

**Terms and conditions for website design and development services provided by Aubergine 262 Ltd (“Terms of Business”):**

**Section A**

**1. INTERPRETATION**

1.1 The definitions and rules of interpretation in this condition apply in the Contract..

**Acceptance:** the acceptance or deemed acceptance of the Website by the Customer pursuant to Condition 4.

**Acceptance Tests:** the tests to be carried out on the Website as set out in Condition 4 and if applicable as described in the Engagement Letter.

**Business Day:** Monday to Friday, 8:30am to 5:30pm, excluding Bank Holidays.

**Change Control Procedures:** the procedures set out in Section B to the Terms of Business;

**Charges:** the charges in respect of the Services set out in the Engagement Letter, together with any charges arising from the Change Control Procedures.

**Confidential Information:** has the meaning given in Condition 16.1.

**Contract:** the agreement between Aubergine 262 Ltd comprising the Engagement Letter and the Terms of Business or any sections of them.

**Design Agency:** if applicable, as set out in the Engagement Letter.

**Effective Date:** the date on which Aubergine 262 Ltd and the Customer shall execute the Engagement Letter.

**Force Majeure Event:** has the meaning given in Condition 15.1.

**Intellectual Property Rights:** all intellectual property rights wherever in the world arising, whether registered or unregistered (and including any application), including copyright, know-how, confidential information, business names and domain names, trade marks, service marks, trade names, or rights to sue for passing off.

**Materials:** the content provided to Aubergine 262 Ltd by the Customer from time to time for incorporation in the Website.

**Non-Supplier Defects:** those defects described in Condition 4.4.

**Engagement Letter:** any Engagement Letter executed by Aubergine 262 Ltd and the Customer incorporating the Terms of Business.

**Phase:** in relation to the Project Plan, one of the key actions of work identified in the Project Plan.

**Project:** the provision by Aubergine 262 Ltd of the Services as set out in the Engagement Letter.

**Project Plan:** the timetable if any within which Aubergine 262 Ltd will implement the Project as set out in the Engagement Letter.

**Server:** a computer server accessible by Aubergine 262 Ltd.

**Service(s):** the services to be provided pursuant to the Contract identified in the Engagement Letter.

**Website:** the Website defined in the Engagement Letter.

**Website Specification:** the specification for the Website set out in the Engagement Letter.

**Third Party Products:** those third party software products set out in the Engagement Letter.

**Visitor:** a visitor to the Website.

1.2 Headings to clauses or conditions in the Contract do not affect the interpretation of the Contract.

1.3 In the Terms of Business, a reference to "Section" means a section of the Terms of Business. A reference in a Section to "clauses" shall be taken to mean a reference to a clause in that Section to the Terms of Business.

1.4 In the event and to the extent only of any conflict between a provision of the Terms of Business and the Engagement Letter, save to the extent expressly provided for in the Engagement Letter, the provision of the Terms of Business shall prevail.

1.5 Unless the context otherwise requires, words in the singular shall include the plural and in the plural include the singular.

1.6 A reference to a particular law is a reference to it as it is in force for the time being taking account of any amendment, or re-enactment

1.7 References to **including** and **include(s)** mean respectively including without limitation and include(s) without limitation.

1.8 References to **content** include any kind of text, information, image, or audio or video material which can be incorporated in a website for access by a Visitor to that website.

1.9 **Writing** or **written** includes email and any other form of electronic message.

## **2. SCOPE OF THE PROJECT**

Aubergine 262 Ltd shall:

(a) deliver the Project in accordance with the Contract, subject to the Customer's timely performance of its obligations under the Contract; and

(b) provide the Services including hosting the Website from the Server if indicated on the Engagement Letter.

## **3. CUSTOMER RESPONSIBILITIES**

3.1 The Customer acknowledges that Aubergine 262 Ltd's ability to provide the Services is dependent upon the full and timely co-operation of the Customer (which the Customer agrees to provide), as well as the accuracy and completeness of the design specifications (if any) provided by the Design Agency and any information and data the Customer provides to Aubergine 262 Ltd. Accordingly, the Customer shall:

(a) provide Aubergine 262 Ltd with access to, and use of, all information, data and documentation reasonably required by Aubergine 262 Ltd for the performance by Aubergine 262 Ltd of its obligations under the Contract; and

3.2 The Customer shall be responsible for the accuracy and completeness of the Materials on the Website in accordance with Condition 11.

## **4. DEVELOPMENT AND ACCEPTANCE OF WEBSITE**

4.1 Once Aubergine 262 Ltd has completed the design and development of the Website in accordance with the Project Plan, Aubergine 262 Ltd shall run the Acceptance Tests. The procedure set out in this Condition 4 shall be repeated in respect of the Project Plan and any further development works agreed by the parties from time to time.

4.2 The Acceptance Tests shall test compliance of the Website with the Website Specification. The form and detail of such tests (if applicable) is set out in the Engagement Letter.

4.3 Acceptance of the Website shall occur when the Website has passed the Acceptance Tests. Aubergine 262 Ltd shall notify the Customer when the tests have been passed and provide the results of the Acceptance Tests to the Customer in writing.

4.4 If any failure to pass the Acceptance Tests results from a defect which is caused by an act or omission of the Customer, or by one of the Customer's sub-contractors or agents for whom Aubergine 262 Ltd has no responsibility (**Non-Supplier Defect**), the Website shall be deemed to have passed the Acceptance Tests notwithstanding such Non-Supplier Defect. Aubergine 262 Ltd shall provide assistance reasonably requested by the Customer in remedying any Non-Supplier Defect by supplying additional services or products. The Customer shall pay Aubergine 262 Ltd in full for all such additional services and products at Aubergine 262 Ltd's then current fees and prices.

4.5 Acceptance of the Website shall be deemed to have taken place upon the occurrence of any of the following events:

(a) the Customer uses any part of the Website for any revenue-earning purposes or to provide any services to third parties other than for test purposes; or

(b) the Customer unreasonably delays the start of the relevant Acceptance Tests or any retests for a period of seven working days from the date on which Aubergine 262 Ltd is ready to commence running such Acceptance Tests or retests; or

(c) the Customer instructs Aubergine 262 Ltd to publish the website to the agreed, final URL as specified in the Contract

## **5. THIRD PARTY PRODUCTS**

The Third Party Products shall be supplied in accordance with the relevant licensor's standard terms. The one-off licence fee for such Third Party Products is not included in the Charges payable pursuant to Condition 7 and is payable in addition.

## **6. PROJECT MANAGEMENT**

6.1 The Customer shall appoint a project manager who shall:

- (a) provide professional and prompt liaison with the other party; and
- (b) have the necessary expertise and authority to commit the relevant party.

6.2 Aubergine 262 Ltd and the Customer Project Manager shall meet until Acceptance at the frequency provided in the Engagement Letter. The Customer shall provide minutes of these meetings to Aubergine 262 Ltd.

## **7. CHARGES AND PAYMENT**

7.1 Aubergine 262 Ltd shall save as provided in the Engagement Letter issue a monthly VAT invoice (to the extent applicable) in respect of the Charges, and the Customer shall pay to Aubergine 262 Ltd the Charges set out in such Supplier's invoice within 28 days of the date of Aubergine 262 Ltd's invoice.

7.2 All Charges are expressed exclusive of VAT.

7.3 Aubergine 262 Ltd shall provide Additional Services specified in the Engagement Letter which shall be charged in accordance with the charges stated in the Engagement Letter and if none stated, at Aubergine 262 Ltd standard charge for the time being;

7.4 If the Customer fails to pay any amount due, Aubergine 262 Ltd may charge the Customer interest on the overdue amount which interest shall be payable by the Customer forthwith on demand, from the due date up to the date of actual payment, until judgment, at the rate of 3% per annum above the base rate for the time being of HSBC PLC . Such interest shall accrue on a daily basis and be compounded quarterly. Aubergine 262 Ltd reserves the right to claim interest under the Late Payment of Commercial Debts (Interest) Act 1998.

## **8. WARRANTIES**

8.1 Each of the parties warrants to the other that it has full power and authority to enter into and perform the Contract.

8.2 Aubergine 262 Ltd shall perform the Services with reasonable care and skill.

8.3 Aubergine 262 Ltd warrants that the Website will perform substantially in accordance with the Website Specification for a period of three months from Acceptance. If the Website does not so perform, Aubergine 262 Ltd shall, for no additional charge, use its reasonable endeavours to carry out any work necessary in order to ensure that the Website substantially complies with the Website Specification.

8.4 The warranty set out in Condition 8.3 shall not apply to the extent that any failure of the Website to perform substantially in accordance with the Website Specification is caused by any Materials, any Third Party Products or non compliance with the Customer's obligations under the Contract.

8.5 The Contract sets out the full extent of Aubergine 262 Ltd's obligations and liabilities in respect of the supply of the Services. All conditions, warranties or other terms concerning the Services which might otherwise be implied into the Contract or any collateral contract (whether by statute or otherwise) are hereby expressly excluded.

8.6 Aubergine 262 Ltd shall use reasonable endeavours to comply with any timing or date agreed for performance of any obligation upon it in the Contract but time shall not be of the essence.

## **9. LIMITATION OF REMEDIES AND LIABILITY**

9.1 Nothing in the Contract shall operate to exclude or limit Aubergine 262 Ltd's liability for:

(a) death or personal injury caused by its negligence; or

(b) any breach of the terms implied by section 12 of the Sale of Goods Act 1979 or section 2 of the Supply of Goods and Services Act 1982; or

(c) fraud; or

(d) any other liability which cannot be excluded or limited under applicable law.

9.2 Aubergine 262 Ltd shall not be liable to the Customer for any damage to software, damage to or loss of data, loss of profit, anticipated profits, revenues, anticipated savings, goodwill or business opportunity, or for any indirect or consequential loss or damage.

9.3 Subject to Condition 9.1, Aubergine 262 Ltd's aggregate liability in respect of claims based on events in any calendar year arising out of or in connection with the Contract or any collateral contract, whether in contract or tort (including negligence) or otherwise, shall in no circumstances exceed the Charges paid by the Customer to Aubergine 262 Ltd for the applicable Service under the Contract .

## **10. INTELLECTUAL PROPERTY RIGHTS**

10.1 All Intellectual Property Rights in the Website (including in the content of the Website) , but excluding the Materials, arising in connection with the Contract shall be the property of Aubergine 262 Ltd, and Aubergine 262 Ltd hereby grants the Customer a non-exclusive licence of such Intellectual Property Rights for the purpose of operating the Website.

10.2 The Customer shall indemnify Aubergine 262 Ltd against all damages, losses and expenses arising as a result of any action or claim that the Materials infringe the Intellectual Property Rights of a third party.

10.3 Aubergine 262 Ltd shall indemnify the Customer against all damages, losses and expenses arising as a result of any action or claim that the Website infringes any Intellectual Property Rights of a third party in the UK, other than infringements referred to in Condition 10.2.

10.4 The indemnities in Condition 10.2, Condition 10.3 and Condition 11.4 are subject to the following conditions:

(a) the indemnified party promptly notifies the indemnifier in writing of the claim;

(b) the indemnified party makes no admissions or settlements without the indemnifier's prior written consent;

(c) the indemnified party gives the indemnifier all information and assistance that the indemnifier may reasonably require; and

(d) the indemnified party allows the indemnifier complete control over the litigation and settlement of any action or claim.

10.5 The indemnities in Condition 10.2, Condition 10.3, Condition 11.4 and Condition 11.5 may not be invoked to the extent that the action or claim arises out of the indemnifier's compliance with any designs, specifications or instructions of the indemnified party.

## **11. WEBSITE CONTENT**

11.1 Aubergine 262 Ltd shall enable the Website to be updated by the Customer from time to time, for example for the purposes of updating content or creating new pages for new offers or services, or for purposes of search engine optimisation (e.g. news or advice.) The Customer shall ensure that the Materials do not infringe any applicable laws, regulations or third party rights (including material which is obscene, indecent, pornographic, seditious, offensive, defamatory, threatening, liable to incite

racial hatred or acts of terrorism, menacing, blasphemous or in breach of any third party Intellectual Property Rights) (**Inappropriate Content**).

11.2 Aubergine 262 Ltd shall grant the Customer or procure access to the Website's content management system, in order to update information held on the Website.

11.3 Aubergine 262 Ltd shall include only Materials on the Website. The Customer acknowledges that Aubergine 262 Ltd has no control over any content placed on the Website by Visitors and does not purport to monitor the content of the Website. Aubergine 262 Ltd reserves the right to remove content from the Website where it reasonably suspects such content is Inappropriate Content. Aubergine 262 Ltd shall notify the Customer promptly if it becomes aware of any allegation that any content on the Website may be Inappropriate Content.

11.4 The Customer shall indemnify Aubergine 262 Ltd against all damages, losses and expenses arising as a result of any action or claim that the Materials constitute Inappropriate Content.

11.5 Aubergine 262 Ltd may include (i) the statement "Designed by Aubergine 262 Ltd" on the home page of the Website in a form to be agreed; and (ii) a small link at the base of each page of the Website to the Aubergine 262 Ltd website (url: [www.aubergine262.com](http://www.aubergine262.com) ). Aubergine 262 Ltd accepts no responsibility arising in respect of any content of such website link.

## **12. DATA PROTECTION**

12.1 Aubergine 262 Ltd warrants that, to the extent it processes any Personal Data on behalf of the Customer it shall act only on instructions from the Customer.

12.2 In this Condition 12, **Personal Data** has the meaning given in the Data Protection Act 1998 and subsequent General Data Protection Regulation.

## **13. TERM AND TERMINATION**

13.1 The Contract shall commence on the Effective Date and shall (subject to earlier termination pursuant to this Condition 13) continue until Acceptance of the Website

and payment of all outstanding sums, unless and to the extent the parties agree in writing to extend the term of the Contract for any period agreed for the ongoing provision of Content Management. Where any hosting service is to be provided, the Contract shall continue after Acceptance until the expiry of at least 30 days notice given by either party on or before the first anniversary of Acceptance or any anniversary thereof.

13.2 Either party may terminate the Contract immediately at any time by written notice to the other party if:

(a) that other party commits any material breach of its obligations under the Contract (including non payment of any invoice by the Customer by the due date) which (if remediable) is not remedied within 30 days after the service of written notice specifying the breach and requiring it to be remedied; or

(b) that other party:

(i) ceases to trade (either in whole, or as to any part or division involved in the performance of the Contract); or

(ii) becomes insolvent or unable to pay its debts within the meaning of the insolvency legislation applicable to that party; or

(iii) a person (including the holder of a charge or other security interest) is appointed to manage or take control of the whole or part of the business or assets of that party, or notice of an intention to appoint such a person is given or documents relating to such an appointment are filed with any court; or

(iv) the ability of that party's creditors to take any action to enforce their debts is suspended, restricted or prevented or some or all of that party's creditors accept, by agreement or pursuant to a court order, an amount of less than the sums owing to them in satisfaction of those sums; or

(v) any process is instituted which could lead to that party being dissolved and its assets being distributed to its creditors, shareholders or other contributors (other than for the purposes of solvent amalgamation or reconstruction).

13.3 On termination of the Contract by Aubergine 262 Ltd pursuant to Condition 13.2, all licences granted by Aubergine 262 Ltd under the Contract shall terminate immediately.

13.4 Aubergine 262 Ltd may also suspend performance of its obligations under the Contract during the period that any invoice remains outstanding on or after the due date.

13.5 On expiry or termination of the Contract otherwise than on termination by Aubergine 262 Ltd pursuant to Condition 13.2, Aubergine 262 Ltd shall promptly return all Materials to the Customer, and shall provide to the Customer an electronic copy of the Website (including all content on the Website). Aubergine 262 Ltd shall provide such assistance as is reasonably requested by the Customer in transferring the hosting of the Website to the Customer or another service provider, subject to the payment of Aubergine 262 Ltd's expenses reasonably incurred.

13.6 On expiry or termination of the Contract, all provisions of the Contract shall cease to have effect, except that any provision which can reasonably be inferred as continuing or is expressly stated to continue shall continue in full force and effect.

#### **14. CHANGE CONTROL**

Any request to change the scope of the Services shall be processed in accordance with the Change Control Procedure.

#### **15. FORCE MAJEURE**

15.1 The definition in this Condition applies in the Contract.

**Force Majeure Event:** any event arising which is beyond the reasonable control of the affected party (including any industrial dispute affecting any third party, governmental regulations, fire, flood, disaster, civil riot or war).

15.2 A party who becomes aware of a Force Majeure Event which gives rise to, or which is likely to give rise to, any failure or delay in performing its obligations under the Contract shall forthwith notify the other and shall inform the other of the period for

which it is estimated that such failure or delay will continue. The affected party shall take reasonable steps to mitigate the effect of the Force Majeure Event.

## **16. CONFIDENTIALITY**

16.1 The definition in this Condition applies in the Contract.

**Confidential Information:** all information, whether technical or commercial (including all specifications, drawings and designs, disclosed in writing, on disc, orally or by inspection of documents or pursuant to discussions between the parties), where the information is:

(a) identified as confidential at the time of disclosure; or

(b) ought reasonably to be considered confidential given the nature of the information or the circumstances of disclosure.

16.2 Each party shall protect the Confidential Information of the other party against unauthorised disclosure by using the same degree of care as it takes to preserve and safeguard its own confidential information of a similar nature, being at least a reasonable degree of care.

16.3 Confidential Information may be disclosed by the receiving party to its employees, affiliates and professional advisers, provided that the recipient is bound in writing to maintain the confidentiality of the Confidential Information received.

16.4 The obligations set out in this Condition 16 shall not apply to Confidential Information which the receiving party can demonstrate:

(a) is or has become publicly known other than through breach of this Condition 16;  
or

(b) was in possession of the receiving party prior to disclosure by the other party; or

(c) was received by the receiving party from an independent third party who has full right of disclosure; or

(d) was independently developed by the receiving party; or

(e) was required to be disclosed by a governmental authority, stock exchange or regulatory body, provided that the party subject to such requirement to disclose gives the other party prompt written notice of the requirement.

16.5 The obligations of confidentiality in this Condition 16 shall not be affected by the expiry or termination of the Contract.

16.6 This Condition 16 supersedes the terms of the Non-Disclosure Agreement between Aubergine 262 Ltd and the Customer entered into prior to the Contract, which is hereby terminated.

## **17. NOTICES**

17.1 A notice given under the Contract:

(a) shall be in writing (b) shall be sent for the attention of the person, and to the address to the e-mail address given on the Engagement Letter (or such other person, address, e-mail address as the receiving party may have notified to the other, such notice to take effect five days from the notice being received); and

(c) shall be:

(i) delivered personally; or

(ii) sent e-mail; or

(iii) sent by pre-paid first-class post, recorded delivery or registered post; or

17.2 The addresses for service of notice are those set against the relevant party as set out in the Engagement Letter:

17.3 A notice is deemed to have been received:

(a) if delivered personally, at the time of delivery; or

(b) in the case of e-mail, at the time of transmission, provided a confirmatory copy is sent by first-class pre-paid post or by personal delivery before the end of the next Business Day; or

(c) in the case of pre-paid first class post, recorded delivery or registered post, 48 hours from the date of posting; or

17.4 To prove service, it is sufficient to prove that the notice was transmitted e-mail address of the relevant party or, in the case of post, that the envelope containing the notice was properly addressed and posted.

## **18. PUBLICITY**

All media releases, public announcements by either party relating to the Contract or its subject matter, including marketing material, shall be co-ordinated with the other party and approved jointly by the parties prior to release.

## **19. ASSIGNMENT**

Neither party may assign or transfer any of its rights or obligations under the Contract without the prior written consent of the other party, such consent not to be unreasonably withheld or delayed.

## **20. ENTIRE AGREEMENT**

19.1 The Contract, and any documents referred to in it, constitute the whole agreement between the parties and supersede any previous arrangement, understanding or agreement between them relating to the subject matter they cover. The term of any purchase order and all other customer documentation is excluded.

19.2 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 the Contract or not) relating to the subject matter of the Contract other than as expressly set out in the Contract.

## **21. THIRD PARTY RIGHTS**

22.1 The Contract is made for the benefit of the parties to it and is not intended to benefit, or be enforceable by, any other person.

## **22. VARIATION AND WAIVER**

22.1 A variation of the Contract shall be in writing and signed by or on behalf of both parties to the Contract.

22.2 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. No waiver shall be implied by taking or failing to take any other action

## **23. SEVERANCE**

23.1 If any provision of the Contract is found to be invalid, unenforceable or illegal, the other provisions shall remain in force.

## **24. GOVERNING LAW AND JURISDICTION**

24.1 The Contract and any disputes or claims arising out of or in connection with it or its subject matter are governed by and construed in accordance with the law of England and the courts of England have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with the Contract.

## **Section B**

### **CHANGE CONTROL PROCEDURE**

1. Aubergine 262 Ltd and the Customer shall discuss any change to the Contract (**Change**) proposed by the other and such discussion shall result in either:

(a) a written request for a Change by the Customer; or

(b) a written recommendation for a Change by Aubergine 262 Ltd,

or, if neither the Customer nor Aubergine 262 Ltd wishes to submit a request or recommendation, the proposal for the Change will not proceed.

2. Where a written request for a Change is received from the Customer, Aubergine 262 Ltd shall, unless otherwise agreed, submit a Change control note (**CCN**) to the Customer within the period agreed between them or, if no such period is agreed, within five Business Days from the date of receipt of such request for a Change[, or inform the Customer that Aubergine 262 Ltd is not able to comply with such written request for a Change.

3. A written recommendation for a Change by Aubergine 262 Ltd shall be submitted as a CCN direct to the Customer at the time of such recommendation.

4. Each CCN shall contain:

(a) the title of the Change;

(b) the originator and the date of the request or recommendation for the Change;

(c) the reason for the Change;

(d) the full details of the Change, including any specifications and user facilities;

(e) the price, if any, of or associated with the Change;

(f) a timetable for implementation, together with any proposals for acceptance of the Change;

(g) the impact, if any, of the Change on other aspects of the Contract, including:

(i) the Charges;

(ii) the contractual documentation; and

(iii) staff resources;

(h) the date of expiry of validity of the CCN (which shall not be less than 10 Business Days); and

(i) provision for signature of the CCN by the Customer and Aubergine 262 Ltd.

5. For each CCN submitted, the Customer shall, within the period of validity of the CCN as set out in Condition 4(h)

(a) allocate a sequential number to the CCN;

(b) evaluate the CCN, and as appropriate either:

(i) request further information; or

(ii) approve the CCN; or

(iii) notify Aubergine 262 Ltd of the rejection of the CCN; and

(c) if approved, arrange for two copies of the approved CCN to be signed for and on behalf of the Customer and Aubergine 262 Ltd. The signing of the CCN shall signify acceptance of a Change by both the Customer and Aubergine 262 Ltd.

6. Once signed by the Customer and Aubergine 262 Ltd in accordance with Condition 5., the Change shall be immediately effective and the Customer and Aubergine 262 Ltd shall perform their respective obligations on the basis of the agreed amendment.