



# **General Terms and Conditions**

January 1, 2011



## **1 Agreement, offers and confirmation**

### **1.1 Application**

These General Terms and Conditions apply, to the exclusion of any purchase or other conditions of the Client, to the preparation, content and performance of all agreements between the Client and the WeLL Design.

### **1.2 Validity of offers**

All offers are without commitment and will be valid for two months.

### **1.3 Confirmation commissions**

Commissions must be confirmed by the Client in writing. If the Client fails to do so, but consents to WeLL Design commencing the work commissioned, the terms of the offer will be deemed to have been agreed. Any subsequent oral agreements and stipulations will not be binding on WeLL Design, unless WeLL Design has confirmed these in writing.

### **1.4 Multiple parties**

If the Client wishes to commission identical works to a party other than WeLL Design or has already commissioned the work to another party, he must inform WeLL Design accordingly in writing, stating the names of those other parties.

## **2 Tasks and responsibilities**

### **2.1 WeLL Design**

WeLL Design will make every effort to perform the work commissioned carefully and independently, to promote the Client's interests to the best of his ability and achieve a result that is useful to the Client. The commission will be executed based on a Project plan consisting out of different phases, which differ per commission. Per phase of the Project Plan, WeLL Design will keep the Client informed about the progress of the work. WeLL Design will inform the Client in writing if a phase has been finalized. WeLL Design will inform the Client either by fax, by post (letter) or by email.

The application of any permits and the assessment whether instructions of the Client comply with statutory or quality standards do not fall within the scope of the work commissioned to WeLL Design.

### **2.2 Client**

The Client must supply WeLL Design in time with all information, data and hardware needed in order to correctly execute the commission. The Client will also appoint a project leader that – besides his/her knowledge concerning the content of the commission – has sufficient power of decision in order to guarantee an efficient progress. The Client needs to communicate every adaption or change that is influencing the work commissioned, the project-program or the result, to WeLL Design as soon as possible and in a written manner.

### **2.3 Check**

Prior to production, reproduction or publication, each party must give the other the opportunity to check and writtenly approve the final drafts, prototypes or galley proofs of the design.

If WeLL Design is to place orders with or give instructions to manufacturing companies or other third parties, whether or not in the Client's name, the Client must confirm his aforesaid approval in writing at WeLL Design's request.

## **2.4 Complaints**

Complaints need to be filed with WeLL Design in writing and as soon as possible, and in any case no later than within ten business days after WeLL Design's written communication that a phase of the Project plan has been finalized. If the Client fails to do so, he will be deemed to have accepted the work commissioned in its entirety.

## **3 Engagement of third parties**

### **3.1 Instructions to third parties**

Unless agreed otherwise, instructions to third parties to be given in the context of executing the work commissioned, will be given by or on behalf of the Client. At the Client's request, WeLL Design may act as an agent for the Client's own account and risk. Parties may agree on a fee for such services.

### **3.2 Estimation of third-party costs**

In case WeLL Design provides an estimate of third-party costs at the Client's request, such estimate will be an approximate only. If required, WeLL Design may seek quotations from third parties on the Client's behalf.

### **3.3 Goods and/or services of third parties**

If WeLL Design procures goods or services from third parties in the performance of the work commissioned for WeLL Design's own account and risk and on the basis of an express agreement, and these goods or services will be passed on to the Client, the general conditions of such supplier with regard to the quality, quantity or properties and delivery of such goods or services will also apply to the Client.

## **4 Intellectual property**

### **4.1 Liability**

Unless otherwise agreed, all intellectual property rights arising from the work commissioned – including patents, design rights and copyrights – will vest in WeLL Design. If any such rights can be acquired only by registration, WeLL Design will have the sole and exclusive power to effect such registration.

### **4.2 Research**

The work commissioned does not include conducting searches for the existence of rights, including patents, trademark rights, drawing and design rights, copyrights or portrait rights of third parties. The same applies to any investigation into the possibility of such forms of protection for the Client.

### **4.3 Citation of name**

WeLL Design is entitled to imprint its name in, on or with or to remove it from the (final) result of the work commissioned (or to have its name imprinted on or in or removed from the work). Without WeLL Design's prior authorization, the Client may not publish or reproduce the work without identifying WeLL Design by name.

### **4.4 Materials**

Unless otherwise agreed in writing, all design drawings, illustrations, prototypes, scale models, templates, drafts, design sketches, films and other materials or (electronic) data files, made by WeLL Design in the course of executing the design will remain WeLL Design's property, irrespective of whether they were made available to the Client or to third parties.

### **4.5 Custody**

Upon completion of the work commissioned, neither the Client nor WeLL Design will have any obligation to retain any used materials and data.

## **5 Use and licence**

### **5.1 Use**

Unless otherwise agreed in writing, WeLL Design will license the Client a licence to use the design solely for the purposes of publication and reproduction as such purposes were agreed when the work was commissioned.

If no such specific purposes have been agreed, the licence will be limited to that manner of use of the design on which firm intentions existed on the date when the work was commissioned. Such intentions must have been verifiably stated to WeLL Design prior to the conclusion of the agreement.

### **5.2 Non agreed use**

Without prior written approval from WeLL Design, the Client is not entitled to any use of the design that is broader or different from the use agreed. In the event of broader or different use on which no agreement was reached, including any amendment, mutilation or infringement on the provisional or final design, WeLL Design will be entitled to compensation due to infringement of his rights of at least three times the agreed fee, or a fee that is reasonably and fairly proportional to the infringement committed, without prejudice to WeLL Design's right to claim reimbursement of the damage actually incurred.

### **5.3 End of use**

The Client will not (or no longer) be permitted to use the results made available and any licence granted to the Client in the context of the work commissioned will lapse:

- a. from the moment that the Client fails to fulfil his payment or other obligations under the agreement or to do so in full, or is otherwise in default, unless the default is insignificant by reference to the overall scope of the work commissioned;
- b. if the work commissioned is terminated early for any reason whatsoever, unless the consequences are contrary to the principles of reasonableness and fairness.

### **5.4 Publicity and promotional purposes**

WeLL Design may use the design at his discretion for his own publicity or promotional purposes, with due observance of the Client's interests.

## **6 Fees, additional costs and delivery times**

### **6.1 Costs**

In addition to payment of the agreed fees, WeLL Design will also be entitled to reimbursement of any costs incurred by WeLL Design in the performance of the work commissioned.

### **6.2 Quotations**

Quotations and delivery times may be changed as result of changes/modifications in the work commissioned. Quoted prices do not include VAT and any other taxes. Any quoted fees and promotional offers do not automatically apply to any future works commissioned.

### **6.3 Additional costs**

In addition to the fees, all costs incurred by WeLL Design in carrying out the assignment are charged to the client. In the case of materials, prototype parts, products and components purchased externally by WeLL Design, a surcharge of 15% is added to cover administrative costs.

Next to the fee a surcharge of 5% general office expenses will be charged separately.

Travel time within the Netherlands is charged at 50% of the relevant hourly fee, up to a maximum of eight hours travel per day per person.

Travel time outside the Netherlands during normal office hours is charged at 100% of the relevant hourly fee, up to a maximum of eight hours travel per day per person.

Travel time outside the Netherlands and outside normal office hours is charged at 50% of the relevant hourly fee, up to a maximum of eight hours travel per day per person.

Distance travelled is charged at a flat rate of € 0,48 per kilometre.

#### **6.4 Indexation**

WeLL Design is entitled to index the work that has not yet been invoiced per January 1<sup>st</sup> conform the annual adjustments of WeLL Design's applicable fees.

#### **6.5 Additional work**

If WeLL Design is required to perform more or other work due to late delivery or non-delivery of complete, sound and clear data and/or materials, or any change or error in instructions or briefings, such additional work will be charged separately on the basis WeLL Design's usual fees. In such case, WeLL Design is also entitled to change the delivery times.

#### **6.6 Audit of accounting records**

If the fee to be paid is in any way subject to facts or circumstances to be evidenced by the Client's accounting records, WeLL Design will be entitled upon receiving a statement of account from the Client to have the Client's accounting records audited by an accountant to be selected by WeLL Design. If the results of the accountant's audit differ more than 2% or € 100,- from the Client's report and statement of account, the costs of the audit will be for the Client's account.

## **7 Payments**

### **7.1 Invoices**

Unless otherwise agreed in writing, WeLL Design has the right to invoice the Client at monthly intervals for work performed and costs incurred in the performance of the work commissioned.

### **7.2 Term of payment**

Payments must be made within 14 days of the invoice date. If WeLL Design has not received payment (or payment in full) at the end of that term, the client will be in default and will owe WeLL Design interest at the statutory rate.

### **7.3 Extrajudicial costs**

All costs incurred by WeLL Design in connection with overdue payments, such as costs of litigation and judicial and extrajudicial costs, including the costs of legal assistance, bailiffs and debt collection agencies ('incassobureaus') will be for the Client's account.

### **7.4 Reductions or sett-off**

The Client will pay the amounts due to WeLL Design without any reduction or set-off, save for the settlement against adjustable advance payments relating to the agreement which the Client may have made to WeLL Design. The Client is not entitled to suspend payment of invoices for work that has already been performed.

## **8 Suspension, notice of termination and dissolution of the agreement**

### **8.1 Suspension**

If the Client does not, not sufficiently or not in time comply with any of the obligations arising out of the agreement or any other corresponding agreements or if WeLL Design has reasonable grounds to believe that the Client is or will not be able to fulfill its obligations, WeLL Design has the right to suspend the further performance of the agreement without giving any prior notice and without any judicial intervention being required. In such case WeLL Design will not be liable for any damages.

### **8.2 Termination by Client**

If the agreement is terminated by the Client, the Client will be required to pay, in addition to damages, WeLL Design's fees and the costs incurred in connection with the work performed until that date.

### **8.3 Dissolution by WeLL Design**

If the agreement is terminated by WeLL Design on the grounds of breach by the Client in the performance of the agreement, the Client will be required to pay, in addition to damages, WeLL Design's fee and the costs incurred in connection with the work performed until that date. In this context, any conduct by the Client on the grounds of which WeLL Design cannot reasonably be required to complete the work commissioned will also be regarded as breach in the performance of the agreement.

### **8.4 Damages**

The damages as referred to in the preceding two paragraphs of this article (8.2 and 8.3) will comprise at least the costs arising from obligations undertaken by WeLL Design in its own name with third parties for the performance of the work commissioned, as well as at least 50% of the balance of the fee that the Client would owe WeLL Design if the work commissioned were fully completed.

### **8.5 Dissolution**

WeLL Design and the Client both have the right to terminate the agreement in whole or in part with immediate effect if the other party is declared bankrupt or is granted a suspension (whether or not provisional) of payment ('surséance'). If the Client is declared bankrupt, WeLL Design will have the right to terminate the right of use granted.

### **8.6 Termination by Client**

In the event of termination by the Client on the grounds of breach by WeLL Design in the performance of the obligations, the performances already completed and the related payment obligations will not be subject to cancellation.

Amounts that WeLL Design has invoiced before the dissolution for work performed or delivered properly under the agreement will remain payable in full with due observance of the previous sentence and will fall due immediately upon termination.

### **8.7 Indefinite period of time**

In case the work commissioned by WeLL Design exists out of repetitive performances of similar activities, the applicable agreement will be suggested to have entered into for an indefinite period of time, unless otherwise agreed in writing. Such agreement can only be terminated by written notice and by observance of a notice period of at least three months.

## **9 Warranties and indemnifications**

### **9.1 Guarantee design**

WeLL Design guarantees that the design supplied to the Client has been made by him or on his behalf and, if the design is protected by copyright, that WeLL Design is the author within the meaning of the Auteurswet (Copyright Act) and as the copyright owner has the power of disposition of the work.

### **9.2 Indemnification Client**

The Client indemnifies WeLL Design or persons engaged by WeLL Design in the performance of the work commissioned against any third-party claim or action arising from the application or use of the design created by WeLL Design or persons referred to above.

The Client indemnifies WeLL Design against any claim or action relating to intellectual property rights in materials or information supplied by the Client and used in the performance of the work commissioned.

## **10 Liability**

### **10.1 No liability WeLL Design**

WeLL Design will not be liable for:

- a. errors or defects in materials supplied by the Client;
- b. misunderstandings, errors or defects in the performance of the agreement if such misunderstandings or errors were caused by acts of the Client, such as late delivery or non-delivery of complete, sound and clear information and/or materials.
- c. errors and defects by third parties engaged by or on behalf of the Client;
- d. inaccuracies in offers made by suppliers, or prices quoted by suppliers being exceeded;
- e. errors or defects in the design or errors in the text/data if the client has given his approval in accordance with the provisions of Article 2.5 or has had the opportunity to perform an inspection and has declined to do so; or
- f. errors or defects in the design or errors in the text/data if the Client has not had a particular model or prototype prepared or a particular test performed and the errors would have been apparent in such model, prototype or test.

### **10.2 Attributable and direct damages**

WeLL Design will be liable only for direct and attributable damages. Direct damages will include only:

- a. reasonable costs to assess the cause and extent of the damages, to the extent that such assessment concerns damages within the meaning of these general conditions;
- b. any reasonable costs necessarily incurred to have WeLL Design's defective performance conform to the Agreement;
- c. reasonable costs incurred to prevent or limit damages, to the extent that the Client demonstrates that those costs led to a limitation of the direct damages referred to in these terms of use.

### **10.3 Other damages**

WeLL Design's liability for damages, other than as the abovementioned damages (as mentioned under 10.2), such as indirect damages, including consequential damages, loss of profit, mutilated or lost data or materials, or damages due to business interruptions is hereby excluded.

#### **10.4 Wrongful act**

Save in the event of intent or wilful recklessness by WeLL Design or WeLL Design's management – therefore except for persons under their control – WeLL Design's liability for damages or loss arising from an agreement or any wrongful act committed against the Client will be limited to the amount invoiced for the portion of the work performed, less the costs incurred by the Client in the engagement of third parties, on the understanding that that amount will not exceed € 45.000,- and will in no event be higher than the benefit that the insurance company may pay to WeLL Design.

#### **10.5 Expiration liability**

Any and all liability will expire twelve months (being one calendar year) from the date of completion of the work commissioned.

#### **10.6 Custody**

Where reasonably possible the Client will be required to retain copies of materials and data he has supplied until the work commissioned has been completed. If the client fails to do so, the contractor cannot be held liable for any damages or loss that would not have occurred if such copies had existed.

### **11 Confidentiality**

#### **11.1 Information**

Both parties will keep secret and strictly confidential any and all oral, written, graphic or electronic information that becomes known to the other party. Without the written approval of the supplying party, the other party will not publish, disseminate or in any other way give notice of this information to any third parties, except for situations as described hereunder in 11.2. Third parties concerned with the performance of the work commissioned will also be bound by a similar confidential treatment of facts and circumstances supplied by the other party.

#### **11.2 Exceptions**

This confidentiality does not apply to information of which the receiving party can prove in writing that:

- (a) this information already belongs or will belong to the public domain without any act or omission of the receiving party being required;
- (b) this information is already known to the receiving party at the moment of receipt, which can be proved in writing;
- (c) this information is supplied to the receiving party by any third party based on a legal obligation without any restriction to the publication thereof.

### **12 Miscellaneous**

#### **12.1 Transfer**

Without the written approval of WeLL Design, the Client is not allowed to transfer any rights to any third parties.

#### **12.2 Headings**

The headings in these Terms of Use have been included for easy reference only and are no part of these Terms of Use.

#### **12.3 Applicable law**

The agreement between WeLL Design and the Client is governed by Dutch law. The court that has the power to hear and decide any dispute between WeLL Design and the Client will be the court having jurisdiction in the district where WeLL Design will have its registered office or the court having jurisdiction pursuant to the law, at WeLL Design's option.