

Small Business Services Terms

The terms provided here are for current (and potential) Midnight Graphics clients who desire to take advantage of our 250 or 500 Club payment option memberships. These terms and conditions are subject to change at any time.

Eligibility

You (or your company) may be subject to a credit inquiry.

Membership in the 250 or 500 Club is available to an individual who is the owner of a business. An individual who applies for membership in any Small Business Services payment program must provide evidence that he or she owns at least 25% of a for-profit or non-profit organization. Those applying for membership in the 250 or 500 Clubs must provide to Midnight Graphics one of the following forms of evidence of business ownership. Acceptable documents include:

- Copy of business license or permit that shows ownership
- Federal Employer Identification application
- State sales tax permit or application
- Copy of the articles of incorporation
- Copy of the partnership agreement
- Copy of assumed name (DBA) certificate
- Brochure listing you as an owner
- Business card listing you as an owner
- Print of Internet home page listing you as an owner

Right to Decline

Midnight Graphics reserves the right to decline to enter into any contractual agreement, to close an existing agreement, to withdraw any agreement (or terms of an agreement), or to terminate an existing relationship with a Midnight Graphics client at any time upon written notice to the client and without explanation. Midnight Graphics reserves the right to decline to enter into any contractual agreement, or to withdraw an offer of an agreement to a prospective client upon written notice and without explanation.

Contracting

All clients of Midnight Graphics (including those who are eligible for Small Business Services) will be required to sign our standard agreement. The Small Business Services agreement includes all terms related to compliance, both for you and Midnight Graphics. The Small Business Services agreement also includes the scope of services selected by you (“the company”) and the payment terms stipulated to by Midnight Graphics.

Payment

Midnight Graphics is not a loan-granting institution.

Midnight Graphics retains the right to suspend any charge for a service rendered or to suspend payments based on calendrical anomalies or Midnight Graphics prerogative but this will in no way set a precedent that billable hours presented to you in the form of an invoice is “advisory only” or “optional.” Submission of an invoice to you by Midnight Graphics always indicates some actual service has been performed or some product has been generated. Down payments or retainers will always be noted on an invoice and that invoice will not be generated until a contractual agreement for such accommodation has been entered into by Midnight Graphics and you. It is the policy of Midnight Graphics to expect payment on outstanding invoices **NET 15 DAYS** unless other terms are reached and covered by a payment agreement stipulated in a signed Small Business Services contract.

You agree if any current payment is not received by Midnight Graphics by the date on any current Midnight Graphics invoice—or if the payment is returned for insufficient funds—we will charge you \$30 or the highest amount allowed by law, whichever is less, for any check or other instrument (including credit card chargebacks) tendered by you and returned unpaid by a financial institution for any reason. You agree to reimburse us the fees of any collection agency, which may be based on a percentage at a maximum of 33% of the debt, and all costs and expenses, including reasonable attorneys’ fees, we incur in such collection efforts. In addition to any late fees associated with non-payment or returned payments, you agree to pay the full amount of any agreed stage payment(s) to the extent the subsequent stage payment balance is “to date” and not in arrears. Failure to pay an agreed payment stage associated with the completion of the Small Business Services contractual agreement will constitute contractual default in compliance with this agreement, instantiate a Midnight Graphics STOP WORK ORDER* and further, Midnight Graphics retains the right to engage legal representation with the purpose of collecting the remainder of the agreed project total in the full amount to the

extent of any current project milestone achieved by Midnight Graphics. At that time, Midnight Graphics retains the right to “repossess” any web-based files, programming scripts, log on or password information, original art (electronic or otherwise) or any other marketing collateral which is not licensed to you as part of this agreement.

Limits

Term of Contracts or Small Business Services Agreements—The Midnight Graphics contract period of performance limitation limits rolling services covered in any one agreement to no more than five years under a single contract even though delivery may take place beyond five years from the date of the initial contract or agreement.

The 250 and 500 Club payment agreements are indefinite-quantity contracts and provides for an indefinite number of services, within limits that are stated in the contract, to be provided during a time period that is fixed in the Small Business Services agreement. Deliveries of the services are scheduled by placing orders with Midnight Graphics. This type of contract is appropriate when the Midnight Graphics client cannot predetermine, above a specified minimum, the precise quantity of services that will be required during the contract period, and it is inadvisable for the Midnight Graphics client to commit itself for more than a minimum quantity. Indefinite-quantity contracts offer several advantages:

1. minimum marketing services may be used,
2. marketing services may be used at a specific time predetermined by the Midnight Graphics client,
3. services can be ordered after marketing planning (by the client) becomes known, and
5. the client’s obligation is limited to the minimum quantity of marketing services specified in the contract.

Minimum and Maximum Quantities—To ensure that the Small Business Services contract is binding, a minimum amount of “graphic services used” must be stated in the contract, and it must be more than a nominal quantity determined by Midnight Graphics. There must also be a stated maximum of graphic services that may be ordered. For the purposes of contracting, any Indefinite-quantity contract entered into by you or your company, and Midnight Graphics will never be “open ended,” where no maximum quantity is stated. The contract may also state maximum or minimum quantities of graphic services that may be ordered under each task and the maximum that may be ordered during a specified period of time within the contract’s period of performance. The typical maximum term for 250 and 500 Club memberships is any total more than 25% over the original bid cost (specified at contract instantiation) or one (1) additional year of membership term, whichever occurs first.

If it becomes necessary to order graphic services above the maximum stated in the contract, (which would be the amount of anticipated work included in the original agreement), such orders will not be processed as “change orders,” (“change orders” must be within the scope of the original agreement), but will be processed as “new procurements” and covered in a subsequent contractual agreement.

Confidentiality and Non-Disclosure

Midnight Graphics recognizes and acknowledges that the Small Business Services agreement creates a confidential relationship between Midnight Graphics and you (or your company) and that information concerning your business affairs, customers, vendors, finances, properties, methods of operation, computer programs, and documentation, and other such information, whether written, oral, or otherwise, is confidential in nature. All such information concerning you is hereinafter collectively referred to as “Confidential Information.” Midnight Graphics agrees that, except as directed by you, your company, or a representative of your company, it will not at any time during or after the term of the Small Business Services agreement disclose any Confidential Information to any person whatsoever and that upon the termination of the agreement it will turn over to you all documents, papers, and other matter in its possession or control that relate to you or your company. Midnight Graphics further agrees to bind its employees and subcontractors to the terms and conditions of the Small Business Services agreement.

Governing Law

The Midnight Graphics Small Business Services agreement shall be construed and enforced in accordance with the laws of the State of Illinois.

Limitation of Liability

All Midnight Graphics clients expressly understand and agree that under no circumstances shall Midnight Graphics be liable for any direct, indirect, incidental, consequential, special, exemplary, and punitive damages (even if Midnight Graphics has been advised of the possibility of such damages). Such limitations of liability shall apply whether the damages arise from use or misuse of and reliance upon the products and services, from inability to use the products and services, or from the interruption, suspension, or termination of the products and services (including such damages incurred by third parties). This limitation applies whether the alleged liability is based on contract, tort, negligence, strict liability, or any other basis, such limitation of liability shall apply to the fullest extent permitted by law. Under no circumstances shall Midnight Graphics be held liable for any delay or failure in performance resulting directly or indirectly from

acts of nature, forces, or causes beyond its reasonable control, including, without limitation, Internet failures, electrical power failures, strikes, labor disputes, shortages of labor or materials, fire, floods, storms, explosions, acts of God, governmental actions, non-performance of third parties, or loss of or fluctuations in heat, light, or air conditioning. Because some jurisdictions do not allow the exclusions or limitations of incidental or consequential damages, Midnight Graphics' liability in such jurisdictions shall be limited to the extent permitted by law.

Indemnification

Upon a request by Midnight Graphics, you agree to defend, indemnify, and hold harmless Midnight Graphics or its staff, employees, or sub-contractors from all liabilities, claims, and expenses, including attorney's fees that arise from use or misuse of this web product. Midnight Graphics reserves the right, at its own expense, to assume the exclusive defence and control of any matter otherwise subject to indemnification by you, in which event you will cooperate with Midnight Graphics in asserting any available defenses.

Warranties

Midnight Graphics represents and warrants to you that it has the experience and ability to perform the services required of the Small Business Services agreement; that it will perform services in a professional, competent and timely manner; that it has the power to enter into and perform the Small Business Services agreement; and that its performance of the agreement shall not infringe upon or violate the rights of any third party or violate any federal, state and municipal laws. However, you will not determine or exercise control as to general procedures or formats necessary to have these services meet your satisfaction.

Disclaimers of Warranties

All Midnight Graphics Small Business products and services are provided "as is" and "as available" for your use. The products and services are provided without warranties of any kind. All expresses, implied, and statutory warranties, including, without limitation, the warranties of merchantability, fitness for a particular purpose, and non-infringement of proprietary rights, are expressly disclaimed to the fullest extent permitted by law. Midnight Graphics disclaims any warranties for the security, reliability, timeliness, and performance of the products and services.

You expressly understand and agree that Midnight Graphics disclaims any and all responsibility or liability for the accuracy, content, completeness, legality, reliability, operability, or availability of information or material in the products and services. Midnight Graphics disclaims any responsibility for the deletion, failure to store, misdelivery, or untimely delivery of any information or material. Midnight Graphics disclaims any responsibility or liability for any harm resulting from downloading or accessing any information or material through the products and services, including, without limitation, for harm caused by viruses or similar contamination or destructive features. Because some jurisdictions do not permit the exclusion of certain warranties, these exclusions may not apply to you.

Definitions

***Stop Work Order.** A "Stop Work Order" generated by Midnight Graphics is a notification to the client of record there are project-critical parameters missing that significantly hamper or impair the ability to complete a project milestone or task. Some examples of behaviors or omissions that would necessarily instantiate a Stop Work Order may be (but are not limited to): Failure to pay a Stage Payment; failure to supply project-specific data necessary for the functioning of the product provided by Midnight Graphics; failure to comply with the agreed project parameters of the Small Business Services agreement, and others. When a Stop Work Order is generated by Midnight Graphics, we will inform you by electronic communication (e-mail) and if we have not been advised of the manner in which the Stop Work Order will be resolved within two (2) business days, Midnight Graphics will send (via US Postal Service) a postcard informing you of the Stop Work Order communicating the problem and informing you what stage or milestone we have arrived at.