

Terms of Engagement: Kirman Design

1. Contract

This contract is made between the Designer ("we" or "us"), and the Client ("you") as defined in the Proposal. The terms of this contract will override terms that you may have sent or may send to us or any other written correspondence or verbal communication including any advice or recommendation made before we accept the order. Any typographical, clerical or other errors or omissions in the catalogue, Proposal, price list, order or any other document may be changed without us incurring any liability.

2. Definitions

"Design or Designs" means all designs including drawings produced by us when performing the Services; "Fee(s)" means the fees set out in the Proposal or any variation to the Fee; "Project Inspection" has the meaning given to it in Clause 4; "Proposal" means the written document(s) that we send to you together with these terms and conditions for the execution of the Services, which will be agreed by both of us; "Services" means the set of services to be provided by us under this contract as set out in the Proposal; "Site" means the location where the Works are to be carried out as set out in the Proposal; "Works" means all the hard and soft landscaping including preparation, construction and planting work undertaken at the Site to implement the Design(s).

3. Services

3.1 Once the contract is accepted by you, we will provide the Services set out in the Proposal using reasonable skill and care in accordance with standards expected of a reasonable garden designer. We will provide the Services in a timely fashion but any time deadline set out in the Proposal is only an estimate.

3.2 This is a design and consultancy only agreement. We may assist you in communicating with third parties but it is your responsibility to contract directly with third parties to carry out the Works. We will not be responsible for the work undertaken by third parties, the manner in which the Works are being carried out nor any other aspect of their progress.

3.3 All specifications, figures, sizes and other descriptions in the Design are approximations only and should not be relied upon.

3.4 You may suspend the Services at any time, but all sums due at the date of suspension will become due for immediate payment. Once we receive your further instructions we will use reasonable endeavours to reschedule the Services as soon as is practicable. This rescheduling will not be guaranteed to be at a time requested by you. Any additional cost incurred by us in complying with these instructions will be added to the total Fees unless such suspension was due to something we had done or failed to do.

4. Project Inspection

4.1. If we have specified in writing in the Proposal that we will carry out Project Inspection then the following Clause 4 will apply.

4.2. In consideration of payment of the fee specified in the Proposal, we will carry out Project Inspection.

4.3. Project Inspection means that we will conduct site inspections at appropriate intervals of the Works as agreed in the Proposal. We shall notify you of any discrepancies that we have noted between the Design and the actual Works being delivered in order that you may take steps to rectify such changes as you see fit.

4.4. We will not supervise or manage the Works. We may if agreed in the Proposal assist you in communicating with third parties but you will contract directly with the third parties and by undertaking Project Inspection we will not take responsibility or liability for their work or the Works, and we will not accept any liability in respect of either the execution or performance of such third party contractor, or the delivery or performance of the Works once completed.

5. Variations

5.1. Either party will be entitled to vary or amend the scope of the Services or the Proposal upon the prior consent of the other party. Any variation will only be effective once the details of the variation (which may take the form of a further Proposal) together with an additional Fee or any variation to the Fee have been put in writing and agreed by both parties, whereupon this will form a binding contract between the parties. We will then carry out the varied contract as if the variation was originally included in the Proposal. We may refuse to accept a variation if it reduces the value of the contract by ten per centum or more.

5.2. If you require services outside of the scope of the Proposal or at a higher level of service than that currently subscribed, then we will try to carry out such service at our convenience and for a fee that we will set at that time.

5.3. We may vary these terms and conditions by giving you 14 days' prior written notice if we are required to do so for reasons beyond our reasonable control.

6. Fees

6.1. The Fees for the Services are set out in the Proposal and will become fixed on the acceptance of the Proposal by both parties unless varied in accordance with these terms, or unless the Fee is based on the value of the project, or on the size of the Site and this is found to be larger once the Site has been measured. The Fees will be payable in instalments in accordance with the payment schedule or in the circumstances set out in the Proposal. All invoices shall be paid by you upon receipt of the invoice and are exclusive of value added tax and delivery charges which shall be added to the invoice where applicable. If sent by post, the invoice shall be deemed to have been received two working days after posting. We reserve the right to charge interest at 8% per annum above the base rate of the Bank of England on any outstanding amounts (calculated on a daily basis) that remain payable after the due date. If you fail to pay an invoice by the due date, we may, after seven days' prior notice, suspend the performance of the Services until payment in full is received.

7. Your Obligations

7.1. You have certain obligations under this contract. Failure to comply with these obligations may result in us suspending or terminating the contract. If we incur any damages or fines through your failure to carry out your obligations, then you will repay us all such moneys on a full indemnity basis.

7.2. You will provide us at the time of asking with the necessary information in order to carry out the Services. You will warrant the accuracy of this information and that the information is not subject to any third party rights that would prevent us from using this information. You will be liable for any costs that we may suffer if this warranty is not true.

7.3. You will allow us reasonable access to both you and the Site at the agreed times in order to carry out the Services.

7.4. You will notify us in writing of any issues which may affect the Services as soon as possible to enable us at the earliest opportunity to investigate and rectify where necessary; and notify us as soon as possible of any structural alterations that may affect the Works.

7.5. If as part of the Works there is a requirement that any remedial work is required to trees at the Site (including but not limited to cutting down or lopping), then you will make the necessary checks and arrangements that such tree is not subject to any type of protection order. You will also be responsible for any planning permission or licences in respect of the Works unless otherwise agreed in the Proposal. You will cover any fines or damages that are incurred by either party as a result of failing to make such arrangements and you will indemnify us from and against any costs, claims, damages, liabilities and expenses incurred by us arising from any breach of planning permission or licences in respect of the Works.

7.6 Nothing in this contract shall require us to provide advice or services in connection with the presence of or risk of contamination or pollution by harmful substances. You will be solely responsible for determining what investigations and actions should be taken in relation to such substances and shall commission such professional third party advice as you consider necessary.

8. Intellectual Property Rights and Licence

8.1. We are the owner of all intellectual property rights in the Designs together with the rights in any developments and modifications in such Designs. We assert the moral rights that we may have in any Designs.

8.2. We will grant you a non-exclusive, perpetual, non-transferable and personal licence to use the Designs for your own internal business or residential purposes at the location set out in the Proposal, but for no other purpose. You may not allow any third party to use any of those Designs; use those Designs on behalf of or for the benefit of any third party; sub-license the use of the whole or any part of those Designs; recreate the Design at a different location or transfer them to anyone else without our prior written permission.

8.3. We will be allowed to refer to you in any publicity after the Services have taken place provided we receive your written consent in advance (including the taking and publication of photographs of the Works and the Site).

8.4 The provisions of this clause 8 shall remain in full force and effect after termination of this contract for whatever reason.

9. Liability

9.1 In the event of any fault or defect arising in the Services, we shall have the right to remedy such fault where possible by re-supplying the Service. In the event that you do not advise us of any defect in the Services within thirty days after completion of the Services or the provision or delivery of the relevant part of the Services, you shall be deemed to have accepted the Services or part thereof.

9.2 If plants or other goods are provided to you by a separate supplier, those supplies will be provided under a separate contract with your supplier and we can accept no responsibility for that contract or the supplies under it.

9.3 As far as permitted by law, in no circumstances shall we be liable, in contract, tort (including negligence or breach of statutory duty) or otherwise howsoever and whatever the cause thereof (i) for any loss of profits, business, contracts, revenues or anticipated savings or (ii) for any special indirect or consequential damage of any nature whatsoever.

9.4 Nothing in this contract shall affect the statutory rights of a consumer.

9.5 Nothing herein shall limit either party's liability for death or personal injury arising from the proven negligence by itself or its employees.

9.6 We will use reasonable endeavours to comply with any specified delivery dates but no such dates are guaranteed and we exclude liability for any loss (whether direct, consequential or otherwise) resulting from any delay in the delivery of the Services.

9.7 The provisions of this clause 9 shall remain in full force and effect after termination of this contract for whatever reason.

10. Transfer of Rights

We will be entitled to transfer all or any of our rights or obligations under this contract. You will need our prior written permission before transferring any or all the rights to a third party.

11. Termination

11.1 The Services will start on the date specified in the Proposal. Either party may terminate this contract at any time by giving the other party advance written notice if the other becomes insolvent or bankrupt, makes any arrangement or composition with its creditors, has any petition filed against it for compulsory liquidation or bankruptcy, has a receiver appointed over any or all of its assets, is unable to pay its/his/her debts as and when they fall due or otherwise ceases to carry on business.

11.2 If either party is in breach of any significant provision of this contract (a material breach) then that party will give the other party not less than fourteen (14) days' written notice to allow them to correct that breach. If that

party fails to remedy the breach within the notice period, then the other party will be entitled to terminate the contract with immediate effect at the end of that notice period.

11.3 You may terminate this contract at any time by giving us prior written notice but you will have to pay for the Services carried out up to the date of expiry of the notice. We may also assist you in the cancellation of any third party contracts but we cannot guarantee that you will not have to pay such fees in full subject to the terms of any third party contracts. Any licence that we have given you under Clause 8 will end and you must stop using any Designs immediately.

12. Force Majeure

Neither party will be regarded as in breach of this Proposal if the failure is as a result of a circumstance beyond that party's reasonable control (Force Majeure). This will include (but not be limited to) the death or incapacity of the garden designer working on the Design(s). If the Force Majeure continues for a period of one week or more both parties will discuss ways in which to alleviate the situation which will include the possibility of approaching a third party during the period that the Force Majeure exists or if this is not possible to terminate the contract, without either party sustaining any financial liability other than to pay all outstanding Fees that are due up to the date of termination (including contracts that cannot be cancelled).

13. Waiver

If either party chooses not to take up any right of action at any time then this will not prevent that party from taking action on the same or similar point at another time.

14. Proper Law

These terms and conditions will be governed by and construed in accordance with the laws of England and Wales. In the event of any dispute we would ask that you contact us in the first instance to resolve any issues in good faith. If this matter is not referred or resolved within 14 days of the matter being raised then the parties will submit to the exclusive jurisdiction of the English Courts.

15. Notices

Notices to the address specified in the Proposal must be given in writing either by hand, by first class post, or by facsimile transmission provided that there is a transmission sheet showing that the transmission was properly transmitted to the correct number. Post will be judged to have arrived 2 days from date of posting. Notices sent by other means will be deemed received on delivery.

16. Contracts (Rights of Third Parties) Act 1999

The parties to this contract do not intend that any of its terms will be enforceable by virtue of the Contracts (Rights of Third Parties) Act 1999 by any person not a party to it but this shall not affect any right or remedy of a third party that exists or is available apart from that Act.

17. Party Wall Act 1996

If you are required under the Party Wall Act 1996 to appoint a party wall surveyor, then you will be responsible for ensuring that such a surveyor is appointed and we will co-operate and pass all such relevant information to the surveyor as soon as is reasonably practicable.

18. Severability

If any term of this contract shall be held to be invalid, illegal or unenforceable, the remaining terms shall remain in full force and effect and such invalid, illegal or unenforceable term shall be deemed not to have been part of this contract.

19. Entire Agreement

This contract, the Proposal and any variation to the Proposal in accordance with clause 5 above contains the entire understanding between the parties and supersedes all previous agreements between the parties. It is expressly provided that nothing in this contract excludes any liability for pre-contract statements or representations made fraudulently.

20. Professional Membership

As a member of the Society of Garden Designers, we are obliged to comply with its Code of Professional Conduct. Please do tell us if you are not happy with any aspect of the Services. We will try to resolve any problems quickly and to your satisfaction. If you are not satisfied after speaking to us, you are entitled to raise the issue with the Society of Garden Designers. A copy of the Society's Complaints Procedure is available on request.

21. Supply of Plants and/or Other Goods

21.1 If the Proposal specifies that we will supply any goods or plants then this Clause 21 will be supplemental to our Terms of Engagement.

21.2 "Goods" means the plants and other goods listed in the Proposal;

21.3 You agree to order, and we agree to supply you with, the Goods as described, and at a price, set out in writing. You accept that such description is for guidance only and that there may be slight variations in colour, size and shape of the Goods.

21.4 If requested by you, we will arrange for the delivery of Goods to the Site. If we make the arrangements then the cost of delivery will be set out in the Proposal and will be payable by you. We may deliver the Goods in instalments where necessary.

21.5 If in the unlikely event that the costs of supplying the Goods increases between taking your order and the delivery date, we will notify you as soon as possible and will agree the new price with you. If the new price is not acceptable, you will be entitled to cancel the order for such Goods.

21.6 From time to time it may not be possible to supply the Goods you have ordered. If this occurs, we shall offer you items of an equivalent quality, type, age and price to those we are unable to provide, where possible. You will be entitled to accept the equivalent item, choose another alternative or cancel that part of the order.

21.7 The risk in the Goods will pass to you once the Goods are delivered to the Site and you should ensure you have appropriate insurance cover in place.

21.8 Until we have received payment in full for the Goods supplied, the property in the Goods shall remain with us and you shall allow us to enter the location where the Goods are held to take repossession of the Goods.

21.9 If, at the time of delivery, any of the Goods have any defect or damage, please contact us immediately. We shall either repair or replace any Goods which were defective at the time of delivery to you. Our liability is limited to repair or replacement of such Goods by similar goods or plants of similar age and quality appropriate to the season in which they are replaced. We cannot accept responsibility for plants dying or becoming damaged due to neglect or use of inappropriate watering, fertilisation or soil conditions by you or at your property after delivering to you. In the event that you do not advise us of any defect or damage to the Goods within seven days after delivery, you shall be deemed to have accepted the Goods.

21.10 If you terminate the contract in accordance with clause 11.3 above, you remain responsible for either (i) the cancellation costs for the Goods we incur with our supplier or (ii) full payment of any Goods that were ordered prior to termination of the contract, whichever shall be the lesser.