

BACKGROUND:

Marketing Smartly Ltd (Mark-Smart) known as “The Service Provider” provides marketing services to business clients. These Terms and Conditions shall apply to the provision of services by the Service Provider to its clients.

1. Definitions and Interpretation

1.1. In these Terms and Conditions, unless the context otherwise requires, the following expressions have the following meanings:

- “Proposal” means the agreement entered into by the Service Provider and the Client which shall govern provision of the Services;
- “Business Day” means, any day (other than Saturday or Sunday) on which ordinary banks are open for their full range of normal business in the UK
- “Client” means the party procuring the Services from the Service Provider who shall be identified in the Agreement;
- “Commencement Date” means the date on which provision of the Services will commence, as defined in the Agreement;
- “Confidential Information” means, in relation to either Party, information which is disclosed or made available to that Party by the other Party pursuant to or in connection with the Agreement relating to the business and/or affairs of either party to include information relating to (including the identity) the clients of either party. (whether orally or in writing or any other medium, and whether or not the information is expressly stated to be confidential or marked as such);
- “Data Protection Legislation” up to but excluding 25 May 2018, the Data Protection Act 1998 and thereafter (i) unless and until the GDPR is no longer directly applicable in the UK, the GDPR and any national implementing laws, regulations and secondary legislation, as amended or updated from time to time, in the UK and then (ii) any successor legislation to the GDPR or the Data Protection Act 1998;
- “Fees” means any and all sums due under the Agreement from the Client to the Service Provider, as specified in the Agreement;
- “GDPR” General Data Protection Regulation ((EU) 2016/679).
- “Personal Data” means any information relating to an identified or identifiable natural person (‘Data Subject’); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.
- “Services” means the services to be provided by the Service Provider to the Client in accordance with the Agreement, as fully defined in the Agreement
- “Term” means the term of the Agreement as defined therein.

1.2. Unless the context otherwise requires, each reference in these Terms and Conditions to:

- 1.2.1. “writing”, and any cognate expression, includes a reference to any communication effected by electronic or facsimile transmission or similar means;
- 1.2.2. a statute or a provision of a statute is a reference to that statute or provision as amended or re-enacted at the relevant time;
- 1.2.3. “these Terms and Conditions” is a reference to these Terms and Conditions as amended or supplemented at the relevant time;
- 1.2.4. a Clause or paragraph is a reference to a Clause of these Terms and Conditions or to a Clause of the Agreement, as appropriate; and
- 1.2.5. a “Party” or the “Parties” refer to the parties to the Agreement.

1.3. Words imparting the singular number shall include the plural and vice versa.

1.4. References to any gender shall include the other gender.

1.5. References to persons shall include corporations.

2. Acceptance of the Proposal

2.1. The Service Provider shall provide a Proposal to the Client for each project. The Proposal forms part of the agreement.

2.2. The Client assumes sole responsibility for ensuring that the Service described in the Proposal meets its requirements before agreeing to the Proposal.

2.3. The Client shall agree to the Proposal / Agreement by confirming in writing via letter or email. Upon receipt of this order acknowledgement, the agreement will begin.

2.4. By purchasing the Service, the Client acknowledges that it has read these Terms and Conditions, understands them, and agrees to be bound by them.

3. Provision of the Services

3.1. With effect from the Commencement Date, the Service Provider shall, throughout the Term of the Agreement, provide the Services to the Client.

3.2. The Service Provider shall provide the Services with reasonable skill and care, commensurate with prevailing standards in the marketing sector in the United Kingdom.

3.3. The Service Provider shall act in accordance with all reasonable instructions given to it by the Client provided such instructions are compatible with the specification of Services provided in the Agreement.

3.4. The Service Provider shall be responsible for ensuring that it complies with all statutes, regulations, byelaws, standards, codes of conduct and any other rules relevant to the provision of the Services.

3.5. The Service Provider may, in relation to certain specified matters related to the Services, act on the Client’s behalf. Such matters shall not be set out in the Agreement but shall be agreed in writing between the Parties as they arise from time to time.

3.6. The Service Provider shall use all reasonable endeavours to accommodate any reasonable changes in the Services that may be requested by the Client, subject

to the Client's acceptance of any related reasonable changes to the Fees that may be due as a result of such changes.

4. Client's Obligations

4.1. The Client shall use all reasonable endeavours to provide all pertinent information to the Service Provider that is necessary for the Service Provider's provision of the Services.

4.2. The Client may, from time to time, issue reasonable instructions to the Service Provider in relation to the Service Provider's provision of the Services. Any such instructions should be compatible with the specification of the Services provided in the Agreement.

4.3. In the event that the Service Provider requires the decision, approval, consent or any other communication from the Client in order to continue with the provision of the Services or any part thereof at any time, the Client shall provide the same in a reasonable and timely manner.

4.4. If any consents, licences or other permissions are needed from any third parties it shall be the Client's responsibility to obtain the same in advance of the provision of the Services (or the relevant part thereof). The Service Provider shall promptly notify the Client if it becomes aware of the need for the client to obtain any consent, licence or permission relevant to the Services or otherwise.

4.5. Any delay in the provision of the Services resulting from the Client's failure or delay in complying with any of the provisions of the Agreement shall not be the responsibility or fault of the Service Provider.

5. Fees, Payment and Records

5.1. For printing and physical goods, unless otherwise stated in the Proposal, the Purchase Price shall be payable to the Service Provider on receipt of the order acknowledgement.

5.2. For retained work billed monthly, unless otherwise stated in the Proposal, the agreed monthly element of the Purchase Price shall be payable in full to the Service Provider within 14 days of the invoice date. Charges for Services provided on the basis of a Retainer will be payable monthly in advance. The Proposal cost is fixed whether the stated hours are used or not. If the hours worked are considerably more than what the Proposal states these hours are calculated in accordance with Mark-Smarts standard daily/hourly fee rates, as stated in the Proposal which may be amended from time to time by Mark-Smart. Mart-Smart has no obligation to give hourly reports of work carried out.

5.3. For single project work such as website development, brochure design, unless otherwise stated in the Proposal, the Purchase Price shall be payable to the Service Provider as follows:

- 5.3.1. 30% non-refundable deposit payable on receipt of agreement in writing to the proposal/agreement; and
- 5.3.2. 30% upon the approval of second design concept or fulfilment of stage 2 of the project
- 5.3.3. 40% upon final completion of product / payment to be made before a Website goes live.

- 5.4. Prior to each payment, the Service Provider shall issue an invoice to the Client. Unless otherwise stated in the Proposal, each invoice is payable as per the terms detailed on the invoice.

5.5. The Service Provider is not obliged to carry out any work related to a proposal before an invoice has been issued and payment has been duly received. In the event that any preliminary work is carried out prior to receipt of the payment and the order is then cancelled, the Service Provider will invoice the Client for this work.

5.6. All payments shall be paid in full without setoff, deduction or counterclaim whatsoever.

5.7. The Service Provider reserves the right to vary the Purchase Price according to further requirements made by the Client subsequent to the agreed Proposal. Any such variation shall be advised by the Service Provider in writing and agreed by the Client in writing before either the work proceeds further or any charges are incurred.

5.8. The Purchase Price, once accepted by both parties as signified by the receipt of a signed Proposal, is applicable for 3 months from the date of signing.

5.9. If payment is not made on the due date, interest may be charged pursuant to the Late Payment Act of Commercial Debts (Interest) Act 1998, to recover interest and all costs involved in recovering outstanding monies.

5.10 The Service Provider shall instruct the services of a third party debt collector should payment arrears exceed 30 days past the due date. Service to the Client shall also be put on hold until any overdue payments are made.

5.11 Annual increase – All our fees will increase each year, on the 1st January, in line with inflation rates. This will be by the higher of 3% or the rate of the official UK RPI increase published by the UK ONS for the 12 month period immediately preceding the date. We will give you not less than [7] days' written notice of such increases.

5.12 Mark-Smart reserves the right to review and adjust their fees, and you will be advised of this with 30 days notice.

6. Liability, Indemnity and Insurance

6.1. The Service Provider shall ensure that it has at all times suitable and valid insurance that shall include appropriate (in scope and amount) public liability and professional indemnity insurance.

6.2. In the event that the Service Provider fails to perform the Services with reasonable care and skill it shall carry out any and all necessary remedial action at no additional cost to the Client.

6.3. The Service Provider's total liability for any loss or damage, costs or expenses (whether direct, indirect or consequential and whether relating to loss of profit, loss of business, business interruption, loss of data, depletion of goodwill or other such losses), caused as a result of its negligence or breach of the Agreement shall be limited to and in no event shall exceed, the greater of amount originally paid to the Service Provider for the Service and the amount of the professional indemnity insurance of the Service Provider.

6.4. The Service Provider shall not be liable for any loss or damage suffered by the Client that results from the Client's failure to follow any reasonable instructions given by the Service Provider.

6.5. Nothing in these Terms and Conditions nor in the Agreement shall limit or exclude the Service Provider's liability for death or personal injury.

6.6. The Client shall be responsible for any reasonable costs, liability, damages, loss, claims or proceedings arising from loss or damage to any equipment (including that belonging to any third parties appointed by the Service Provider) caused by the Client or its agents or employees.

6.7. Where a deliverable includes goods to be received by the Client:

- 6.7.1. The passing of risk shall occur on the day of the delivery to the Client.
- 6.7.2. If goods are received by the Client in any way damaged upon delivery, the Client must advise the Service Provider within 24 hours of delivery (or if appropriate in the circumstances such longer period as is reasonable) of the nature of the damage and must retain the Goods as delivered.
- 6.7.3. The maximum extent of the Service Provider's liability for damaged goods will be, at its sole discretion depending on the circumstances: a return of the Purchase Price related to the goods or replacement of the goods.
- 6.7.4. Goods remain the property of the Service Provider and title remains with the Service Provider until payment has been made in full.

7. Confidentiality

7.1. Each Party undertakes that, except as provided by sub-Clause 7.2 and as permitted in clause 8 or as authorised in writing by the other Party, it shall, at all times during the continuance of the Agreement and for two years after its termination or if longer the period during which the disclosure of specific information is likely to be damaging to the goodwill and reputation of the other party:

- 7.1.1. keep confidential all Confidential Information;
- 7.1.2. not disclose any Confidential Information to any other party;
- 7.1.3. not use any Confidential Information for any purpose other than as contemplated by and subject to the terms of the Agreement;
- 7.1.4. not make any copies of, record in any way or part with possession of any Confidential Information; and
- 7.1.5. ensure that none of its directors, officers, employees, agents, sub-contractors or advisers does any act which, if done by that Party, would be a breach of the provisions of sub-Clauses 7.1.1 to 7.1.4

7.2. Either Party may disclose any Confidential Information to:

- 7.2.1. any sub-contractor or supplier of that Party;
- 7.2.2. any governmental or other authority or regulatory body; or
- 7.2.3. any employee or officer of that Party or of any of the aforementioned persons, parties or bodies;

to such extent only as is necessary for the purposes contemplated by the Agreement (including, but not limited to, the provision of the Services), or as required by law but where such disclosure is made to a sub-contractor or supplier then the party making it shall ensure that the recipient is bound by an equivalent duty of confidentiality and terms no less onerous than the terms herein. But for the avoidance of doubt this shall not make the Service Provider responsible for third parties whom the Service Provider introduces to the Client but whom the Client contracts directly with.

7.3. The Service Provider shall not publicise any details of the services provided to the Client unless it shall have first obtained the written approval of the Client but this shall not prohibit the Service Provider from including in its credentials (during the term of the agreement only) a reference (in clear reasonable terms) to the fact that it is the provider of services to the Client.

8. Data Protection

8.1. Both parties will comply with all applicable requirements of the Data Protection Legislation. This Clause 8 is in addition to, and does not relieve, remove or replace, a party's obligations under the Data Protection Legislation.

8.2. The parties acknowledge that for the purposes of the Data Protection Legislation, the Client is the Data Controller and the Service Provider is the Data Processor (where Data Controller and Data Processor have the meanings as defined in the Data Protection Legislation).

8.3. Without prejudice to the generality of Clause 8.1, the Client will ensure that it has all necessary appropriate consents and notices in place to enable lawful transfer of the Personal Data (as defined in the Data Protection Legislation) to the Service Provider for the duration and purposes of the Agreement.

8.4. Without prejudice to the generality of Clause 8.1, the Service Provider shall, in relation to any Personal Data processed in connection with the performance by the Service Provider of its obligations under the Agreement:

- 8.4.1. process that Personal Data only on the written instructions of the Client unless the Service Provider is required by the laws of any member of the European Economic Area or by the laws of the European Economic Area applicable to the Service Provider to process Personal Data (Applicable Data Processing Laws). Where the Service Provider is relying on laws of a member of the European Economic Area or European Economic Area law as the basis for processing Personal Data, the Service Provider shall promptly notify the Client of this before performing the processing required by the Applicable Data Processing Laws unless those Applicable Data Processing Laws prohibit the Service Provider from so notifying the Client;
- 8.4.2. ensure that it has in place appropriate technical and organisational measures to protect against unauthorised or unlawful processing of Personal Data and against accidental loss or destruction of, or damage to, Personal Data, appropriate to the harm that might result from the unauthorised or unlawful processing or accidental loss, destruction or damage and the nature of the data to be protected, having regard to the state of technological development and the cost of implementing any measures (those measures may include, where appropriate, pseudonymising and encrypting Personal Data, ensuring confidentiality, integrity, availability and resilience of its systems and services, ensuring that availability of and access to Personal

Data can be restored in a timely manner after an incident, and regularly assessing and evaluating the effectiveness of the technical and organisational measures adopted by it);

- 8.4.3. ensure that all personnel who have access to and/or process Personal Data are obliged to keep the Personal Data confidential; and

8.4.4. only transfer Personal Data outside of the European Economic Area with the prior written consent of the Client and only on the condition that:

- 8.4.4.1. the Client or the Service Provider has provided appropriate safeguards in relation to the transfer and the Data Subject (as defined in the Data Protection Legislation) has enforceable rights and effective legal remedies; OR
- 8.4.4.2. If 8.4.4.1 does not apply and there is an absence of an appropriate level of protection within the country to which the Personal Data is transferred, the transfer may only take place if it is necessary for the performance of a contract between the Data Subject and the Client or the conclusion or performance of a contract in the interest of the Data Subject between the Client and the Service Provider or another natural or legal person or if any other derogation under the GDPR applies;

in either case the Service Provider must comply with its obligations under the Data Protection Legislation by providing an adequate level of protection to any Personal Data that is transferred and the Service Provider must comply with reasonable instructions notified to it in advance by the Client with respect to the processing of the Personal Data;

- 8.4.5. assist the Client, at the Client's cost, in responding to any request from a Data Subject and in ensuring compliance with its obligations under the Data Protection Legislation with respect to security, breach notifications, impact assessments and consultations with supervisory authorities or regulators;
- 8.4.6. notify the Client without undue delay on becoming aware of a Personal Data breach;
- 8.4.7. at the written direction of the Client, delete or return Personal Data and copies thereof to the Client on termination of the agreement unless required by Applicable Data Processing Law to store the Personal Data; and
- 8.4.8. maintain complete and accurate records and information to demonstrate its compliance with this Clause 8..

8.5. The Client consents to the Service Provider appointing third-party processors of Personal Data as part of the Services such postal mailing service providers as email service provider Mailchimp and sales and marketing platform Hubspot. The Client acknowledges that such third parties may store Personal Data outside the European Economic Area. The Service Provider confirms that it has entered or (as the case may be) will enter with the third-party processor into a written agreement incorporating terms which are substantially similar to those set out in this Clause 8. As between the Client and the Service Provider, the Service Provider shall remain fully liable for all acts or omissions of any third-party processor appointed by it pursuant to this Clause 8.

8.6. Either party may, at any time on not less than 30 days' notice, revise this Clause 8 by replacing it with any applicable controller to processor standard clauses or similar terms forming part of an applicable certification scheme (which shall apply when replaced by attachment to the Contract).

9. Force Majeure

9.1. No Party to the Agreement shall be liable for any failure or delay in performing their obligations where such failure or delay results from any cause that is beyond the reasonable control of that Party but where such circumstances occur the party seeking to rely upon this provision shall notify the other party as soon as possible and will take all reasonable steps to overcome the problem. If the circumstances continue for a period of 30 days then either party may terminate the Agreement upon giving 30 days notice.

10. Term and Termination

10.1. The Agreement shall come into force on the agreed Commencement Date and shall continue for a defined Term from that date, subject to the provisions of Clause 10.

10.2. The contract may not be cancelled following order acceptance unless a trial or rejection period has been agreed in advance.

10.3. For retained work billed monthly and where no contract period has been explicitly stated on the Proposal, the contract may be terminated by the Client giving 2 months notice in writing.

10.4. Unless otherwise stated in the proposal, the contract may not be cancelled except by agreement in writing of both parties and upon payment to the Service Provider of such amount as may be necessary to meet the reasonable direct costs incurred to the Service Provider up to the date of cancellation.

10.5. The Client shall have no right to seek any cancellation or repayment of job costs on the basis of style or composition. Any changes or amendments to the agreed Proposal will not be agreed without discussion and mutual consent.

10.6. The Service Provider shall not be liable for any loss, damage or delay which arises as a result of the termination of the contract between us, or for our compliance with relevant statutory or regulatory requirements.

11. Effects of Termination

Upon the termination of the Agreement for any reason:

11.1. any sum owing by either Party to the other under any of the provisions of the Agreement shall become immediately due and payable;

11.2. all Clauses which, either expressly or by their nature, relate to the period after the expiry or termination of the Agreement shall remain in full force and effect;

11.3. termination shall not affect or prejudice any right to damages or other remedy which the terminating Party may have in respect of the event giving rise to the termination or any other right to damages or other remedy which any Party may have in respect of any breach of the Agreement which existed at or before the date of termination;

11.4. subject as provided in Clause 11 and except in respect of any accrued rights neither Party shall be under any further obligation to the other; and

11.5. each Party shall (except to the extent referred to in Clause 7) immediately cease to use, either directly or indirectly, any Confidential Information, and shall immediately return to the other Party any documents or data in its possession or control which contain or record any Confidential Information.

12. No Waiver

12.1. No failure or delay by either Party in exercising any of its rights under the Agreement shall be deemed to be a waiver of that right, and no waiver by either Party of a breach of any provision of the Agreement shall be deemed to be a waiver of any subsequent breach of the same or any other provision.

13. Further Assurance

13.1. Each Party shall execute and do all such further deeds, documents and things as may be necessary to carry the provisions of the Agreement into full force and effect.

14. Assignment and Sub-Contracting

14.1. The Service Provider shall be entitled to perform any of the obligations undertaken by it through any other member of its group or through approved and suitably qualified and skilled sub-contractors.

15. Time

15.1. The times and dates referred to in the Agreement shall be for guidance only and shall not be of the essence of the Agreement and may be varied by mutual agreement between the Parties but the Service Provider shall use its reasonable endeavours to comply with any agreed timescales.

16. Relationship of the Parties

16.1. Nothing in the Agreement shall constitute or be deemed to constitute a partnership, joint venture, agency or other fiduciary relationship between the Parties other than the contractual relationship expressly provided for in the Agreement and neither party shall have any authority to represent and bind the other without prior written consent.

17. Non-Solicitation

17.1. Neither Party shall, for the Term of the Agreement and for a period of 12 months, after its termination or expiry, employ or contract the services of any person who is or was employed or otherwise engaged by the other Party at any time in relation to the Agreement without the express written consent of that Party.

17.2. Neither Party shall, for the Term of the Agreement and for a period of 12 months, after its termination or expiry, solicit or entice away from the other Party any customer or client where any such solicitation or enticement would cause damage to the business of that Party without the express written consent of that Party.

18. Third Party Rights

18.1. No part of the Agreement shall confer rights on any third parties and accordingly the Contracts (Rights of Third Parties) Act 1999 shall not apply to the Agreement.

18.2. Subject to Clause 18, the Agreement shall continue and be binding on the transferee, successors and assigns of either Party as required.

19. Compliance and Intellectual Property Rights

19.1. It is the responsibility of the Service Provider to ensure that the deliverables comply with all laws, regulations and codes in the United Kingdom to include but not limited to the provisions of the Data Protection Act 1998 (relating inter alia to the collection storage and handling of personal data) and do not infringe third party rights. But for the avoidance of doubt this shall not apply in circumstances where the Service Provider has merely been asked by the Client to carry out a specific task and where that task is not of the type where the Client would normally look to and expect the Service Provider to have responsibility for legal and regulatory compliance

19.2. Once any work forming part of the service has been paid for, the ownership of the intellectual property rights to the copy, artwork and any imagery created will pass to the Client all other back end aspects of the deliverables from the Service Provider to be enjoyed by the Client (including the right to adapt and modify the same) on a perpetual royalty free licence basis for the purpose for which they were commissioned by the Client. For the avoidance of doubt both during and at any time after the termination of the Agreement for any reason the Client shall have unlimited and unrestricted rights in respect of its website, its intranet and any other digital service for which the Service Provider has provided the Service.

19.3. Any ability that the Service Provider enjoys in respect of access to the Clients website and intranet during the subsistence of the Agreement can be withdrawn by the Client at any time upon notice to the Service Provider and shall come to an end automatically and immediately upon the termination of the Agreement for any reason.

19.4. Third party materials, such as imagery, used in the deliverables where the rights therein are not to pass to the Client under Clause 19.2 of this agreement, may be subject to usage liabilities such as royalties and license fees. The Service Provider shall identify such elements to the Client in writing and procure such license as necessary for the use of third party materials for use within the scope of the Proposal. The Client should obtain written consent from the Service Provider for use of any part of the deliverables outside of the scope of the Proposal. But this shall not apply to items such as but not limited to logo's and images provided to the Service Provider by the Client itself or on its behalf by third parties contracted directly by the Client

20. Notices

20.1. Any notice or other communication pursuant to this agreement must be in writing and signed by or on behalf of the party giving it and may be served by pre-paid first class post to the address of the relevant party as set out in the agreement or subject to the provisions of clause 20.2 by email. All such notices or demands shall be deemed to have been received:

- 20.1.1. in the case of pre-paid first class post two Business Days after posting; and
- 20.1.2. in the case of fax, at the time of transmission, provided that if receipt occurs before 9am on a Business Day the notice shall be deemed to have been received at 9am on that day, and if receipt occurs after 5pm on a Business Day, or on a day which is not a Business Day, the notice or demand shall be deemed to have been received at 9am on the next Business Day.

20.2. A communication sent by email shall not be effective unless the addressee acknowledges receipt of such communication, such acknowledgement to take the form of a reply email to include the communication being acknowledged.

21. Entire Agreement

21.1. The Agreement contains the entire agreement between the Parties with respect to its subject matter and may not be modified except by an instrument in writing signed by the duly authorised representatives of the Parties.

21.2. Each Party shall acknowledge that, in entering into the Agreement, it does not rely on any representation, warranty or other provision except as expressly provided in the Agreement, and all conditions, warranties or other terms implied by statute or common law are excluded to the fullest extent permitted by law.

22. Counterparts

22.1. The Agreement may be entered into in any number of counterparts and by the Parties to it on separate counterparts each of which when so executed and delivered shall be an original, but all the counterparts together shall constitute one and the same instrument.

23. Severance

23.1. If at any time one or more of the terms of provisions of this agreement becomes in whole or in part void, invalid, or unenforceable then the remainder of this agreement shall nevertheless be valid and enforceable.

24. Dispute Resolution

24.1. The Parties shall attempt to resolve any dispute arising out of or relating to the Agreement through negotiations between their appointed representatives who have the authority to settle such disputes.

24.2. If negotiations under sub-Clause 24.1 do not resolve the matter within 30 days of receipt of a written invitation to negotiate, the parties will attempt to resolve the dispute in good faith through an agreed Alternative Dispute Resolution ("ADR") procedure.

24.3. If the ADR procedure under sub-Clause 24.2 does not resolve the matter within 30 days of the initiation of that procedure, or if either Party will not participate in the ADR procedure, the dispute may be referred to arbitration by either Party.

24.4. The decision and outcome of the final method of dispute resolution under Clause 24 shall be final and binding on both Parties.

25. Law and Jurisdiction

25.1. The Agreement and these Terms and Conditions (including any non-contractual matters and obligations arising therefrom or associated therewith) shall be governed by, and construed in accordance with, the laws of England and Wales.