

Definitions

1. Unless otherwise expressly agreed between Nodero Limited ("Nodero") and a client ("Customer") these terms will apply to the provision of all Software development Services by Nodero to the Customer, and are to be read in conjunction with any Statement of Work (SOW) entered into with the Customer ("SOW").
2. Each SOW together with these terms forms a separate agreement ("Agreement"). These terms do not apply to other IT and/or support Services where Nodero and the Customer may have entered into separate written agreements dealing with those subject matters.
3. Nodero may modify or amend these terms on 30 days' prior written notice.

Scope of Agreement

4. Nodero shall develop, supply and, if applicable, install the Software for the Customer and shall licence the Software to the Customer. The Customer shall pay Nodero in accordance with the terms and conditions outlined in any corresponding SOW.
5. Nodero shall supply the third party / proprietary Software [if any] set out in the SOW on the terms of the relevant licence agreement and the Customer shall pay Nodero the licence fees in accordance with the terms and conditions outlined in any corresponding SOW.

Development of Software

6. Nodero shall develop the Software substantially in accordance with the Specifications.
7. Either party may suggest changes to the Specifications in accordance with the clauses laid out in the section titled 'Change Request Procedure'.

Delivery and Installation

8. Nodero shall use reasonable endeavours to deliver the Software and the Documentation, if any, to the Customer on the delivery date specified in the SOW or as soon as reasonably practical.
9. If applicable, Nodero shall use reasonable endeavours, on or before the installation date specified in the SOW, if any, to install the Software on the System.
10. Nodero will have no liability for any delays or failure in delivery where such delays or failure are the direct or indirect result of any act or omission of the Customer or a breach by the Customer of this Agreement.

Acceptance

11. The Customer must, within 7 days of delivery date and, if applicable, installation of the Software, test the Software in accordance with the acceptance criteria set out in the SOW and/or relevant Specifications. Nodero will be entitled to observe and, at its option, participate in the acceptance tests.
12. The Customer is deemed to have accepted the Software when either:
 - a. the Customer has completed those acceptance tests to its reasonable satisfaction; or
 - b. 14 days have elapsed since the Software has been made available to the Customer for testing and the Customer has failed either to complete the acceptance tests or to notify Nodero in writing of any defects.

Warranty

13. During the Warranty Period stated in any corresponding SOW, Nodero warrants that the Software will operate in conformity with the Specifications in all material respects.
14. The Customer must notify Nodero in writing during the Warranty Period if the Customer identifies a defect in the Software.
15. The Customer's sole remedy for a breach of the warranty is limited, at Nodero's option, to one of the following:
 - a. The supplying of the Services again at no additional charge; or
 - b. The refund of any charges paid to Nodero for the defective Services.
16. If Nodero finds that the alleged defect does not exist, Nodero may make an additional charge for investigating the alleged defect.
17. Nodero will not be liable under this clause:
 - a. If the defect is not notified to Nodero in writing during the Warranty Period;
 - b. If the defect cannot be verified or reproduced by Nodero; or
 - c. If and to the extent that the defect is caused by the Customer or a third party.

Licence

18. Nodero grants the Customer a non-exclusive, non-assignable licence to use:
 - a. the Software and to make a copy of the Software for the Customer's security, backup and archival purposes; and
 - b. the Documentation.
19. The Customer must use the Software and Documentation for its own internal business purposes only.

Change Request Procedure

20. The Customer may request or Nodero may suggest a change to the Specifications and/or functionality of the Software ["Change Request"].
21. The Customer will approve an agreed amount of time [a minimum of two hours] for the analysis of the proposed change and accepts that such time is chargeable, regardless of whether the Customer subsequently decides to proceed with the change or not.
22. Should a Change Request be made, Nodero shall give an estimate to the Customer of the cost of implementing that Change Request, and indicate the impact of the proposed change on the budget and/or schedule of the project.
23. If the Customer accepts the estimate and the impact on timing provided under clause 22 and instructs Nodero to proceed with the proposed change, then Nodero shall provide to the Customer the following:
 - a. revised Specifications [if applicable]; and
 - b. the revised charges and fees [if applicable], and this Agreement shall then be deemed to incorporate the revised components specified in this clause.
24. Nodero may charge the Customer for any work undertaken in providing estimates under this clause at its then current rates.

Client Obligations

25. The Customer must, at its own expense, prepare its IT System(s) and access to such Systems for the installation of the Software. In doing so, the Customer must comply with any reasonable directions or Specifications issued by Nodero.
26. The Customer must provide Nodero with full and safe access to its IT Systems as is reasonably required by Nodero.
27. The Customer shall make available to Nodero in a timely manner all assistance, including personnel, information, facilities, Services and equipment, reasonably required by Nodero for the performance of its obligations under this Agreement.

Support

28. Following expiry of the Warranty Period, Nodero shall not be required to correct errors or defects in the Software or in any other respect support the Software pursuant to this Agreement.
29. Nodero may, at its option, provide support Services to the Customer pursuant to a separate agreement.

Charges and Support

30. The Customer must pay Nodero the amounts specified in any corresponding SOW in accordance with the timing specified in such SOWs.
31. All sums payable by the Customer under this Agreement shall be made in full, without set-off or counter-claim and, except to the extent required by law, free and clear of any deduction on account of tax or otherwise.
32. If the Customer fails to make payment of any amount due under this Agreement on the due date, Nodero may without prejudice to its other rights require the Customer to pay interest on the amount due from the due date until the date of payment, at a rate equal to 5% above the current overdraft rate that Nodero has with its principal banker [in addition to the Customer remaining liable for the full amount outstanding].

Protection of Intellectual Property

33. Nodero's Intellectual Property Rights
 - a. All of Nodero's pre-existing Intellectual Property (including tools, methodologies and know-how and any modifications thereto) will be and remain owned by Nodero. Nodero grants to the Customer a non-exclusive, perpetual licence to use all Intellectual Property owned by Nodero exclusively for the purpose that forms part of the Deliverables or Services provided under this Agreement.
 - b. Except where expressly agreed the Customer must not, nor may it permit any other person to:
 - i. copy, alter, modify, reproduce, reverse assemble, reverse compile or enhance the Software or the Documentation that is part of the pre-existing Intellectual Property;
 - ii. alter, remove or tamper with any trademarks, any patent or copyright notices, or any confidentiality, proprietary or trade secret, legend or notice, or any numbers, or other means of identification used on or in relation to the Software and/or the Documentation;
 - iii. make any of the Software and/or the Documentation available to any person other than its employees without the prior written consent of Nodero; or
 - iv. do any act that would or might invalidate or be inconsistent with Nodero's Intellectual Property rights.
 - c. The Customer must, at Nodero's expense, take all such steps as Nodero may reasonably require to assist Nodero to maintain the validity and enforceability of Nodero's Intellectual Property rights.

34. Third Party Intellectual Property Rights
- a. All Intellectual Property (and any modifications thereto) in third party licensed Deliverables provided under Specified Services will be and remain owned by the relevant third party licensor.
 - b. Each third party licensed Deliverable may be licensed to the Customer on the third party licensor's licence terms. Nodero must obtain the Customer's prior consent in writing to use any third party Intellectual Property, and agreement on the terms of third party license agreements prior to the third party licensed Deliverable being provided to the Customer under a Specified Service.
 - c. Nodero warrants that it has a legal entitlement to use third party intellectual property provided as part of the Services and that providing the Services and any Deliverables does not infringe the intellectual property rights of any third party; and
 - d. Nodero indemnifies the Customer against any claim arising from Nodero's infringement or alleged infringement of any third party's intellectual property
 - e. The Customer indemnifies Nodero against any loss, costs, expenses, demands or liability, whether direct, indirect or consequential or otherwise, and whether arising in contract, tort [including in each case negligence], or equity or otherwise, arising out of a claim by a third party alleging infringement of that third party's Intellectual Property rights if such claim arises from infringement, suspected infringement or alleged infringement due to:
 - i. use of any of the Software and/or the Documentation in combination by any means and in any form with Software or equipment not specifically approved by Nodero, or in a manner or for a purpose not reasonably contemplated or authorised by Nodero.
35. Customer's Intellectual Property Rights
- a. All of the Customer's pre-existing Intellectual Property (including tools, methodologies and know-how and any modifications thereto) will be and remain owned by the Customer. The Customer grants to Nodero a non-exclusive, perpetual licence to use all Intellectual Property owned by the Customer exclusively for the purpose that forms part of the Deliverables or Services provided under this Agreement.
 - b. Subject to clause 33 (Nodero Intellectual Property) and clause 34 (Third Party Intellectual Property), the Customer owns all Intellectual Property developed under or in connection with this Agreement on creation and owns every output of the Service or Deliverable unless otherwise agreed in writing by the Parties

Confidentiality, Security and Publicity

36. The parties recognise and acknowledge the confidential nature of any Confidential Information.
37. Neither party may use or disclose any Confidential Information other than:
 - a. to its employees to the extent necessary;
 - b. with the express prior written consent of the other party; and
 - c. to its professional advisers.
38. Each party agrees to implement such security arrangements as may be necessary to ensure that the secrecy of the Confidential Information is preserved.
39. Neither party may advertise or publicly announce any matter relating to the existence or the contents of this Agreement without the other party's prior written consent, which shall not be unreasonably withheld. Nodero shall be entitled to refer to the Customer as a client of Nodero and provide extracts of its work in its portfolio.
40. The Customer shall indemnify Nodero against any losses, costs [including solicitor and client costs], expenses, demands or liability, whether direct, indirect, consequential, or otherwise, and whether arising in contract, tort [including in each case negligence], or equity or otherwise, incurred as a result of any unauthorised disclosure or use of the Confidential Information by the Customer or any of its employees.

Limitation of Liability

43. Except for the warranty provided in this document, the Customer acknowledges that to the fullest extent permissible by law, the Services and the Software are provided without representations or warranties of any kind, either express or implied [unless otherwise stated in this Agreement], and all warranties and conditions, whether express or implied, are excluded including but not limited to implied warranties of merchantability and fitness for a particular purpose.
44. Nodero will install, configure and integrate the Software, if so stated in the Specifications, however, Nodero accepts no liability for any loss, damage or interruption caused directly or indirectly to the Customer's computer network or IT Systems, internet connections or data as a result of such installation, configuration or integration.
45. Nodero, its officers, employees or agents will not be liable in contract, tort, or otherwise to the Customer for any direct or indirect damage, loss or cost arising directly or indirectly in respect of the goods or Services supplied or from any of Nodero's acts or omissions.
46. If the Customer is using the Services for the purposes of a business, then it agrees that the provisions of the Consumer Guarantees Act 1993 will not apply to its use of or any reliance on any Services.
47. If Nodero is held liable to the Customer for any reason, Nodero's maximum liability is the amount paid by the Customer for the Services to which the liability relates.
48. No claim will be valid unless the Customer gives Nodero written notice of the claim within 6 months after it becomes aware or should have become aware of the circumstances giving rise to such claim.

Termination

49. Either party may terminate this Agreement immediately by notice in writing, upon:
- the other party committing any material breach of this Agreement that is incapable of remedy;
 - the other party failing to remedy any breach of this Agreement that is capable of remedy, within 30 days of notice of that breach having been given by the non-defaulting party to the other party; or
 - the commencement of liquidation or the insolvency of the other party [except for the purposes of solvent amalgamation or reconstruction], or upon the appointment of a receiver, statutory manager or trustee of the other party's property, or upon an assignment for the benefit of the other party's creditors, or upon execution being levied against the other party, or upon the other party compounding with its creditors or being unable to pay its debts in the ordinary course of business.

Consequences of Termination

50. On termination by either party in accordance with clause 49, the licence granted under this Agreement shall terminate immediately. The Customer shall cease to use Nodero's Intellectual Property [including all Software and Documentation] and shall deliver to Nodero [or destroy at Nodero's option] all copies of the Software and the Documentation and any material containing the Intellectual Property and any related documents.
51. In the case of termination by Nodero because of non-payment of monies owing by the Customer, all intellectual property developed under the agreement as specified in clause 35b shall revert to Nodero

Force Majeure

52. Either party may suspend its obligations to perform this Agreement if it is unable to perform as a direct result of a Force Majeure Event by notifying the other party giving details of the Force Majeure Event. Any such suspension of performance must be limited to the period during which the Force Majeure Event continues.
53. Where a party's obligations have been suspended pursuant to clause 52 for a period of 30 days or more, the other party may immediately terminate this Agreement by giving notice in writing to the other party.

Assignment

54. The Customer shall not assign its rights under this Agreement without the prior written consent of Nodero.

Standard Terms & Conditions



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Subcontracting

55. The Customer shall not subcontract any of its obligations under this Agreement without the prior written consent of Nodero.
56. Nodero may, with the prior consent of the Customer, subcontract the performance of this Agreement in whole or part, such consent not to be unreasonably withheld. Nodero may, without the consent of the Customer, engage individuals on a subcontract or consultancy basis, whether or not operating under a corporate structure, to assist in the provision of any Services pursuant to this Agreement.

Entire Agreement

57. This Agreement constitutes the complete and exclusive statement of the agreement between the parties, superseding all proposals or prior agreements, oral or written, and all other communications between the parties relating to the subject matter of this Agreement.

Further Assurances

58. The parties must each do all such further acts [and sign any documents] as may be necessary or desirable for effecting the transactions contemplated by this Agreement.

Amendments

59. Except as specifically provided, no amendment to this Agreement will be effective unless it is in writing and signed by both parties.

Waiver

60. No exercise or failure to exercise or delay in exercising any right or remedy by a party shall constitute a waiver by that party of that or any other right or remedy available to it.

Non Merger

60. The agreements, obligations and warranties contained in this Agreement shall not merge on completion of the transactions contemplated by it but will remain in full force until satisfied.

Partial Invalidity

61. If any provision of this Agreement or its application to any party or circumstance is or becomes invalid or unenforceable to any extent, the remainder of this Agreement and its application shall not be affected and shall remain enforceable to the greatest extent permitted by law.

Notices

61. Any notice or other communication in connection with this Agreement shall be:
 - a. in writing;
 - b. marked for the attention of the person specified in the SOW or any replacement person notified by the relevant party; and
 - c. left at the address or sent by prepaid post or facsimile to the address or facsimile number of the relevant party specified in the SOW, or any replacement address or facsimile number notified by that party.
62. Notices or other communications are deemed received:
 - a. if delivered by hand, on delivery;
 - b. if delivered by post:
 - i. on the third day following posting if sent and received within New Zealand; and
 - ii. on the tenth day following posting to or from an overseas destination.
 - c. if delivered by facsimile, on production of a transmission report by the machine from which the facsimile was sent in its entirety to the facsimile number of the recipient, specifying the correct number of pages sent, the date and time of transmission and that transmission was successful, provided that the onus of proving receipt shall be on the sender.

Dispute Resolution

63. Where any dispute arises between the parties concerning this Agreement or the circumstances, representations, or conduct giving rise to this Agreement, no party may commence any court or arbitration proceedings relating to the dispute unless that party has complied with the procedures set out in this clause 64.
64. The party initiating the dispute ["the first party"] must provide written notice of the dispute to the other party ["the other party"] and nominate in that notice the first party's representative for the negotiations. The other party must within 7 days of receipt of the notice give written notice to the first party naming its representative for the negotiations. Each representative nominated shall have authority to settle or resolve the dispute.
65. If the parties are unable to resolve the dispute by discussion and negotiation within 14 days of receipt of the written notice from the first party, then the parties must immediately refer the dispute to mediation.
66. The mediation must be conducted in terms of the LEADR New Zealand Inc Standard Mediation Agreement. The mediation must be conducted by a mediator at a fee agreed by the parties. Failing agreement between the parties, the mediator shall be selected and his/her fee determined by the Chair for the time being of LEADR New Zealand Inc.

Governing Law

67. This Agreement shall be governed by New Zealand law, and the parties submit to the non-exclusive jurisdiction of the courts of New Zealand.

Definitions

68. Unless the context otherwise requires, the following expressions shall have the following meanings:

"Confidential Information" means information which is or has been disclosed by one party to the other, but does not include any information that is:

- a. on receipt, in the public domain, or which subsequently enters the public domain without any breach of this Agreement;
- b. on receipt, already known by the party receiving it;
- c. at any time after the date of receipt, received in good faith from a third party; or
- d. required by law to be disclosed;

"Documentation" means the Documentation described in the Specifications;

"Force Majeure Event" means any war, riot, strike, natural or man-made disaster, or other circumstance of a similar nature;

"GST" means goods and Services tax imposed under Goods and Services Tax Act 1985;

"Intellectual Property" means copyright, patents, designs, trademarks, trade names, goodwill rights, trade secrets, Confidential Information and any other intellectual proprietary right or form of Intellectual Property;

"Services" means the Services supplied by Nodero in order to create and develop the Software;

"Software" means the Software described in the SOW, but excludes the source code;

"SOW" means "Statement of Work". On smaller projects the term refers to the "Proposal";

"Specifications" means the Specifications referred to in the SOW;

"System" means the equipment and Software that form the System on which the Software is to be installed, as specified in the Specifications;

"Warranty Period" means the period specified in the SOW.