

DESIGN CONSULTANT AGREEMENT

DRAFT

I. The Parties. This Design Consultant Agreement ("Agreement") is made effective as of June 5th, 2023, by and between:

Designer: Berberich Design with a street address of 1515 Forest Drive, City of Rapid City, State of South Dakota, 57701 (Designer)

AND

Client: City of Deadwood with a street address of 108 Sherman Street, City of Deadwood, State of South Dakota 57732 ("Client").

II. Services. Designer agrees to provide the following Services:
Design and documentation of wayfinding signage, architectural signage, interpretive signage, architectural design, interior design, 3D brand communication, logo design, as well as, research, copywriting ("Services").

III. Term. The Services shall commence on June 5th, 2023, and end: (check one)

- On the date of _____, 20____.
- At completion of the Services performed.
- Upon either party may terminate this Agreement with 30 days' notice.
- Other. _____.

IV. Compensation. In consideration for the Services provided, the Designer is to be paid in the following manner: (check all that apply)

- Per Hour. \$110 /hour.
- Per Job. \$_____ for the completion of the Services.
- Commission. ____% commission based on _____.
- Other. _____.

V. Contingency. As part of the Designer's Pay: (check one)

- There **SHALL** be a contingency-fee arrangement in accordance with: (check applicable)
 - ____% of _____.
- There **SHALL NOT** be a contingency-fee arrangement as part of this Agreement.

VI. Payment. Designer shall be paid, in accordance with section IV: (check one)

- On a weekly monthly quarterly basis beginning on _____, 20____.
- At completion of the Services performed.

- Upon the Client receiving an Invoice from the Designer, typically monthly.

- Other. _____.

VII. Retainer. The Client is: (check one)

- Required to pay a Retainer in the amount of \$_____ to the Designer as an advance on future Services to be provided ("Retainer"). The Retainer is: (check one)

- Refundable.

- Non-Refundable.

- Not required to pay a Retainer before the Designer is able to commence work.

VIII. Expenses. Designer is: (check one)

- Responsible for all expenses. The Designer shall be responsible for all expenses related to providing the Services under this Agreement. This includes, but is not limited to, supplies, equipment, operating costs, business costs, employment costs, taxes, Social Security contributions and/or payments, disability insurance, unemployment taxes, and any other cost that may or may not be in connection with the Services provided by the Designer including out-of-pocket expenses.

- Reimbursed for ONLY the following expenses: _____.

Client agrees to pay the Designer within thirty (30) days of receiving notice of any expense directly associated with the Services. Upon request by the Client, the Designer may have to show receipt(s) or proof(s) of purchase for said expense.

- Not required to pay or be responsible for any expense in connection with the Services provided. The professional service fees listed above do not include Reimbursable Expenses, which are incurred during the course of the project on behalf of the Client. Reimbursable expenses shall consist of expenditures made in the interest of the project to include but not limited to, use of consultants, meeting facilitator(s), transportation, translation services, color computer printouts, high resolution scans, purchase of copyrighted material, photocopies, photography, postage, and overnight delivery charges. All reimbursable expenses incurred shall be invoiced as needed and payable upon receipt.

IX. Disputes. If any dispute arises under this Agreement, the Designer and the Client shall negotiate in good faith to settle such dispute. If the parties cannot resolve such disputes themselves, then either party may submit the dispute to mediation by a mediator approved by both parties. If the parties cannot agree with any mediator or if either party does not wish to abide by any decision of the mediator, they shall submit the dispute to arbitration by any mutually acceptable arbitrator, or the American Arbitration Association (AAA). The costs of the arbitration proceeding shall be borne according to the decision of the arbitrator, who may apportion costs equally or in accordance with any finding of fault or lack of good faith of either party. If either party does not wish to abide by any decision of the arbitrator, they shall submit the dispute to litigation. The jurisdiction for any dispute shall be administered in Pennington County, State of South Dakota.

X. Legal Notice. All notices required or permitted under this Agreement shall be in writing and shall be deemed delivered when delivered in-person or deposited in the United States Postal Service via Certified Mail with return receipt. **If different** from the mailing address in Section I, enter below:

Client's Address: 108 Sherman Street, Deadwood, SD 57732

Designer's Address: 1515 Forest Drive, Rapid City, SD 57701

XI. Return of Records. Upon termination of this Agreement, the Designer shall deliver all records, notes, and data of any nature that are in the Designer's possession or under the Designer's control and that are of the Client's property or relate to Client's business.

XII. Waiver of Contractual Right. The failure of either party to enforce any provision of this Agreement shall not be construed as a waiver or limitation of that party's right to subsequently enforce and compel strict compliance with every provision of this Agreement.

XIII. Independent Contractor Status. The Designer, under the code of the Internal Revenue (IRS), is an independent contractor and neither the Designer's employees or contract personnel are, or shall be deemed, the Client's employees. In its capacity as an independent contractor, the Designer agrees and represents:

- a.) Designer has the right to perform Services for others during the term of this Agreement;
- b.) Designer has the sole right to control and direct the means, manner, and method by which the Services required under this Agreement will be performed; Designer shall select the routes taken, starting and ending times, days of work, and order the work that performed;
- c.) Designer has the right to hire assistant(s) as subcontractors or to use employees to provide the Services under this Agreement and any fees shall be a reimbursable expense.
- d.) Neither Designer nor the Designer's employees or personnel shall be required to wear any uniforms provided by the Client;
- e.) The Services required by this Agreement shall be performed by the Designer, Designer's employees or personnel, and the Client will not hire, supervise, or pay assistants to help the Designer;
- f.) Neither the Designer nor the Designer's employees or personnel shall receive any training from the Client for the professional skills necessary to perform the Services required by this Agreement; and
- g.) Neither the Designer nor Designer's employees or personnel shall be required by the Client to devote full-time to the performance of the Services required by this Agreement.

XIV. State and Federal Licenses. The Designer represents and warrants that all employees and personnel associated shall comply with federal, state, and local laws requiring any required licenses, permits, and certificates necessary to perform the Services under this Agreement.

XV. Payment of Taxes. Under this Agreement, the Client shall not be responsible for:

- a.) Withholding FICA, Medicare, Social Security, or any other Federal or State withholding taxes from the Designer's payments to employees or personnel or make payments on behalf of the Designer;
- b.) Making Federal and/or State unemployment compensation contributions on the Designer's behalf; and
- c.) Making payments of taxes incurred while performing the Services under this Agreement, including all applicable income taxes and, if the Designer is not a business entity, all applicable self-employment taxes. Upon demand, the Designer shall provide the Client with proof that such payments have been made.

XVI. Employees' Compensation. Designer shall be solely responsible for the following:

- a.) Employee Benefits. The Designer understands and agrees that they are solely responsible and shall be liable to all benefits that are provided to their employees, including, but not limited to, retirement plans, health insurance, vacation time-off, sick pay, personal leave, or any other benefit provided.
- b.) Unemployment Compensation. The Designer shall be solely responsible for the unemployment compensation payments on behalf of their employees and personnel. The Designer shall not be entitled to unemployment compensation with the Services performed under this Agreement.
- c.) Workers' Compensation. The Designer shall be responsible for providing all workers' compensation insurance on behalf of their employees. If the Designer hires employees to perform any work under this Agreement, the Designer agrees to grant workers' compensation coverage to the extent required by law. Upon request by the Client, the Designer must provide certificates proving workers' compensation insurance at any time during the performance of the Services.

XVII. Indemnification. Designer shall release, defend, indemnify, and hold harmless Client and its officers, agents, and employees from all suits, actions, or claims of any character, name, or description including reasonable Designer fees, brought on account of any injuries or damage, or loss (real or alleged) received or sustained by any person, persons, or property, arising out of services provided under this Agreement or Designer's failure to perform or comply with any requirements of this Agreement including, but not limited to any claims for personal injury, property damage, or infringement of copyright, patent, or other proprietary rights. Client reserves the right to retain whatever funds which would be due to the Designer under this Agreement until such suits, action or actions, claim or claims for injuries or damages as aforesaid shall have been settled and satisfactory evidence to that effect furnished.

XVIII. Confidentiality & Proprietary Information. The Designer acknowledges that it will be necessary for the Client to disclose certain confidential and proprietary information to the Designer in order for the Designer to perform their duties under this Agreement. The Designer acknowledges that disclosure to a third (3rd) party or misuse of this proprietary or confidential information would irreparably harm the Client. Accordingly, the Designer will not disclose or use, either during or after the term of this Agreement, any proprietary or confidential information of the Client without the Client's prior written permission except to the extent necessary to perform the Services on the Client's behalf. Designer shall treat all information and work product relating to assignments as secret and confidential when so identified by Client.

Proprietary or confidential information includes, but is not limited to:

- a.) The written, printed, graphic, or electronically recorded materials furnished by Client for Designer to use;
- b.) Any written or tangible information stamped "confidential," "proprietary," or with a similar legend, or any information that Client makes reasonable efforts to maintain the secrecy of, business or marketing plans or strategies, customer lists, operating procedures, trade secrets, design formulas, know-how and processes, computer programs and inventories, discoveries and improvements of any kind, sales projections, and pricing information; and
- c.) Information belonging to customers and suppliers of the Client about whom the Designer gained knowledge as a result of the Designer's Services to the Client.

Upon termination of the Designer's Services to the Client, or at the Client's request, the Designer shall deliver all materials to the Client in the Designer's possession relating to the Client's business.

Concepts, layouts, and color applications that are created for the outlined scope of work but not approved by the Client shall remain the exclusive property of the Designer, who shall be free to use such designs in any way desired. No use of same shall be made except upon agreed to compensation. The Designer reserves the right to use any work produced for promotions, such work may be used or reproduced in any reasonable way for marketing needs.

XIX. Assignment and Delegation. The Designer may assign rights and may delegate duties under this Agreement to other individuals or entities acting as a subcontractor ("Subcontractor") to the Designer. The Designer recognizes that they shall be liable for work performed by a Subcontractor and shall hold the Client harmless of any liability in connection with their performed work.

The Designer recognizes that they shall not be liable for work performed by a Subcontractor hired by the Client.

XX. Governing Law. This Agreement shall be governed under the laws in the State of South Dakota.

XXI. Severability. This Agreement shall remain in effect in the event a section or provision is unenforceable or invalid. All remaining sections and provisions shall be deemed legally binding unless a court rules that any such provision or section is invalid or unenforceable, thus, limiting the effect of another provision or section. In such case, the affected provision or section shall be enforced as so limited.

XXII. Additional Terms and Conditions. N/A

XXIII. Entire Agreement. This Agreement, along with any attachments or addendums, represents the entire agreement between the parties. Therefore, this Agreement supersedes any prior agreements, promises, conditions, or understandings between the

Client and Designer. This Agreement may be modified or amended if the amendment is made in writing and is signed by both parties.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement on the dates written hereunder.

Designer's Signature



Date June 5, 2023

Print Name Ray Berberich, Berberich Design

Client's Signature _____

Date _____

Print Name _____