms apply to your Agreement with BDL.

## 1. DEFINITIONS

1.1 In these general terms, unless the context otherwise requires:

**Agreement** means the services agreement between you and BDL in respect of the Services and includes the Project Proposal and these general terms;

**Commencement Date** means the date that you first instruct and/or engage BDL to provide the Services;

**Contract Fee** means the contract fee payable by you to BDL in accordance with this Agreement, as set out in the Project Proposal;

**Delivery Date(s)** means the date for delivery of the Services as set out in the Project Proposal and/or as otherwise advised to you by BDL from time to time;

**IP** means all intellectual property rights and interests, including (without limitation) all statutory, common law and proprietary rights in respect of copyright works, designs, inventions, patents, trade marks, brands, logos, layout designs, know how and other confidential information; and

(a) **BDL's IP** means all IP owned by BDL, or licensed by a third party (other than you) to BDL, as at the Commencement Date and all modifications, adaptations or developments made to, or based on, such IP (whether made by BDL or otherwise) created or developed in connection with the Services, but which does not include the Service Information;

(b) **Existing IP** means all IP that is owned by or licensed to you as at the Commencement Date and all modifications, adaptations or developments to such IP made by or on behalf of you (including by BDL) in connection with the Services;

**Party** means you and/or BDL (as the case may be);

**Payment Date** means the date set out or otherwise described in an invoice issued to you by BDL under this Agreement;

**Product** means any product, software, design or any other thing created or otherwise developed by BDL at your request and as a result of providing the Services;

**Project Proposal** means the written proposal provided to you by BDL (in whatever form), in respect of Services to be provided by BDL;

**Service Information** means all new IP and any Products in whatever form or format (including all supporting data) created or otherwise developed by BDL at your request and as a result of providing the Services; and

**Services** means the design, software and other services to be provided to you by BDL under the terms of this Agreement, including (without limitation) any such services described in the Project Proposal and (as the context may require) any Product.

## 2. PROVISION OF SERVICES

2.1 **Provision of Services:** In consideration of you paying the Contract Fee, BDL will provide you with the Services on the terms and conditions set out in this Agreement.

2.2 **Standard:** BDL will provide the Services in a professional and competent manner.

2.3 **Delivery Dates:** BDL will use reasonable endeavours to provide the Services by the relevant Delivery Dates. A Delivery Date will automatically be postponed by a reasonable period if any delay or failure to meet a Delivery Date is directly or indirectly caused by or results from:

- (a) BDL being required to provide the Services in circumstances other than those reasonably anticipated as at the Commencement Date;
- (b) any act or omission by you and/or any breach of this Agreement by you; or
- (c) the occurrence of an Unforeseen Event (as defined in clause 8.1).

2.4 **Change Request:** You may request a change to the nature and/or scope of the Services from time to time by submitting a written request (a **Change Request**) to BDL. A Change Request will include a description of the change proposed and the reason for the change.

2.5 **Acceptance and Amended Terms:** Upon receipt of a Change Request, BDL will assess the Change Request and BDL will promptly notify you in writing:

- (a) of the feasibility of the change;
- (b) whether it agrees to the Change Request (such agreement to be given or withheld at BDL's sole discretion); and
- (c) any required amendment to any other aspect of the Services, the Contract Fee and/or the Delivery Dates (the **Amended Terms**).

If BDL agrees to the Change Request in the manner contemplated above and you agree to proceed with the requested change on the Amended Terms advised by BDL, this Agreement will be deemed to be varied to the extent necessary to take account of the Change Request and the Amended Terms.

For the avoidance of doubt, the submission of any Change Request will not alter the validity of this Agreement (in its then current form) or affect the Parties' rights and obligations under this Agreement until such time that BDL agrees to the Change Request in the manner contemplated above and you decide to proceed with the requested change on the Amended Terms.

### 3. YOUR OBLIGATIONS

3.1 **Your obligations:** You will, at your own cost:

- (a) submit all information, project briefs, materials, documents, photographs, images, and/or any other item or information which may be relevant to the Services, as BDL may reasonably require from time to time to enable BDL to undertake and perform the Services and otherwise fulfil its obligations under this Agreement;
- (b) promptly respond to all requests made by BDL for instructions; and
- (c) fully cooperate with BDL to enable BDL to undertake and perform the Services.

### 4. REMUNERATION AND PAYMENT

4.1 **Invoices:** Unless BDL otherwise agrees, or as otherwise provided in a Project Proposal, BDL will invoice you for work done to date on the last day of each month until the project is completed. Invoices will be for the Contract Fee and all other costs and expenses payable by you under this Agreement. All invoices are payable within 15 days from the date of the invoice.

4.2 **Remuneration:** Upon receipt of an invoice from BDL, you will pay to BDL the full amount stated in such invoice without setoff or deduction on the relevant Payment Date(s). You acknowledge that payment on time is essential to BDL.

4.3 **Goods and Services Tax (GST):** Unless expressly stated, amounts stated in and payable under this Agreement do not include any GST. Each such amount must be increased for GST and is payable by you.

4.4 **Expenses:** Unless otherwise agreed by BDL, the Contract Fee does not include out-of-pocket expenses incurred in respect of the Services, which will be charged to and payable by you in addition to the Contract Fee.

4.5 **Variation:** BDL will be entitled to vary the Contract Fee if any of the circumstances described in clause 2.3 occur or otherwise in accordance with clause 2.5, provided that the relevant circumstances do not directly result from any breach of this Agreement by BDL.

4.6 **Deduction:** BDL will be entitled to deduct any amount that you owe to BDL from any amount that BDL may owe to you (for whatever reason).

4.7 **Payment default:** If you default in any of your payment obligations under this Agreement, you will also pay to BDL on demand:

- (a) all costs of recovery incurred by BDL, including (without limitation) its legal expenses on a solicitor and own client basis; and
- (b) interest on the amount(s) in default, calculated at 5% above BDL's overdraft rate charged by its primary bank at the relevant time(s) calculated from the due date for payment until the date payment is made to and received by BDL in full.

## 5. INTELLECTUAL PROPERTY

- 5.1 **Existing IP:** All Existing IP will be and will remain your or your licensor's property, and BDL will not:
- (a) obtain any right, title or interest in the Existing IP or any part of it; and
  - (b) at any time contest or dispute your ownership of or right to use the Existing IP.
- 5.2 **BDL's IP:** All BDL's IP will be and will remain the property of BDL, and you will not:
- (a) obtain any right, title or interest in BDL's IP or any part of it; and
  - (b) at any time contest or dispute BDL's ownership of or right to use BDL's IP.
- 5.3 **Service Information:** Subject to compliance by you with the terms of this Agreement including payment of the Contract Fee, BDL grants you a limited, perpetual, non-exclusive, royalty free, right and license to use the Service Information for all foreseeable commercial purposes.
- 5.4 **New IP:** BDL owns and retains all right, title and interest in and will be free to use all new IP used or created in performing the Services, including (without limitation) concepts, ideas, templates, documentation, mock ups, methodologies, processes, systems, software or development tools.
- 5.5 **Credits:** You acknowledge and agree that where the Product is not of a confidential nature or otherwise with your prior consent, BDL may use all or any part of the Product (or any image or reproduction of it) for the purposes of marketing, advertising and/or publicising BDL's services in any media.

## 6. LIABILITY AND INDEMNITY

- 6.1 **Materials:** BDL will use its reasonable endeavours to keep all the information, materials, documents, photographs, images and/or any other thing provided by you to BDL under this Agreement (**Materials**) free from loss, harm or damage, provided that under no circumstances will BDL be liable for any loss, harm or damage that may arise in respect of such Materials. You will be responsible for insuring all Materials against all loss, harm and damage notwithstanding that they may be in BDL's possession at the time that such loss, harm or damage may arise.
- 6.2 **Consumer Guarantees Act 1993 (the Act):** You acknowledge that you are acquiring the Services for business purposes and agree that, to the fullest extent permitted by law the Act will not apply to the provision of any Services (and/or any Products supplied) by BDL to you under this Agreement.
- 6.3 **Other representations and warranties:** You acknowledge and agree that, to the fullest extent permitted by law, all representations and warranties in respect of the Services and/or any Product (whether express, implied by law or otherwise) by or from BDL or its officers, employees, agents, contractors, representatives or advisers are excluded, including (without limitation) any implied warranties in relation to quality, fitness for purpose or merchantability.

- 6.4 **No consequential damages:** To the fullest extent permitted by law, under no circumstances will BDL or its officers, employees, agents, contractors, representatives or advisers, be liable to you and/or any other person for any loss of profits, loss of income, indirect loss, special or consequential losses, damages, liabilities, costs and/or expenses sustained, suffered and/or incurred by you and/or any other person as a result of any direct or indirect breach of this Agreement by BDL or its officers, employees, agents, contractors, representatives or advisers.
- 6.5 **Product liability:** To the fullest extent permitted by law, under no circumstances will Born Digital Limited or its officers, employees, agents, contractors, representatives or advisers, be liable for any loss or damage whether direct or indirect, including (without limitation) any economic loss or loss of profit, arising out of the manufacture, use or sale by you (or your agents or customers) of any Product or items incorporating Product.
- 6.6 **Liability for loss, harm or damage:** To the fullest extent permitted by law, under no circumstances will BDL or its officers, employees, agents, contractors, representatives or advisers, be liable for any loss, harm or damage to any information, materials, documents, photographs, images, and/or any other thing provided by you to BDL or its officers, employees, agents, contractors, representatives or advisers under or as a result of this Agreement.
- 6.7 **Maximum liability:** To the fullest extent permitted by law, under no circumstances will BDL's liability, and that of its officers, employees, agents, contractors, representatives and advisers, under or in connection with this Agreement exceed in aggregate the total Contract Fee paid by you to BDL under this Agreement.

## 7. TERMINATION

- 7.1 **Termination by you:** Unless otherwise stated in the Project Proposal or agreed between you and BDL, you may terminate this Agreement at any time by:
- (a) giving BDL no less than 30 days' prior written notice; and
  - (b) paying BDL the Contract Fee for the Services provided up to the date of termination together with all incidental and associated costs of early termination, including (without limitation) BDL's costs of terminating subcontracting arrangements and other pre-incurred costs due to other persons.
- 7.2 **Termination by BDL:** BDL may immediately terminate this Agreement by written notice to you if:
- (a) you fail to comply with any material obligation imposed on you under this Agreement and such failure continues for 10 business days after the date written notice has been provided to you by BDL requiring the failure to be remedied; or
  - (b) you:
    - (i) go into liquidation (other than a voluntary liquidation for the purposes of a solvent reconstruction or amalgamation) or are bankrupted;

- (ii) are wound up or dissolved;
- (iii) make or attempt to make any composition, assignment or other arrangement with, or for the benefit of, your creditors; or
- (iv) have a receiver, manager or other administrator appointed in respect of any or all of your assets or business.

7.3 **Termination for Unforeseen Event:** Either party may immediately terminate this Agreement if an Unforeseen Event (as defined in clause 8.1) prevents BDL from performing the Services for more than 60 consecutive days.

7.4 **Prior breaches:** Any termination of this Agreement will be without prejudice to the rights either party may have against the other in respect of any prior breach of any of the provisions contained or implied in this Agreement.

7.5 **Suspension:** If you fail to comply with any of your obligations under this Agreement, BDL may (at its sole discretion) suspend the provision of the Services until that breach has been remedied.

7.6 **Termination without prejudice:** Termination of this Agreement (for any reason) will be without prejudice to those provisions of this Agreement that are intended to survive termination, including (without limitation) this clause 7.6 and clauses 5, 6, 7.7, 9, 11.8 and 11.9.

7.7 **Consequences of termination:** Upon termination of this Agreement (for any reason) you will pay to BDL all amounts due and owing by you under this Agreement in full and without setoff or deduction.

## 8. UNFORESEEN EVENT

8.1 **Unforeseen Event:** Under no circumstances will BDL be liable for any failure or delay in complying with any of its obligations under this Agreement if the failure or delay arises from a cause or an event beyond its reasonable control (**Unforeseen Event**). BDL will use its reasonable endeavours to perform such obligations despite the Unforeseen Event. Subject to clause 7.3, performance under this Agreement will resume, as soon as possible and to the greatest extent possible, following the Unforeseen Event coming to an end.

## 9. CONFIDENTIALITY

9.1 **Confidentiality:** Each party will keep confidential the terms of this Agreement (in particular the Project Proposal) and any other confidential information of the other party.

9.2 **Exclusions:** The confidentiality obligations set out in clause 9.1 will not apply to the extent that:

- (a) the consent of the other party has been obtained in relation to the relevant disclosure;

- (b) such confidential information has become public knowledge, or is already in the public domain, other than as a result of any unauthorised disclosure by a party or its officers, employees, agents, contractors, representatives or advisers;
- (c) such disclosure is required by law or court order or regulatory authority having jurisdiction over a party; and/or
- (d) the disclosure is reasonably required by a party to perform its obligation(s) arising under this Agreement.

## 10. NOTICE AND DELIVERY

- 10.1 **Notices:** Any notice given under this Agreement will be in writing and addressed to the party to whom it is to be sent at the address set out in this Agreement or otherwise designated from time to time by that party in writing to the other party. Delivery of such notice may be effected by hand, by post or airmail with postage prepaid, or by email.
- 10.2 **Deemed receipt:** Any notice given under this Agreement will be deemed to have been received:
  - (a) if delivered by hand, at the time of delivery;
  - (b) if sent by post, on the third business day after the date of mailing; and
  - (c) if delivered by email, on the business day the email is sent, provided that the email was correctly addressed to the address provided by the addressee for the receipt of email and no error message was received by the information system used by the sender to send such email. If any notice given under this Agreement is not given on a business day, or is given after 5:00pm on the day concerned in the place in which it is given, the notice will be deemed not to have been given until 9:00am on the next business day.
- 10.3 **Other modes of service:** The provisions of this clause 10 are in addition to any other mode of service permitted by law.

## 11. GENERAL

- 11.1 **Entire agreement:** This Agreement sets out the entire agreement and understanding between the parties in respect of its subject matter, and supersedes all prior arrangements, undertakings, representations and warranties by or between the parties in relation to the same.
- 11.2 **Variation:** You acknowledge and agree that BDL may (in its sole discretion and without prior consultation with you) vary these general terms from time to time, provided that such variation does not materially alter or frustrate the intent of this Agreement. BDL will use reasonable endeavours to notify you prior to any such change being implemented. The latest version of these general terms is available on request from BDL or on BDL's website [www.borndigital.co.nz](http://www.borndigital.co.nz).
- 11.3 **Severability:** If any provision of this Agreement is, or becomes, unenforceable, illegal or invalid for any reason, the relevant provision will be deemed to be modified to the

extent necessary to remedy such unenforceability, illegality or invalidity, or if this is not possible, then such provision will be severed from this Agreement without affecting the enforceability, legality or validity of any other provision of this Agreement.

- 11.4 **Priority of Documents:** In the event of conflict between these agreed general terms and a Project Proposal, the terms of this Project Proposal shall prevail to the extent required to resolve that conflict.
- 11.5 **No waiver:** No delay, grant of time, release, compromise, forbearance (whether partial or otherwise) or other indulgence by BDL in respect of any breach of your obligation(s) under this Agreement is to:
- (a) operate as a waiver or prevent the subsequent enforcement of such obligation(s); 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.
- 11.6 **Subcontract:** BDL will be entitled to (in its sole discretion) subcontract any person to provide any or all of the Services.
- 11.7 **No assignment:** Subject to clause 11.6, neither party may assign or otherwise transfer or attempt to assign or otherwise transfer any right or obligation arising out of this Agreement without obtaining the prior written consent of the other party.
- 11.8 **Non-solicitation:** You will not, without BDL's prior written consent, directly or indirectly solicit or offer employment to:
- (a) employees of, or individuals contracting to, BDL; or
  - (b) a person who has been an employee of, or individual contracting to, BDL within six months of the date that such person leaves the employment of, or ceases its contract with, BDL, but the above restrictions:
    - (i) do not preclude you from recruiting an employee who has been made redundant, or an employee or a former employee of, or individual contracting to or formerly contracting to, BDL as a result of such employee or individual responding to a media advertisement placed by you; and
    - (ii) cease to apply six months after termination or expiry of this Agreement.
- 11.9 **Dispute resolution:**
- (a) If any dispute arises between the parties relating to this Agreement or any part of it (**Dispute**), either party may notify the other party of the Dispute and both parties will promptly meet to attempt to resolve the Dispute in good faith.
  - (b) If the Dispute remains unresolved after the expiry of 10 business days from the date that notice of the Dispute is first given, either party may refer the Dispute (by written notice to the other party) for mediation by a single mediator agreed between the parties.



- (c) If the parties are unable to agree on the person to be appointed mediator, the mediator will be appointed at the request of either party by the chairperson or any other similar office holder for the time being of the New Zealand chapter of LEADR.
  - (d) Where the Dispute is not resolved within 10 business days of the date of commencement of mediation, either party may terminate the mediation process and initiate court proceedings in relation to the Dispute or any part of it.
  - (e) Subject to any right either party may have to apply to a court for any urgent equitable relief in respect of a Dispute, completion or termination of mediation will be a condition precedent to the commencement of any other form of dispute resolution proceeding, including (without limitation) the initiation of court proceedings, in relation to the Dispute or any part of it.
- 11.10 **Construction:** This Agreement will not be construed adversely in respect of a party solely because that party prepared or procured the preparation of this Agreement.
- 11.11 **Further assurances:** Both parties will take all steps necessary to give full effect to this Agreement, including (without limitation) executing such further documents and doing such further acts as may be necessary or desirable to implement the terms of this Agreement.
- 11.12 **Governing Law:** This Agreement is governed by New Zealand law and the parties agree to submit to the exclusive jurisdiction of the New Zealand courts.