

Sample Additional Conditions governing assignments for interactive media design

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bno

Beroepsorganisatie
Nederlandse Ontwerpers

Explanation

These Additional Conditions may be used for assignments for the development of interactive media applications, such as mobile and other applications (“apps”), websites, booking or registrations systems, etc. They are additions to and deviations from the BNO general Conditions (2013) and it is therefore advisable, insofar as relevant and desirable, to expressly include these provisions in, or enclose them with, the offer in which the BNO General Conditions (2013) are declared applicable. These conditions have been amended in light of the General Data Protection Regulation (GDPR), which will replace the Wet bescherming persoonsgegevens (Personal Data Protection Act) as from 25 May 2018.

It is important to bear in mind that any other addition to or deviation from the provisions may have drastic consequences for the liability and, if applicable, the coverage under the liability insurance. It is therefore advisable always to present additional or deviating agreements to a legal advisor (of BNO) or to the insurance company or insurance broker. (See also the explanation of the BNO General Conditions (2013).)

Sample text:

Notwithstanding or in addition to the BNO General Conditions (2013) (referred to below as the “**BNO General Conditions**”) governing this offer, a copy of which is enclosed [OR: a copy of which you have already received], the following provisions apply.

1 Specifications

Insofar as possible a description of the assignment is appended to the agreement or the offer, stating (functional and technical) specifications, which appendix forms an integral part of the agreement (or offer). To avoid any misunderstanding, the Designer is free to draw up or require a more detailed description of the assignment or more detailed specifications.

2 The work

The Customer and the Designer determine in consultation what conditions the outcome of the assignment (the “**Work**”) must in any event meet, in addition to the specifications stated in Article 1. Unless otherwise agreed, the Work consists of the visual design (the “**Visual Design**”), the interactive media applications, such as mobile and other applications/apps and websites (the “**Software**”) and the source code used to write the Software (the “**Source Code**”). Insofar as correct use of the Work so requires, the parties must also agree to what extent the Designer will be involved in the maintenance of the Work.

3 Contacts

The Customer and the Designer will each designate a contact who is authorised to make decisions with regard to the assignment. If a party’s designated contact is unavailable for any reason for a period of more than four weeks, that party must designate another contact.

4 Correct provision of materials

The Customer must ensure that Software, materials, data and other information that are necessary or desirable in order to correctly perform the assignment are made available to the

Designer in a timely, correct and complete manner and are suitable for use by the Designer in respect of the assignment.

5 State of the art

The Designer will perform the assignment to the best of his/her ability, in accordance with the state of the art. The Designer cannot warrant that the Work will function without interruption or error-free in every environment. The Work and the way in which it is displayed may be dependent on external factors, such as hardware, systems, browsers, screen resolutions or operating systems. If applicable, the Customer may record in the specifications before the performance of the assignment in what environment the Work will be used, so that the Work can be adjusted accordingly.

6 Test period

If an acceptance test is agreed on in respect of the assignment, a test period is set, which may in no event be longer than 14 days after delivery of the Work by the Designer, unless otherwise agreed in writing. During the test period the Customer may not disclose the Work or the test data or make any changes to them, and may not have them tested by third parties without the Designer's consent.

7 Defects and acceptance

If in the Customer's opinion the Work is not in keeping with the relevant technical and/or functional specifications, the Customer must inform the Designer accordingly in writing immediately, in any event no later than 14 days after delivery, and in the case of defects that are not due to failure to comply with the aforesaid technical and/or functional specifications in any event no later than 30 days after delivery, failing which the Customer is deemed to have accepted the Work unconditionally as is. The latter 30-day period days does not apply if the Customer can irrefutably prove that, even though that period has passed, it could not have discovered the defect any sooner. Also in that case the Customer must report the defect to the Designer as soon as possible. Creative, substantive, artistic or linguistic choices of the Designer can in no event constitute a "defect" as referred to in this article or in the agreement, unless they expressly form part of the aforesaid technical or functional specifications.

8 Special warranty provision

The Designer will repair any defects in the Software or the Work, as referred to and set out in the preceding article, insofar as such defects are due to failure to meet the stipulated specifications as a result of actions of the Designer. Notwithstanding the above provisions, if an acceptance test has been agreed on, the Designer will repair such defects in the Software that are reported by the Customer in writing within 14 days after the end of the test period, insofar as the defects are related to changes/corrections made during the test period.

9 Lapse of special warranty provision

The Designer is not required to repair defects in the Work if they were caused by the Customer itself, by third parties or by changed or other circumstances of which the Designer was not and should not have been aware on the conclusion of the agreement. The warranty also lapses if the Customer makes or commissions changes to the Software or other parts of the Work without the Designer's consent, or if the Customer itself attempts to repair or commission the repair of a defect in any manner without the Designer's written consent.

10 Provision of other services by the Designer

The Designer provides other services, such as applying for domain name registrations and establishing security, inspection, maintenance and system management procedures, only if they expressly form part of the assignment.

11 Privacy

If the Designer is required to process personal data of the Customer, or the Customer's customers, in respect of the services to be provided, the Designer is regarded as the "processor"

and the Customer as the “controller” within the meaning of the General Data Protection Regulation (GDPR) and an additional data processing agreement is concluded if the parties so wish. When recording the technical specifications as referred to in Article 2 of these Additional Conditions, it is then specifically stated what appropriate technical and organisational measures have been taken to protect the personal data against loss or wrongful processing.

12 Engagement of hosting & internet providers and other service providers

If the Designer recommends the engagement of other service providers or suppliers, such as certain hosting & internet providers, with a view to the functioning or creation of the Work, the Designer is not liable if those service providers or suppliers fail to fulfil their obligations.

13 Extra work

If the Designer is required to perform extra work due to a change in or expansion of the assignment, due to late, incorrect or incomplete supply of Software, materials or data, due to the repair of the design or the Work as a result of incorrect or improper use, due to permission having to be obtained from owners or due to the need to assist employees or suppliers of the Customer outside the terms of reference (on request or by force of circumstances), a fee is due for that work regardless of whether a fixed price was agreed on, which fee is then based on the rates charged by the Designer at that time.

14 Use of the Work

The Customer may use the Work in the agreed manner when it has performed all its obligations under the agreement. The use made of the Work must be correct and proper at all times. In the event of doubt or uncertainty as to whether a certain manner of use is permitted, the Customer must consult with the Designer before using the Work in that manner.

15 Intellectual property rights

For the purpose of these Additional General Conditions, the term “intellectual property rights” as used in Article 4 of the BNO General Conditions expressly means copyrights, database rights, neighbouring rights, trademark rights, design rights, patents, domain name rights, know-how, commercial knowledge, trade secrets and all similar rights that have arisen anywhere in the world, regardless of whether they are eligible for registration, including any application to that effect.

16 Licence for the use of the Work

If the Customer performs all its obligations under the agreement with the Designer, it is granted a licence to use the Work as referred to in Article 5 of the BNO General Conditions. With regard to the Visual Design that forms part of the Work, the licence referred to in paragraph 1 of this article is exclusive and non-transferable. With regard to the Software and the Source Code developed by the Designer and the related technical and other documentation, the licence referred to in paragraph 1 of this article is non-exclusive and non-transferable, regardless of whether the Software and the Source Code were produced as part of the assignment. The Designer remains the owner of the copyright in the Work, unless the parties agree on a transfer of rights in accordance with Article 4.2 of the BNO General Conditions.

17 Third-party material

The Customer itself is responsible for obtaining permission for the use of third-party material that is protected by copyright or any other intellectual property rights and that will be used in the Work, unless the parties expressly agree that the Designer is responsible for doing so. To the extent possible, the Designer will state beforehand for what material permission for use must be obtained. At the Customer's request, the Designer can apply for a cost estimate at the supplier in question with regard to the material proposed by the Designer for use in the Work. For these purposes copyright protected third-party material includes software, house style elements, fonts, photographs, musical and other compositions and visual/audio-visual works. If necessary, the Designer may request proof that the permission referred to in the preceding paragraphs has been fully and properly obtained. The Designer is in no event liable if the licences referred to

above have not been obtained or are incorrect or incomplete. The Customer indemnifies the Designer against any third-party claims in that regard.

18 Changes

In the case of an assignment for the development of a mobile or other application or website, or a design that is equivalent to such an application, the Customer may make changes to the content of the databases, the underlying pages and the tree structures, for day-to-day use, within the limits set by the Designer. Without the Designer's prior written consent, however, the Customer may not change:

- a. the Visual Design;
- b. the home page;
- c. the basic structure;
- d. the Software; or
- e. the navigation system.

The Designer may not withhold the consent referred to in the preceding paragraph on unreasonable grounds. If the Customer wishes to have changes made, it must first give the Designer the opportunity to do so. A fee is then payable based on the rates charged by the Designer at that time.

19 Source Code and protection of Software

The Designer will not transfer to the Customer the Source Code of the Software and the technical documentation drawn up during the development of the Work. If the Customer so wishes or if the nature of the assignment so necessitates, the Designer may be obligated to place the Source Code in escrow with a third party. The escrow costs are then payable by the Customer, unless the parties agree otherwise or the escrow arrangement already existed. Insofar as the Customer has access to the Source Code, it may not use it for any purpose (other than that for which it may have been placed in escrow) and may not disassemble, decode, decompile, reverse engineer or change it, or provide third parties with information about it, without the prior written consent of the owner of the Source Code. The Designer may protect his/her Software by means of technical or other measures, in which case the Customer may not remove or circumvent that protection.

20 Enforcement of rights

In the event of infringement of the Designer's rights in respect of the Work, the Designer hereby authorises the Customer, at its own expense, on behalf of the Designer and on its own behalf, to enforce those rights and to claim damages and the surrender of profit both in and out of court. The parties must provide each other with all the information required if measures are taken to that end.

If legal measures are taken as referred to in the preceding paragraph, the Customer is entitled to 60% and the Designer to 40% of the proceeds of any claim honoured or awarded to the Customer, after deduction of any judicial and extrajudicial costs and costs of legal assistance, insofar as the infringing party is not ordered to pay those costs. If the Customer refrains from taking such legal measures, the Designer himself/herself may take legal measures against the infringing party or parties. The damages or compensation payable by a third party on the grounds of these legal measures will then benefit the Designer in their entirety, whereby the reasonable costs incurred by the Customer in assisting the Designer must be reimbursed to the Customer.

21 Right of attribution

In publicity surrounding the Work the Customer must ensure that the Designer's contribution is clearly apparent. If it has been agreed that third parties will be involved in changing or elaborating the Work, the Customer must also obligate such third parties to clearly state the Designer's contribution in publicity surrounding the Work or an elaboration of the Work. The Designer may state his or her name in the Work in a modest manner. The manner in which that will be done must be agreed on in consultation.

Although this specimen has been drafted with the utmost care, BNO accepts no responsibility for harm or loss of any kind whatsoever that might arise from any defect in the terms of this specimen or from its use.