Notes to Standard Conditions of Contract for Digital Marketing Services BPIF 2012

These notes explain how the Standard Conditions may be used in your business.

NB. Changing the Standard Conditions without legal advice is not recommended except for selecting one of the alternative versions which have been included in the square brackets. When the appropriate version has been selected the rejected provision and the square brackets should be removed. Certain conditions which exclude or limit your liability or provide you with specific rights (eg Intellectual Property Rights, Liability and Limitation of Liability) should not be altered without legal advice. For ease of reference those clauses which should not be altered without legal advice are marked thus: DNA.

1. Definitions

It is normal to include definitions at the beginning of a contract so that everyone is clear about the meaning of specific words used in the contract. When using definitions they should always appear with an initial capital letter in the rest of the text to indicate that you are referring back to a definition. DNA

It should be noted that some the definitions refer to the specification and the conditions are reliant on a specification being prepared and completed by you. The specification contains important information as it sets out the nature of the Services, the dates for completion of the Services, the nature of the deliverables which will be supplied, the price of the Services and the terms of payment of the price and any additional conditions or qualifications to the contract such as the texts which have been included in the template relating to search engine optimisation and to third party services and products.

2. Contract

This clause states that the contract between you and your customer is made on your standard conditions only. It is very important that your procedures ensure that your customers' orders are accepted by you in writing subject to your terms and conditions. DNA

3. Price and Payment

a) This clause states that the price is set out in the specification. It also states that the price is exclusive of VAT; if this statement is not made the price is deemed to be inclusive of VAT. DNA. It should be noted that if a licence fee is to be paid in addition to the fees for the Website design, hosting and maintenance then the standard conditions and the specification should be altered accordingly.

b) It will be necessary for you to insert your normal payment terms in clause 3.5. DNA

c) The clause states that if your customer does not provide you with sufficient instructions or materials or is late in providing you with instructions or materials then you are entitled to charge your additional costs.

d) The clause provides that If your invoices are not paid then you are entitled to charge interest in accordance with the statutory provision for payment of interest or as an alternative a rate of interest specified in the contract and/or to suspend your performance of the Services.

e) The clause provides that any dispute with your customer should be referred to mediation or resolved by bringing legal proceedings. Further the clause provides that if only part of an invoice is disputed then the undisputed amount will be paid by your customer.

4. Credit Facilities

The clause contains a general statement about your willingness to grant credit facilities and you may wish to adapt the clause to suit your own arrangements or alternatively you may decide to remove the clause if you don't grant credit facilities to your customers.

5. Delivery of the Services and Acceptance

a) The clause states that the dates given for the performance of the Services and delivering the deliverables are estimates and that time for the performance of the Services or delivery of the deliverables are not of the essence of the contract. DNA

b) The clause envisages that the Services will be performed over a period of time and it will be necessary for you to insert this period in the specification and/or insert in the clause the length of notice which should be given in order to bring the contract to an end.

c) The clause provides that any licence fees which are payable to third parties in order to use their software have been included in your price for the Services and deliverables.

6. Buyers Obligations

a) The clause places specific obligations on your customer so that you are able to fulfill your obligations to perform the Services and supply the deliverables. In particular the clause states that materials supplied by your customer will be provided in accordance with all applicable laws and regulations and if they contain any personal data your customer will have complied with the provisions of the Data Protection Act 1998. DNA

7. Change Procedure

a) The clause sets out a procedure for agreeing variations to the contract and any variations which are agreed will in accordance with clause 15.6 be binding when agreed in writing by you and your customer.

8. Quality

a) The clause states that the Services and deliverables which you supply to your customer will conform with generally accepted industry standards and recognised practices and in all material respects with the specification which you provide. DNA

b) The clause contains an exclusion of any terms which may be implied in respect of the Services or the deliverables. DNA

9. Data Protection

There are rules about personal information and the clause states that you and your customer will comply with the Data Protection Act. DNA

10. Intellectual Property Rights

a) It should be noted that the clause provides for ownership of the Deliverables to be retained by you and for you to grant a licence to your customers to use the Deliverables for the purpose stated in the specification. DNA

b) The clause contains an indemnity given to you by your customer that any materials supplied to you by your customer in connection with the Services do not infringe any third party's intellectual property rights. DNA

c) The clause contains an indemnity given by you to your customer in case your Services or the deliverables should infringe any third party's intellectual property rights and furthermore your liability under the indemnity is subject to your customer complying with certain conditions. DNA

11. Liability

a) The clause seeks to limit your liability by stating that you will not be liable for any claims unless you are given notice of them within the time set out in the clause unless there was a good reason why your customer couldn't comply. In order to be enforceable at law these time limits must be reasonable and you may want to adapt them. DNA

b) The clause provides that you must be able to inspect the defective work or products within 5 business days of being notified of a claim.

c) The clause seeks to limit your liability at your option to re-performing the defective Services and/or correcting or replacing any defective deliverables at your cost or crediting the price of such part of the Services or the deliverables which are defective. DNA

12. Limitation of Liability

a) The clause contains a statement that the limitations or exclusions contained in the contract do not exclude your liability for death or personal injury resulting from your negligence. DNA

b) The clause states that under no circumstances whatsoever will you be liable in contract tort (including negligence or beach of statutory duty) for the specific losses detailed in the clause or any indirect or consequential loss arising under or in connection with the contract. It will be necessary for you to decide which of the specific losses should be included in the clause. DNA

c) The last paragraph of clause 12.2 contains a suggested provision which limits your liability to your customer to a specified sum or percentage of the price paid for the defective Services or defective deliverables although such provision may not be commercially acceptable to your customers unless your negotiating position is such that you are able to impose this limit on your liability and therefore you should decide whether or not to include them. Further the amount of any such limitation should be reasonable in order to be enforceable and if reasonable it would only be enforceable against a business customer and not against a consumer.

13. Insolvency

Under this clause an insolvency practitioner appointed in relation to your customer cannot insist that you complete the contract and all your invoices become immediately payable. DNA

14. Force majeure

The usual exclusions of force majeure events have been included in the clause so that you will not be liable for any failure to perform the contract due to the occurrence of any of these events and you will be entitled to an extension of time. DNA

15. General

a) The clause states that you may assign, transfer, charge, sub-contract or deal with the contract so that you are not dependent on your customer's consent to do so. DNA.

b) The normal statement that a third party has no rights under the contract has been included in accordance with the Contracts (Rights of Third Parties) Act 1999. DNA

c) If a court finds a clause to be unenforceable, it could make the whole contract unenforceable and the clause aims to prevent this situation. DNA

d) The clause contains the usual provision about not disclosing the other's confidential information.

e) The clause states that any variation to the contract must be in writing. DNA

16. Termination

The clause entitles you to terminate the contract with immediate effect if your customer fails to pay any undisputed amount on the due date and remains in default for a specified period thereafter or commits a material breach of its obligations under the contract and fails to remedy such a breach (if remediable) within a specified period after receipt of notice from you or commits a series of persistent minor breaches which when taken together amount to a material breach or your customer is insolvent or your customer ceases or threatens to cease to carry on all or substantially the whole of its business. DNA

17. Notices

It is important that a contract should contain a provision setting out the arrangements for the service of notices. DNA

18. Law

The contract is stated to be governed by English law and also states that any dispute is to be conducted in the Courts of England and Wales so that these provisions would not be appropriate in Scotland. DNA

September 2012