

# Software development agreement

## DATE

6 March 2017

## PARTIES

1. MARK STOECKER of Chandler, Arizona (the "**Developer**"); and
2. HEATHER TREMKO of Oregon City, Oregon (the "**Customer**").

## AGREEMENT

### 1. Definitions

- 1.1 Except to the extent expressly provided otherwise, in this Agreement:

"**Agreement**" means this agreement including any amendments to this Agreement;

"**Assignment IP**" means all Intellectual Property Rights in the Software and the Documentation, excluding the Intellectual Property Rights in the Third Party Materials;

"**Development Services**" means the design and development of the Software or Application by the Developer;

"**Documentation**" means the documentation for the Software produced by the Developer and delivered or made available by the Developer to the Customer;

"**Effective Date**" means the date of execution of this Agreement;

"**Force Majeure Event**" means an event, or a series of related events, that is outside the reasonable control of the party affected (including failures of the internet or any public telecommunications network, hacker attacks, denial of service attacks, virus or other malicious software attacks or infections, power failures, industrial disputes affecting any third party, changes to the law, disasters, explosions, fires, floods, riots, terrorist attacks and wars);

"**Intellectual Property Rights**" means all intellectual property rights wherever in the world, whether registrable or unregistrable, registered or unregistered, including any application or right of application for such rights (and these "intellectual property rights" include copyright and related rights, database rights, confidential information, trade secrets, know-how, business names, trade names, trade marks, service marks, passing off rights, unfair competition rights, patents, petty patents, utility models, semi-conductor topography rights and rights in designs);

"**Schedule**" means any schedule described and communicated on the Upwork platform.

**"Services"** means any services that the Developer provides to the Customer, or has an obligation to provide to the Customer, under this Agreement;

**"Software"** means the software/application identified in the contract located on Upwork.com, including the Source Code of that software created by or on behalf of the Developer in the course of the provision of the Development Services and compiled to create the executable version of that software;

**"Software Defect"** means a defect, error or bug in the Software having an adverse effect on the appearance, operation, functionality or performance of the Software, but excluding any defect, error or bug caused by or arising as a result of:

- (a) any act or omission of the Customer or any person authorized by the Customer to use the Software;
- (b) any use of the Software contrary to the Documentation by the Customer or any person authorised by the Customer to use the Software;
- (c) a failure of the Customer to perform or observe any of its obligations in this Agreement; and/or
- (d) an incompatibility between the Software and any other system, network, application, program, hardware or software not specified as compatible in the Software Specification;

**"Software Specification"** means the specification for the Software communicated between Developer and Customer via Upwork.com, and in the Documentation, as it may be varied by the written agreement of the parties from time to time;

**"Source Code"** means software code in human-readable form, including human-readable code compiled to create software or decompiled from software, but excluding interpreted code;

**"Term"** means the term of this Agreement, commencing in accordance with Clause 3.1 and ending in accordance with Clause 3.2; and

**"Third Party Materials"** means the works and/or materials comprised in the Software, the Intellectual Property Rights in which are owned by a third party, which the parties agree in writing shall be incorporated into the Software.

## **2. Credit**

- 2.1 This document was created using a template from SEQ Legal (<http://www.seqlegal.com>).

## **3. Term**

- 3.1 This Agreement shall come into force upon the Effective Date.

- 3.2 This Agreement shall continue in force indefinitely, subject to termination in accordance with Clause 13.

#### **4. Development Services**

- 4.1 The Developer shall provide the Development Services to the Customer.
- 4.2 The Developer shall use reasonable endeavours to ensure that the Development Services are provided in accordance with the timetable set out in communications on Upwork.com, and that a copy of the Software and Documentation is delivered to the Customer by means of a secure online file sharing system in accordance with that timetable.
- 4.3 The Customer acknowledges that a delay in the Customer performing its obligations under this Agreement may result in a delay in the performance of the Development Services; and subject to Clause 11.1 the Developer will not be liable to the Customer in respect of any failure to meet the Development Services timetable to the extent that that failure arises out of a delay in the Customer performing its obligations under this Agreement.
- 4.4 The Developer shall ensure that the Source Code, and any interpreted code, comprised in the Software created by or on behalf of the Developer during the provision of the Development Services is written to a professional standard, conforms with any coding standards document agreed between the parties, and incorporates sufficient commentary to enable a competent third party developer to understand, adapt, maintain and update the code.
- 4.5 The Developer shall keep the Customer reasonably informed of the progress of the Development Services and, in particular, shall inform the Customer of any substantial obstacles or likely delays in the performance of the Development Services.
- 4.6 The Developer shall during the course of the Development Services at the request of the Customer supply to the Customer a current development version of the Software for the purposes of enabling the Customer to assess the progress of the Development Services and provide feedback to the Developer regarding the Software.

#### **5. Assignment**

- 5.1 On and from the date of contract execution, the Developer hereby assigns to the Customer all of its right, title and interest in the Assignment IP.
- 5.2 The assignment in Clause 5.1 is for the full term of the assigned rights, including all extensions, renewals, reversions and revivals.
- 5.3 The assignment in Clause 5.1 includes the right to bring proceedings in respect of past infringements of the assigned rights, and to recover damages or benefit from any other remedies in respect of any past infringements of the assigned rights.

#### **6. Third Party Materials**

6.1 Subject to any express written agreement between the parties, the Developer shall ensure that the Third Party Materials are:

- (a) licensed to the Customer in accordance with the relevant licensor's standard licensing terms (which the Customer acknowledges may be open source or *Creative Commons* licensing terms);
- (b) licensed to the Customer on reasonable terms notified by the Developer to the Customer;
- (c) sub-licensed by the Developer to the Customer on reasonable terms notified in writing by the Developer to the Customer; or
- (d) sub-licensed by the Developer to the Customer on the basis of a non-exclusive, worldwide, perpetual and irrevocable licence to use the Third Party Materials in connection with the Software.

## **7. Customer obligations**

7.1 Save to the extent that the parties have agreed otherwise in writing, the Customer must provide to the Developer, or procure for the Developer, such:

- (a) co-operation, support and advice; and
- (b) information and documentation,

as are reasonably necessary to enable the Developer to perform its obligations under this Agreement.

## **8. Charges**

8.1 The Customer shall pay the Charges to the Developer in accordance with the existing payment agreement on Upwork.com.

## **9. Payments**

9.1 The Developer shall issue invoices for the Charges to the Customer in accordance with the existing payment agreement on Upwork.com.

## **10. Warranties**

10.1 The Developer warrants to the Customer that:

- (a) the Developer has the legal right and authority to enter into this Agreement and to perform its obligations under this Agreement;
- (b) the Developer will comply with all applicable legal and regulatory requirements applying to the exercise of the Developer's rights and the fulfilment of the Developer's obligations under this Agreement; and
- (c) the Developer has or has access to all necessary know-how, expertise and experience to perform its obligations under this Agreement.

10.2 The Developer warrants to the Customer that:

- (a) the Software as provided will conform in all material respects with the Software Specification;
- (b) the Software will be supplied free from Software Defects and will remain free from Software Defects for a period of at least 12 months following the supply of the Software;
- (c) the Software will be supplied free from viruses, worms, Trojan horses, ransomware, spyware, adware and other malicious software programs; and
- (d) the Software shall incorporate security features reflecting the requirements of good industry practice.

10.3 The Developer warrants to the Customer that the Software and Documentation, when used by the Customer in accordance with this Agreement, will not breach any laws, statutes or regulations applicable under United States law.

10.4 The Developer warrants to the Customer that the Software and Documentation, when used by the Customer in accordance with this Agreement, will not infringe the Intellectual Property Rights of any person.

10.5 If the Developer reasonably determines, or any third party alleges, that the use of the Software by the Customer in accordance with this Agreement infringes any person's Intellectual Property Rights, the Developer may acting reasonably:

- (a) modify the Software in such a way that it no longer infringes the relevant Intellectual Property Rights, providing that any such modification must not introduce any Software Defects into the Software and must not result in the Software failing to conform with the Software Specification; or
- (b) procure for the Customer the right to use the Software in accordance with this Agreement.

10.6 The Customer warrants to the Developer that it has the legal right and authority to enter into this Agreement and to perform its obligations under this Agreement.

10.7 All of the parties' warranties and representations in respect of the subject matter of this Agreement are expressly set out in this Agreement. To the maximum extent permitted by applicable law, no other warranties or representations concerning the subject matter of this Agreement will be implied into this Agreement or any related contract.

## **11. Limitations and exclusions of liability**

11.1 Nothing in this Agreement will:

- (a) limit or exclude any liability for death or personal injury resulting from negligence;

- (b) limit or exclude any liability for fraud or fraudulent misrepresentation;
- (c) limit any liabilities in any way that is not permitted under applicable law; or
- (d) exclude any liabilities that may not be excluded under applicable law.

11.2 The limitations and exclusions of liability set out in this Clause 11 and elsewhere in this Agreement:

- (a) are subject to Clause 11.1; and
- (b) govern all liabilities arising under this Agreement or relating to the subject matter of this Agreement, including liabilities arising in contract, in tort (including negligence) and for breach of statutory duty, except to the extent expressly provided otherwise in this Agreement.

11.3 Neither party shall be liable to the other party with respect to any losses arising out of a Force Majeure Event.

11.4 Neither party shall be liable to the other party with respect to any loss of profits or anticipated savings.

11.5 Neither party shall be liable to the other party in respect of any loss of revenue or income.

11.6 Neither party shall be liable to the other party in respect of any loss of use or production.

11.7 Neither party shall be liable to the other party in respect of any loss of business, contracts or opportunities.

11.8 Neither party shall be liable to the other party in respect of any loss or corruption of any data or database.

11.9 Neither party shall be liable to the other party in respect of any special, indirect or consequential loss or damage.

## **12. Force Majeure Event**

12.1 If a Force Majeure Event gives rise to a failure or delay in either party performing any obligation under this Agreement (other than any obligation to make a payment), that obligation will be suspended for the duration of the Force Majeure Event.

12.2 A party that becomes aware of a Force Majeure Event which gives rise to, or which is likely to give rise to, any failure or delay in that party performing any obligation under this Agreement, must:

- (a) promptly notify the other; and
- (b) inform the other of the period for which it is estimated that such failure or delay will continue.

- 12.3 A party whose performance of its obligations under this Agreement is affected by a Force Majeure Event must take reasonable steps to mitigate the effects of the Force Majeure Event.

### **13. Termination**

- 13.1 Either party may terminate this Agreement as described in the terms of contract on Upwork.com.

### **14. Effects of termination**

- 14.1 Upon the termination of this Agreement, all of the provisions of this Agreement shall cease to have effect, save that the following provisions of this Agreement shall survive and continue to have effect (in accordance with their express terms or otherwise indefinitely): Clauses 1, 9.1, 11, 14, 15, 18 and 19.
- 14.2 Except to the extent that this Agreement expressly provides otherwise, the termination of this Agreement shall not affect the accrued rights of either party.

### **15. Further assurance**

- 15.1 The Developer must use reasonable endeavours to:
- (a) do or procure the doing of all acts; and
  - (b) execute or procure the execution of all documents,
- that the Customer may reasonably request from time to time in order to perfect or confirm the Customer's ownership of the rights assigned by this Agreement.
- 15.2 The Developer must provide to the Customer at the cost and expense of the Customer such reasonable assistance as the Customer may request in order to register the Customer's rights in the Assignment IP with any intellectual property office or registry.
- 15.3 The Developer must provide to the Customer at the cost and expense of the Customer all reasonable assistance in connection with any legal proceedings relating to the rights assigned under this Agreement that are brought by, or against, the Customer.

### **16. Notices**

- 16.1 Any notice from one party to the other party under this Agreement will be communicated via the Upwork platform.

### **17. Subcontracting**

- 17.1 The Developer may subcontract any of its obligations under this Agreement, providing that the Developer gives to the Customer, promptly following the appointment of a subcontractor, a written notice specifying the subcontracted obligations and identifying the subcontractor in question.

17.2 The Developer shall remain responsible to the Customer for the performance of any subcontracted obligations.

## **18. General**

18.1 No breach of any provision of this Agreement shall be waived except with the express written consent of the party not in breach.

18.2 If any provision of this Agreement is determined by any court or other competent authority to be unlawful and/or unenforceable, the other provisions of this Agreement will continue in effect. If any unlawful and/or unenforceable provision would be lawful or enforceable if part of it were deleted, that part will be deemed to be deleted, and the rest of the provision will continue in effect (unless that would contradict the clear intention of the parties, in which case the entirety of the relevant provision will be deemed to be deleted).

18.3 This Agreement may not be varied except by a written document signed by or on behalf of each of the parties.

18.4 Neither party may without the prior written consent of the other party assign, transfer, charge, license or otherwise deal in or dispose of any contractual rights or obligations under this Agreement.

18.5 This Agreement is made for the benefit of the parties, and is not intended to benefit any third party or be enforceable by any third party. The rights of the parties to terminate, rescind, or agree any amendment, waiver, variation or settlement under or relating to this Agreement are not subject to the consent of any third party.

18.6 Subject to Clause 11.1, this Agreement shall constitute the entire agreement between the parties in relation to the subject matter of this Agreement, and shall supersede all previous agreements, arrangements and understandings between the parties in respect of that subject matter.

18.7 This Agreement shall be governed by and construed in accordance with United States law.

## **EXECUTION**

The parties have indicated their acceptance of this Agreement by executing it below.

SIGNED BY Mark Stoecker, the Developer

SIGNED BY Heather Tremko, the Customer

 6 March 2017