

# *Positively Distinctive Media Ltd*

## Terms of Business – Marketing Services

In confidence

## PARTIES

(1) Positively Distinctive Media Ltd [PDM] incorporated and registered in England and Wales with company number 11587539 whose registered office is at Unit 7 The Court House, 72 Moorland Road, Stoke-On-Trent, United Kingdom, ST6 1DY

(2) [The Client] is defined as a company commissioning services or consultancy from PDM via written acceptance of an Order form, Proposal, Scope of Works or email confirmation.

## SERVICES

The scope of the services to be performed by PDM is set out in the Scope of Work which must be signed and dated by both parties, and any subsequent Scope of Works. In the event of any conflict between the content of the proposal and these terms of business, then these terms of business shall take precedence unless expressly stated otherwise in the proposal.

## FEES

The proposal will indicate all fees connected to the project. A copy of our standard rate card is available upon request for any fees falling outside of the proposal fees.

## FIXED FEES

We charge fixed fees wherever possible. This means that all fees listed in our cost estimates are confirmed as final costs, giving note to any set assumptions. It is sometimes not possible at the beginning of a project to fix fees beyond the concept stage because the work involved thereafter will depend upon the nature of the solution proposed. In this case we will estimate likely fee levels and either fix them later or work on the basis of hourly rates which will be mutually agreed by both parties.

## HOURLY RATES

Sometimes it is not possible to determine the right level of fixed fee for a project and in these circumstances, we will work on an hourly rate basis and charge for actual hours worked at our current standard hourly rates. We review our standard hourly rates each year on 31 December but reserve the right to increase them at any other time. Fee estimates prepared on old rates may have to be revised in line with new rates.

## CONSULTANCY FEES

For long-term projects we may charge a consultancy fee, invoiced monthly and agreed in advance. Such fees are reviewed each year on 31 December but we reserve the right to increase them at any other time.

## CHANGED, SUSPENDED OR ABORTED WORK

Charges for changed, suspended or aborted work apply as follows:

1. Where we are asked to work on a brief that is later changed by the Client so that some or all of the work completed has to be replaced or repeated, we charge for all work completed up to the date of such change at our current standard hourly rates in addition to any 'replacement' work carried out following the change of brief (also charged at our current standard hourly rates).
2. Where we complete part of a project and the client suspends or aborts the project then:
  - If the project is suspended, we will charge for the cost of the team allocated to the project for the period of suspension (at our standard hourly rates)
  - We will charge for all costs and expenses incurred or committed to on the Client's behalf for the purposes of the project.

### EXTERNAL AND BOUGHT IN COSTS

There are sometimes several services required on a project that have to be sourced from external suppliers.

Where these costs are pertained to hardware (i.e. visual display screens, computer components or built computer units) 100% payment is usually required at point of order.

When we buy materials or goods to use on a project, we will be entitled to either:

- require the Client to contract with suppliers directly, or
- contract with suppliers ourselves. In either case we may require the Client to make payment to suppliers directly. When we contract with a supplier ourselves, the Client agrees that the terms and conditions or other form of agreement made with a supplier shall apply between us and the Client in relation to such items supplied. A copy of applicable terms and conditions of agreement will be sent to the Client on request and subject to client agreement on all costs and terms. In the interest of transparency and working relationships, at least two quotes will be obtained where possible.

### EXPENSES

We look after our clients' money as if it were our own. Therefore, we look to get the best combination of price and productivity, however out-of-pocket expenses (not costed in proposals or SoW), such as travel and subsistence which we will recharge to the Client on a monthly basis at the cost to us. Our policy is that we travel economy class on all journeys within Europe.

### VALUE ADDED TAX

VAT at the appropriate rate prevailing at the time of invoice will be added to all our charges to clients based in the UK unless otherwise agreed.

### INVOICING AND PAYMENT

#### Normal practice

It is our normal practice to identify an invoicing and payments schedule over the period of a project that breaks the total fee down into regular payments. Bought-in costs and expenses are invoiced separately, and usually as orders are placed.

#### Payment Protection

We routinely ask clients to make an advanced payment of our charges, which is used to cover our costs in the event of a client ceasing to trade or failing to make payment to us when due for any other reason.

Where the Client is recently incorporated, is based overseas or is a smaller subsidiary of another company, we may (instead or in addition) ask the Client to provide a parent (or other) company guarantee with regards to the payment of our charges before we start work.

#### Normal payment terms

Payment will be due 14 days after the date of our invoice at the latest. In some cases, there may be an agreement for earlier payment. Any queries the Client may have following the receipt of an invoice should be raised within 7 days of the date of the invoice. If an invoice is not paid within one month, we may without prejudice to any of our other rights suspend our services to the Client until the invoice is paid.

## GENERAL TERMS

### Disputes

We very much hope that disputes will not arise. If the Client has a legal claim against us, formal legal action must be taken within one year of the date of the applicable invoice to which the claim relates, otherwise the claim will be contractually time-barred. These terms of business and any claims or disputes arising under or in connection with them or any work carried out by us will be governed by English law. We and the Client irrevocably submit to the exclusive jurisdiction of the English Courts save in relation to the enforcement of any judgments where such jurisdiction shall be non-exclusive.

### Liability

Nothing in these terms of business will be effective to limit our liability for death or personal injury caused by our negligence.

Regarding our professional liability;

- any implied condition, warranty, representation or other term is excluded to the maximum extent permitted by law;
- in no event will we be liable for any loss of actual or anticipated income or profits, loss of contracts or for any indirect, special or consequential losses whatsoever and howsoever caused; and
- PDM's maximum liability under or in connection with these terms of business and / or any work carried out by us shall not exceed the charges (excluding VAT) paid or payable by the Client to us in relation to any Scope of Work preceding any claim being made against us.

The Client agrees that it shall not be entitled to set off any amounts claimed by it against any invoice submitted by us for work done and goods supplied.

### Confidentiality

In the course of business, we receive confidential information from our clients and also pass on confidential information to them. We expect to keep confidential all such information until it is released into the public arena and expect our clients to do the same. More information can be found in Appendix A.

## INTELLECTUAL PROPERTY RIGHTS

Once we have completed a project and been paid in full, we will assign to the Client such copyright and other intellectual property rights as we have in the final deliverables produced by us without further charge.

All rights in any original idea, concept or material that is not contained within final deliverables for a project will be retained exclusively by us and may not be used by the Client or shared with any third party without our express prior written consent.

We will obtain appropriate usage rights in any third-party material contained within final deliverables produced by us and the Client agrees to abide by any licence terms or other restrictions that apply to such material (details of which are provided to the client).

Our Client, in supplying any material or information of any kind to us (whether directly or via its other suppliers), warrants that it is (and we are) entitled to use that material or information for the purposes of the project we are to use it for and the Client agrees to indemnify us in respect of any and all claims, costs, damages and expenses incurred by us in the event of a claim by anyone else arising out of our use of that material or information.

This includes but is not limited to claims arising out of alleged infringements of copyright, design right, trademarks and confidential information.

While we take all reasonable care not to infringe copyright or any other rights in other people's work, should such an infringement take place without our prior knowledge, the Client accepts sole responsibility for any action taken against us for materials supplied by The Client or its partners, but not otherwise.

For the avoidance of doubt, the Client will be solely responsible for carrying out any appropriate legal clearance searches (e.g. trade mark, design or patent searches) in respect of the final deliverables that we produce prior to use, again, where these have been supplied by the Client or its partners.

## PUBLICITY

Unless confidentiality would be breached by publication, we will have the right to announce our appointment by the Client on a project and thereafter to release information and visual material regarding the project. All publicity and promotional material should be approved and used with the prior knowledge and consent of the Client. The Client is at liberty to approve or refuse, as they see fit.

## Appendix A – GDPR

### Definitions

**“Approved Sub-processor”** - means a sub-processor that has been approved in writing by the Client to Process Personal Data;

**“Data Controller”** has the meaning given in the Data Protection Act 1998 or (as applicable) has the meaning given to “controller” in the General Data Protection Regulation;

**“Data Processor”** has the meaning given in the Data Protection Act 1998 or (as applicable) has the meaning given to “processor” in the General Data Protection Regulation;

**“Data Protection Legislation”** means before 25 May 2018, the Data Protection Act 1998 and the Data Protection Directive and from 25 May 2018 the General Data Protection Regulation and the UK Privacy and Electronic Communications Regulations 2003 (and any successor legislation);

**“Data Subject”** has the meaning given in the Data Protection Act 1998 or (as applicable) the General Data Protection Regulation;

**“General Data Protection Regulation”** means Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data;

**“Permitted Users”** means the Client (together with all those persons employed or otherwise engaged by it from time to time), the licensed proprietors of each of the Client’s Premises and all those persons employed or otherwise engaged to work at each of the Client’s Premises from time to time;

**“Personal Data”** has the meaning set out in the Data Protection Act 1998 or (as applicable) the General Data Protection Regulation; **“Personal Data Breach”** means an actual or suspected breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, Personal Data transmitted, stored or otherwise Processed;

**“Processing”** has the meaning given in the Data Protection Act 1998 or (as applicable) the General Data Protection Regulation and “Process” and “Processed” have corresponding meanings;

**“Sub-processor”** means any organisation which Processes Personal Data on behalf of PDM pursuant to this Agreement;

**“The Contractor”** means Positively Distinctive Media Ltd (PDM Ltd) or any of its subsidiaries.

**“The Client”** means the company instructing PDM Ltd to carry out data processing tasks on its behalf.

### Services and Data Protection

1. The Contractor may use Client data solely for the purposes of performing its obligations in connection with any tasks explicitly agreed.
2. Upon receipt or creation by the Contractor of any Client customer data and during any collection, processing, storage and transmission by the Contractor of any Client customer data, the Contractor shall take reasonable precautions necessary (without prejudice to its other respective obligations) to preserve the integrity of Client customer data.
3. The Contractor shall limit access to Client customer data to those of the Contractor’s employees, servants, agents, subcontractors, clients or representatives who need that access for the provision of the Contractor’s obligations as agreed.
4. In the event that Client customer data is corrupted, lost or sufficiently degraded as a result of the Contractor’s default, the Contractor shall immediately notify the Client.
5. If the Contractor processes Personal Data under on behalf of the Client (“Client Personal Data”), the Contractor shall only carry out such processing for the purposes of fulfilling its obligations as agreed and only on documented instructions which the Client may give the Contractor from time to time concerning any Processing.
6. The Contractor shall take reasonable technical and organisational security measures against unauthorised or unlawful processing of Client Personal Data and against accidental loss, destruction of, or damage to such Personal Data to the extent that the Contractor fulfils processing of Client Personal Data on behalf of the Client.

7. The Contractor shall ensure that the security measures to be taken are appropriate having regard to the nature of the Personal Data and the scope, context and purposes of the Processing and the likelihood and severity of the risks to Data Subjects that are presented by the Processing of such Personal Data, in particular from accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to Personal Data transmitted, stored or otherwise Processed and the state of technological development and the cost of implementing such measures.
8. The Contractor shall co-operate with the Client, at the reasonable cost of the Client, in complying with any subject access request made by a Data Subject pursuant to the Data Protection Legislation and/or responding to any enquiry made or investigation or assessment of processing initiated by the Information Commissioner in respect of any Client Personal Data.
9. The Contractor shall notify the Client if it becomes aware of a Personal Data Breach and shall ensure that the original notification to the Client includes: (i) a description of the Personal Data Breach; (ii) an explanation of how the Personal Data Breach occurred; (iii) the categories of Personal Data affected (iv) the categories and approximate number of Data Subjects concerned; (v) a description of the likely consequences of the Personal Data Breach; Breach including, where appropriate, to mitigate its possible adverse effects and an outline of the proposed measures it intends to take to address the Personal Data Breach.
10. The Contractor shall provide reasonable assistance to the Client from time to time in undertaking any data protection impact assessments that the Client may reasonably decide to undertake.
11. The Contractor shall take reasonable steps to ensure the reliability of personnel having access to Client Personal Data, to ensure that such personnel are fully aware of the measures to be taken and the Contractor's obligations under this Clause when processing Client Personal Data and that such personnel accept appropriate confidentiality obligations.
12. The Contractor shall not share any Client Personal Data with any sub-contractor or third party without first obtaining written consent from the Client and subject always to a written contract being put in place with the Contractor which requires the sub-contractor or third party only to process Client Personal Data; and to comply with the same obligations with which the Contractor is required to comply under this Clause. If the Contractor's Software and/or third party software resold or sublicensed by the Contractor requires customers of the Client or employees of the client to provide Client Personal Data then the Contractor and/or the relevant third party shall be entitled to process such Client Personal Data solely for the purposes of providing the Services or the functionality delivered by the Contractor's Software and/or third party software.
13. The Contractor shall not transfer Client Personal Data to any country outside the European Union or to an international organisation without the Client's prior written consent.
14. Each party shall maintain a record of its Processing activities which in accordance with the requirements of Article 30 of the General Data Protection Regulation.
15. At any time upon request, and in any event upon termination or expiry of any agreement, the Contractor shall deliver to the Client:
  - 15.1 all Client Personal Data;
  - 15.2 all such records that it holds in connection with such Client Personal Data.
16. In the event of termination or expiry of the relevant agreement the Contractor shall securely delete or destroy all Client Personal Data.
17. The Contractor shall:
  - 17.1 provide the Client with such information as the Client reasonably requests from time to time to enable the Client to satisfy itself that the Contractor is complying with its obligations as agreed;
  - 17.2 allow the Client, its agents, representatives and external auditors access to its premises, provided reasonable prior notice is given, to allow the Client to audit compliance by the Contractor with its Processing activities as agreed and shall provide reasonable co-operation as requested by the Client in the performance of such audit.
18. The Client acknowledges and agrees that the Contractor shall be entitled to use Approved Sub-processors to Process Personal Data on its behalf pursuant to the agreement. In the event that the Contractor wishes to appoint a new or replacement Sub-processor(s), such appointment or replacement is subject to the prior written approval of the Client. The Contractor shall ensure that

any Approved Sub-processor who has access to Client Personal Data shall be subject to binding contractual obligations which are the same as the terms set out in this Agreement.

19. The Client shall not knowingly access, store, distribute or transmit any Viruses, or any material during the course of its use of the Services that:
  - 19.1 is unlawful, harmful, threatening, defamatory, obscene, infringing, harassing or racially or ethnically offensive;
  - 19.2 facilitates illegal activity;
  - 19.3 depicts sexually explicit images;
  - 19.4 promotes unlawful violence;
  - 19.5 is discriminatory based on race, gender, colour, religious belief, sexual orientation, disability; or
  - 19.6 in a manner that is otherwise illegal or causes damage or injury to any person or property; and the Contractor reserves the right, without liability or prejudice to its other rights to the Client, to disable the Client's access to any material that breaches the provisions of this clause.
20. The Client shall not except as may be allowed by any applicable law which is incapable of exclusion by agreement between the parties and except to the extent expressly permitted as agreed: attempt to copy, modify, duplicate, create derivative works from, frame, mirror, republish, download, display, transmit, or distribute all or any portion of the Contractor's Software in any form or media or by any means; or attempt to reverse compile, disassemble, reverse engineer or otherwise reduce to human-perceivable form all or any part of the Software; or
  - 20.1 access all or any part of the Contractor's Software, Services and/or Source Code Materials in order to build a product or service which competes with the Services and/or the Source Code Materials; or
  - 20.2 use the Services and/or Source Code Materials to provide services to third parties; or
  - 20.3 licence, sell, rent, lease, transfer, assign, distribute, display, disclose, or otherwise commercially exploit, or otherwise make the Services and/or Source Code Materials available to any third party except the Permitted Users.
21. The Client shall use all reasonable endeavours to prevent any unauthorised access to, or use of, the Services and/or the Source Code Materials and, in the event of any such unauthorised access or use, promptly notify the Contractor.
22. Each party to this Agreement agrees to comply with its obligations under Data Protection Legislation.
23. The Contractor will promptly advise the Client about any instances of data loss in connection with any services provided as agreed.