

Terms of Service: New Zealand

UPDATED JANUARY 2018

1. Introduction

These terms apply to all Services that we (SiteSmart Digital) provide to you any time, whether now or in the future. In the case of conflict between these terms and the provisions in any other agreements or documents relating to the Services, these terms shall apply and shall be paramount and supersede the conflicting provisions.

2. Services

We may provide you with the following Services:

i. Design, Development, Reporting, Testing, and Marketing Services

- a. We shall provide you with a Quotation detailing proposed Services.
- b. You agree to make information and resources available to us in a timely manner so that we can also fulfil our obligations to you under the Quotation in a timely manner.
- c. We will use our reasonable endeavours to deliver the Services to you in accordance with the Quotation.
- d. The Quotation is based upon information that you provide to us. Therefore, you must make sure that you fully brief us on all matters. If you do not, the cost of the Quotation may change (see clause 3.i).
- e. When the Quotation is agreed in writing by you it shall be deemed to be a complete statement of all of your requirements.

ii. Hosting Services

- a. We may provide Hosting Services as outlined in the Quotation.
- b. We will aim to provide you with consistent and reliable Hosting Services. We use professional hosting facilities but we are dependent on services provided by our Carriers and cannot guarantee there will be no interruptions to our Hosting Services. When access to your Website is disrupted, we will use our reasonable

endeavours to reinstate the Hosting Services as soon as possible. We employ a variety of monitoring systems to detect major interruptions to service.

- c. We will deliver the Hosting Services to you in whatever way we deem to be most appropriate. We can at our sole discretion (and at any time) choose or change Carriers and/or any other suppliers.
- d. You may choose to change the Hosting Services by requesting the change in writing and we will action your request as soon as we are reasonably able to. Any change to the Charges for the Hosting Services will take effect on the day we notify you that the changed Hosting Services are available for your use. If you change your Hosting Services it is up to you to check what, if any, special terms and conditions may apply to the new Hosting Services or if there is any fee for changing the Hosting Services.

iii. Support Services

Support requests must be submitted by email to support@sitesmart.co.nz. Support requests will be responded to within 48 hours (unless a Service Level Agreement applies that defines an alternative or urgent support function). Standard rates and charges will apply to any support requests submitted.

iv. Consultancy Services

The provision of, and the cost for any Consultancy Services shall be as agreed by both parties in writing and a deposit may be required before work can proceed.

3. Changes

Sometimes projects require changes which weren't expected at the outset or you may request changes to the Services. This can involve a change in cost to you. If this happens, we will agree upon a written variation (including, if necessary, a price variation) to the Services ("Change Specification"). If we cannot agree on a variation (including the price of the variation), the Services will continue in accordance with the original Quotation.

4. Warranties

- i. We warrant that we will provide all our Services with the care and skill that can be expected from a competent website designer, developer and hosting service provider.

- ii. Except as mentioned above, all conditions and warranties, express or implied, are excluded to the maximum allowed by law. In particular, we do not warrant that the Services (if any) will:
 - a. be completely free of defect or error; or
 - b. be completely secure; or
 - c. comply with all internet browsers, devices, operating systems and screen resolutions.
- iii. We support technologies for browsers, devices and computer settings current at the time of development. We accept no responsibility if, due to technology changes or otherwise, a project or service is no longer able to be maintained, accessed, or used as expected.
- iv. Also, if we recommend that you use someone else's products or services in conjunction with the Services, you agree that we will have no liability (however arising) in respect of such products or services or the provision of such products and services to you. For the avoidance of doubt, this includes the use of any automatic credit card transaction process facility or payment gateway.
- v. You agree that to the extent that the Services are purchased by you for the purpose of your business, the provisions of the Consumer Guarantees Act 1993 do not apply.

5. Your Responsibilities

- i. When we have, or are going to, supply you with Services, it is your responsibility to:
 - a. promptly provide, all the information, assistance and approvals that we may reasonably require;
 - b. maintain backup data necessary to replace any of your data that is lost or damaged from any cause;
 - c. obtain, and if required pay for, any consents and licenses required for us to incorporate third party materials in the website; and
 - d. follow any instructions provided by us in respect of the Website and/or the Services and ensure that your employees, agents and contractors who uses the Website and the Services also meet your responsibilities under this Agreement when using the Website and/or the Services;
 - e. keep strictly confidential any password and log-on we give you for access to the administration features.
- ii. You confirm that all data, images, software and other information you supply to us or place on your Website ("Your Materials"):
 - a. are complete and accurate and not likely to mislead or deceive or cause damage to the reputation of any person or company; and
 - b. will not cause us to infringe upon any person's Intellectual Property or patent, registered design, or trademark in the execution of your order and you agree to

- indemnify us against any action taken by a third party against us in respect of any such infringement; and
- c. are not offensive, harmful, upsetting, unlawful, or otherwise objectionable. For the avoidance of doubt, this includes complying with the Film, Videos and Publications Classification Act 1993.
- iii. You agree that you will not, either on your own account or as a consultant, partner, agent, contractor, corporate trustee, shareholder or member of any other person or entity, induce, or attempt to induce, any employee, contractor or licensee of ours to terminate his or her employment or relationship with us.

6. Intellectual Property

- i. You acknowledge that SiteSmart is the owner of processes, inventions, data, knowhow, software and material, as well as the Intellectual Property Rights therein, which are created by us and which may be made available to you in connection with this Service or Project.
- ii. You acknowledge that the tools, libraries, files, and software used in the provision of Services are the exclusive property of SiteSmart.

7. Liability

- i. We will not be liable to you, or any third party, for any:
 - a. loss or damage to information or data from any cause,
 - b. breach of security;
 - c. loss of profit; or
 - d. incidental, indirect, special or consequential loss or damage.
- ii. In any event, the maximum aggregate liability of SiteSmart to you arising out of any claim for loss and/or damages (for any cause whatsoever) will under no circumstances exceed an amount equal to the total charges paid by you under the relevant Quotation in the 12 month period immediately preceding the event giving rise to liability.
- iii. The limitations and exclusions of liability in this clause 7 shall apply however liability arises, whether in contract, tort (including negligence), breach of statutory duty or otherwise.

- iv. Sometimes we will not be able to fulfil our responsibilities through no fault of our own. Therefore, we are not responsible for any failure or delay to perform our obligations due to events beyond our reasonable control or failure by you to perform any of your responsibilities under these Terms.
- v. You agree that we should not be exposed to your business and operational risks and so you agree:
 - a. that we will not be liable for the results you achieve from your use of the Services, including any loss of profits, costs or damages related to products or services that you sell, or are unable to sell; and
 - b. to indemnify us against any third party claims, damages, liabilities, costs and expenses arising out of the conduct of your business, including your use of the Services and the Website.

8. Payment

- i. Standard Payment Terms: You agree to pay the Charges for:
 - a. any deposit specified upon acceptance;
 - b. all Services as specified and in the manner provided;
 - c. all Hosting and Maintenance Services on a monthly basis as required; and
 - d. early Termination Fees if applicable Services are terminated prior to the end of any Minimum Term:
 - i. by you other than as permitted in clause 12; or
 - ii. by us in accordance with clause 12.
- ii. All Charges are in New Zealand dollars and are exclusive of all taxes and duties.
- iii. Unless otherwise agreed, you agree to pay all invoices within 14 days of the invoice date. You shall not be entitled to set off against, or deduct from the Charges, any sums owed or claimed to be owed to you by us nor to withhold payment of any invoice because part of that invoice is in dispute.
- iv. If you do not pay the Charges on time we may, at our option do any or all of the following:
 - a. Allow a grace period of a further 7 days for payment to be received, after which time we may:
 - b. suspend or restrict your use of the Services;
 - c. terminate the relevant Services in accordance with clause 12;

- d. refer your account to our debt collection agency;
- e. charge you all collection costs incurred by us, and you agree to indemnify us from and against all costs and disbursements incurred by us in recovering the unpaid charges (including but not limited to internal administration fees, legal costs on a solicitor and own client basis, our collection agency costs, and bank dishonour fees);
- f. charge you default interest from the date when payment became due, until the actual date of payment of all amounts owing (including default interest), at a rate of two percent (2%) per calendar month (which shall at our sole discretion compound monthly at such a rate) after as well as before any judgement.

9. Privacy Act 1993

- i. You authorise us to:
 - a. access, collect, retain and use any information about you;
 - i. (including any overdue fines balance information held by the Ministry of Justice) for the purpose of assessing your creditworthiness;
 - ii. for the purpose of meeting our obligations and enforcing our rights under this Agreement and the Terms of Reference; or
 - iii. for the purpose of marketing products and services to you.
 - b. disclose information about you, whether collected by us from you directly or obtained by us 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 you.
 - c. with the exception of any Confidential Information, exchange the information we hold about you with our contractors, agents, representatives and Carriers for the purpose of meeting our obligations under this Agreement and the Terms of Reference.
 - d. Monitor and record calls you make to us or we make to you in order to improve the service we provide to you and to assist us with meeting our obligations to you.
 - ii. Where you are an individual the authorities under clause 9i are authorities or consents for the purposes of the Privacy Act 1993.
 - iii. You shall have the right to request us for a copy of the information about you retained by us and the right to request us to correct any incorrect information about you held by us.
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10. Confidential Information

- i. Each party will keep all information about the Proposal, the Quotation, the Services, and other information that is confidential to the other party ("Confidential Information") confidential and will not disclose this information to a third party without the consent of the other party. Each party shall ensure that its employees, subcontractors, professional advisors and agents abide by these obligations of confidentiality.
- ii. Unless we agree otherwise in writing, we will each use any Confidential Information belonging to the other party only for the purposes of fulfilling our obligations to each other under the Terms of Reference and as permitted in these Terms.
- iii. Confidential Information does not include information clearly required to be disclosed by law; or is generally known and available without a party having breached its obligations under this clause 10; or is, or has been, independently and lawfully acquired or developed without the benefit or use of the other party's Confidential Information.

11. Suspension of Services

- i. We may suspend the provision of the Services to you:
 - a. if you do not meet all of your responsibilities under this Agreement, provided we give you 7 days' notice of such suspension.
 - b. if a Carrier supplying services to us suspends or interrupts its service to us and that suspension or interruption affects our ability to provide the Services to you.
 - c. in an emergency or whenever we, any Carrier, or any other appropriate person considers that it is necessary or reasonable to protect persons, systems or other property.
- ii. We may remove material from or block access to your Website where we have received a notice of infringement under section 92C of the Copyright Act 1994 or any similar legislation in any other jurisdiction. You agree that we shall have no liability to you in respect of any loss (including loss of profit), cost or damage suffered or incurred by you as a result of such action.

- iii. Unless we otherwise agree, the Charges will continue to apply where we have suspended the Services or blocked access to your Website under this clause.

12. Termination

- i. Either of us may terminate Services (including the Hosting Services) by providing written notice to the other party if the other party has either:
 - a. been placed in receivership or liquidation, or entered into an arrangement or makes an assignment for the benefit of its creditors, or has become insolvent or bankrupt; or
 - b. breached these Terms and failed to remedy such breach after being given written notice allowing at least 30 days to remedy the breach.
- ii. If you have agreed to a Minimum Term in a Quotation, you may not terminate those Services (other than as specified in clause 12.i) until that Minimum Term is completed. You may otherwise terminate Services by providing us with one month's written notice at any time.
- iii. We may terminate Services on the occurrence of any of the following events:
 - a. if you have not paid any charges within 14 days of the due date for payment, with the exception of any amounts that are the subject of a genuine dispute and which you have previously notified us in writing as being in dispute; or
 - b. if in our reasonable opinion, you are using the Services for any unlawful abusive, or fraudulent purpose; or
 - c. if you fail to comply with a legal requirement of any of our Carriers concerning your use of the Services.
 - d. if you commit a material breach of this Agreement or any other Agreement between us, when the breach is not reasonably capable of being remedied.
- iv. We may terminate Services without cause by notice in writing to you at any time. If we exercise our rights under this clause we will promptly repay to you the remainder of any deposit prepaid for work due to be completed after the termination date.
- v. Upon termination:
 - a. any amounts owing by you to us under the Quotation and these Terms must be paid immediately (including, without limitation, any applicable Early Termination Fee); and

- b. subject to clause 12.v, we may be regarded as discharged from any further obligations.
- vi. Termination or cancellation of Services shall not relieve either party from any right, liability, or claim that has accrued on or before the date of termination or cancellation. The provisions of clauses 6, 7, 8, 9, 10, 12 and 13 of these Terms will survive termination or cancellation of Services.

13. Marketing

- i. You agree that we may:
 - a. List details of the Project and/or Services on our marketing materials, including on our website; and
 - b. from time to time, we may send you e-mails with articles and information about our organisation and products and services that we think may be of interest to you. You may elect not to receive such e-mails at any time by clicking the 'unsubscribe' link at the bottom of those e-mails.

14. Variation of Terms

We may amend or replace these Terms from time to time. The amended or replacement Terms ("Amended Terms") will then apply to the Services. We will tell you about any changes at least 30 days before they come into effect by notifying you by e-mail of the Amended Terms. If you object to the Amended Terms, you may terminate Services by providing us with one month's written notice. You will be taken to have accepted the Amended Terms if you make a further request of us to provide Services to you or if you continue to make use of our Services and do not give us any notice to terminate this Agreement.

15. Miscellaneous

- i. You agree that, with the exception of urgent interlocutory relief in respect of use of confidential information or intellectual property in breach of this Agreement, both of us will attempt to resolve any dispute under this Agreement by negotiating in good faith for at least 14 days.
- ii. The failure by us to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect our right to subsequently enforce that provision. If any provision of these Terms shall be invalid, void, illegal or unenforceable the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or

impaired.

- iii. If any of your address details change, you agree to promptly provide us with your new address and contact details. We will send you notices and other communications to the last known address, fax number or email address you have given to us.
- iv. You warrant that you have the power to accept these Terms and have obtained all necessary authorisation to allow you do so, that you are not insolvent and that this acceptance creates binding and valid legal obligations on you.
- v. You may not assign any rights or obligations under these Terms without our prior written consent. We may sub-contract any of our obligations under this Agreement, but in so doing, will not be relieved of any liability to you under this Agreement.
- vi. We may decline your application for the Services (and/or any request for Additional Services) at our discretion and we do not have to disclose our credit criteria or the reasons for our decision.
- vii. These terms and conditions and any contract to which they apply shall be governed by the laws of New Zealand and are subject to the exclusive jurisdiction of the Courts of New Zealand.

16. Definitions

“Additional Services” means any additional services (not being Hosting or Website Design, Consulting and Marketing Services) that we agree to provide to you.

“Charges” means all charges payable by you to us for the Services you have agreed to in the Quotation. The Charges include amounts payable under any Change Specification or for Additional Services)

“Carriers” means is any entity with whom we have entered into an agreement or arrangement (directly or indirectly) providing for the passing of customer generated or customer destined internet traffic between us and that entity.

“Change Specification” has the meaning given in clause 3.i.

“Content Material” means all written copy, illustrations, diagrams, photographs or other materials provided to you as part of the Content Services.

“Content Services” means any copywriting, illustration, photography, or other services to provide Content Material for the Website as selected by you in a Terms of Reference and provided by, or on behalf of us, as

part of the Website Design, Consulting and Marketing Services. The particulars and specifications of the Content Services are described in the relevant Product Brochures for those services.

“Early Termination Fee” means the sum of the following equation:

(Cost of Services/Minimum Term) X number of months elapsed in Minimum Term

where the ‘Cost of Services’ is the sum of the list prices for each Service terminated before the end of the Minimum Term times a multiplier of 1.4

“Hosting Services” means the ongoing hosting and the support Services agreed by you in a Quotation and to be provided by us to:

1. place the Website on the computer server(s) in order that you and others may use the Website;
2. provide password restricted access for you to use and administer the Website;
3. allow storage of information received by you or from the general public on such server(s); and
4. support and enhance your use and operation of the Website.

“Intellectual Property” means all intellectual property as defined in article 2 of the Convention Establishing the World Intellectual Property Organisation of 1967 and, without limitation, includes any discovery, invention, novel or original designs (whether or not registrable as designs or patents), any trade marks or trade names or goodwill rights associated with such marks, applications for any of the foregoing, the copyright in any software, drawings, plans, specifications, designs, know-how and trade secrets owned or used, secret process or improvement in procedure.

“Minimum Term” means a fixed term of Service provision outlined in a Quotation.

“Monthly Service Fee” means the fee paid by you to us for Hosting and Maintenance Services.

“Services” means any service we provide, including Website Design, Website Development, Advice, Consulting, Testing, Reporting and Marketing Services, the Hosting and Maintenance Services and the Additional Services as described in clause 2.

“Quotation” means:

- a. the written outline of required Services, specifications, timings and prices provided by us; and
- b. each agreed Change Specification (if any); and
- c. supporting documentation such as a proposal, design mockup, or additional terms.

“we” or **“us”** means SiteSmart NZ and **“our”** has a corresponding meaning.

“Website” means the website we create for you as part of our Services.

“you” means the client under these Terms and **“your”** has a corresponding meaning.