

**WINDSHADOW LIMITED  
TERMS OF BUSINESS**

In these Terms of Business (the "Terms") we have used "we", "us" and "our" to refer to **Windshadow Limited** and "you" to refer to our customer. By agreeing to proceed with the Project and accepting or acknowledging our quotation, if any, you agree to these Terms (subject to any amendments or variations expressly agreed in writing) to the exclusion of your terms (if any).

**1. PLANNING AND DESIGN**

- 1.1 Prior to construction we shall discuss with you your requirements and conduct a site inspection for the purposes of preparing our quotation.
- 1.2 As part of the site inspection we shall also assess the environmental, operational and logistical factors required to undertake the Project, as well as to identify any safety hazards. You agree to make available to us your work place hazard schedule and accident register, either prior to our during our site inspection.
- 1.3 Following our site inspection we shall prepare and deliver to you our design for your approval, prior to commencement of physical work on the Project. Implementation of the Project may require alteration or removal of structures already established at the site. As part of your approval of our design, you are deemed to have given your consent to relevant alterations or removals.
- 1.4 As part of our undertaking the Project, you agree to make available, in a timely manner, such information and provide us with such access as we should reasonably require as part of our quotation process, hazard assessment and design process.
- 1.5 Should we consider that you have not provided sufficient information or access to allow work on the design and physical work on the Project to be undertaken properly and in accordance with our requirements, we may give notice to postpone or cancel work until you have provided the relevant access or information.
- 1.6 We shall use our reasonable endeavours to make such alterations to the Project's design or scope as may be requested by you, prior to or during physical work on the Project, subject always to us reserving the right to amend any quotation previously given to you.
- 1.7 Where changes to specification or design of the Project are requested at a stage where we reasonably consider we are unable to accommodate them into the scope of the Project as previously agreed, we may refuse to implement such amendments.

**2. THE PROJECT**

- 2.1 We undertake the Project on basis that it is your responsibility to:
  - (a) promptly provide access to the Property and water and/or power supplies necessary to enable us to carry out the Project, during usual business hours (or such other hours as may be agreed between us and you);
  - (b) obtain any necessary consents, approvals, permits, licences, authorisations or code compliance certificates or certifications to enable us to carry out and complete the Project in accordance with applicable law, regulation or by-law. We shall provide such assistance as is reasonable in the context of the application or consent process.
  - (c) provide safe and secure onsite storage for materials, tools and accessories supplied and used by us, our employees, sub-contractors or agents.
- 2.2 You acknowledge and agree that as part of the implementation of the Project, we may employ or engage such sub-contractors or agents as we consider appropriate from time to time.
- 2.3 In the event of loss or damage to our, or our agent or sub-contractor's tools, material or equipment, due to your failure to comply with clause 2.1 (c), you agree to reimburse us in cash on demand, in respect of our reasonable estimate of our, or our agent or sub-contractor's loss.
- 2.4 In the event that we are unable to commence physical work on the Project within 60 days of the date of our quotation, due to any unforeseen delays that were not in the reasonable contemplation of you or us; or in the event that you delay the commencement of for whatever reason for any period of more than 60 days from the date of our quotation, then any cost associated with the delay such as price increases or variations to the Project shall be borne by you and shall be deemed to be a variation of the Project and to be authorised by you.

**3. TITLE AND RISK**

- 3.1 We shall retain all legal and beneficial ownership to the materials which we, or our sub-contractor or agents supply as part of the Project until we have been paid in full.
- 3.2 In the event that you fail to make any payment by the due date under the quotation or these Terms, then we shall be entitled to retake possession of materials and remove our equipment which has been brought onto the Property until payment is made and, at our option and may resell the relevant materials, but without prejudice to our other rights and remedies.
- 3.3 You hereby provide us and our agents with irrevocable authority to enter onto the Property to recover possession of our equipment or materials under these Terms.
- 3.4 Risk and title in all materials used in the Project passes to you when the Project is complete, as evidenced by you counter-signing the Project Completion Certificate and payment in respect of the Project has been made to us in full. You shall not do anything inconsistent with our ownership of Project materials until title in them passes to you.

**4. DEFECTS LIABILITY**

- 4.1 You must notify any defects in relation to the Project works (being materials or workmanship) which may require repair or alteration, in writing within 6 months of the date of the Project Completion Certificate, fair wear and tear to be excepted (which may include damage caused by adverse weather events). Such repairs or alterations shall be corrected by us, or our sub-contractors or agents, at our cost within a reasonable time of notice being given. After the expiry of the 6 month period, you shall be responsible for repair and maintenance of the Project works.

**5. PRICE**

- 5.1 The price payable by you in respect of the Project shall be paid in such amount and in such instalments as has been agreed with you as part of our quotation process and is set out in our quotation to you.
- 5.2 Our written quotation shall be valid for a period of 30 days from the date thereof.
- 5.3 Unless otherwise agreed or stated in writing, all prices are exclusive of GST.
- 5.4 Our quotation to you is based on the information available and provided to us at that time and as may be discovered as part of our initial site inspection. We reserve the right to charge you more than the amount quoted if our costs (including but not limited to the cost of materials, transport or tax) are subject to change, or if the specifications/design of, or the Project, are subject to change either at your request, or due to unforeseen logistical, environmental or physical factors being discovered during the implementation of the Project. Certain materials used as part of the Project may suddenly become unavailable and we reserve the right to use such substitute materials as we consider appropriate in the circumstances. Where possible we shall use equivalent/comparable products; however any increase in the cost of materials may be passed on to you.

**6. PAYMENT**

- 6.1 You must make payment for the Project in such manner as is set out in our quotation to you.
- 6.2 We may require you to pay a deposit, being an advanced payment to cover the cost of materials ordered in advance of commencement of the Project.
- 6.3 You agree to pay our invoices within seven days of the date of the invoice.
- 6.4 Where we consider necessary, we may require a guarantee in respect of your obligations to be provided to us.

6.5 All payments shall be made without set-off or deduction. Receipt of a cheque, bill of exchange, or other negotiable instrument will not constitute payment and you remain liable for payment until payment in cleared funds is received by us.

6.6 We may apportion payments to outstanding accounts as we see fit.

## **7. DEFAULT**

7.1 You will be in Default if:

- (a) you fail to pay an amount due under these Terms or the quotation by the due date for payment; or
- (b) you commit a breach of any of your other obligations under these Terms; or
- (c) you become insolvent, are wound up, have a receiver appointed, enter into any composition or arrangement with your creditors, do any act which would render you liable to be placed in liquidation or have a receiver appointed over your property, commit an act of bankruptcy, cease to be of full legal capacity, or die;
- (d) materials that we have retained title to are at risk; or
- (e) an event or a series of events (whether related or not) occurs which, in our opinion, may cause a material adverse change in your ability to meet your obligations to us.

7.2 If you are in Default then we may, at our option, do any one or more of the following:

- (a) charge you default interest at a default interest rate 24% per annum on any late payments calculated on a daily basis from the due date until the date payment is received;
- (b) require you to remedy the default in the manner and within the period that we tell you;
- (c) require you to pay to us all amounts you owe us immediately;
- (d) suspend or terminate work on the Project;
- (e) enforce any security interests created by these Terms;
- (f) exercise any rights that we have under these Terms or that are available to us at law.

7.3 If our work on the Project is terminated, you must immediately pay us any amount you owe us. Termination will not affect any of our rights that have arisen before termination.

## **8. CANCELLATION**

8.1 If following the acceptance of the quotation and these Terms and prior to the commencement of the Project, you repudiate, abandon, purport to cancel or otherwise default in your obligations under these Terms or the quotation, we may give notice to notice of cancellation or our work on the Project.

8.2 In the event of us exercising the right to cancel in accordance with clause 8.1, we may forfeit and retain for our benefit any deposit paid as liquidated damages for the costs and expenses incurred by us, included but not limited to costs of materials or payments to sub-contractors or agents.

## **9. WARRANTIES**

9.1 The Fair Trading Act 1986, and other statutes may impose warranties, conditions or obligations upon us which cannot by law (or which can only to a limited extent by law) be excluded. Other than as expressly provided for in these Terms, we exclude all such imposed warranties, conditions or obligations to the extent permitted by law and exclude any warranty, condition or obligation imposed or implied under common law, equity or otherwise.

9.2 You confirm that the Project is being undertaken for business purposes and that sections 9, 12A and 13 of the Fair Trading Act 1986 shall not apply.

## **10. LIMITATION OF LIABILITY**

10.1 Save as provide for by clause 10.2, we shall not be liable for any loss or damage or liability of any kind whatsoever (including consequential loss or lost profit or business) whether suffered or incurred by you or another person and whether in contract, or tort, or otherwise and whether such loss or damage arises directly or indirectly from our work (or that of our sub-contractors), on the Project, or the design of the resulting structure or containment pond, save in respect of damage to physical structures which was not contemplated as part of the design process and save where we have acted fraudulently.

10.2 To the extent that we are liable for any reason for any loss suffered or liability incurred by you arising from any breach of these Terms or for any other reason, such liability is limited to the price paid by you to us for the physical materials used in the Project.

## **11. INSURANCE**

11.1 We maintain a contractor's risk insurance policy.

11.2 Upon completion of the Project you shall be responsible for insuring the relevant structure or containment pond.

## **12. INTELLECTUAL PROPERTY**

12.1 In respect of Intellectual Property used in or arising from the Project or the performance of any associated services:

- (a) all pre-existing Intellectual Property the subject of an Intellectual Property right resides with the owner as at the date of these Terms (whether you or us);
- (b) any new Intellectual Property will be dealt with in accordance with clause 13.

## **13. INTELLECTUAL PROPERTY OWNERSHIP**

13.1 Subject to clauses 12.1(a), we are and will remain the exclusive owner everywhere in the world of all Intellectual Property rights and interests in the design and structures or containment ponds created as part of the Project, and any other work performed by us for you, as first owner of those Intellectual Property rights and interests.

13.2 We shall retain exclusive worldwide ownership at all times of our methods of working, techniques, ideas, skills and know-how.

13.3 You must not attribute the Project design, structure or containment pond to anyone other than us or remove any of our trade marks or logos, if any.

13.4 This clause 13 shall continue in force as between us and you notwithstanding the termination of these Terms or completion of the Project.

## **14. HEALTH AND SAFETY**

14.1 We shall use due care and skill and implement such practices, policies or procedures as we consider necessary or desirable for the purposes of ensuring the health and safety of our employees, agents and sub-contractors at the Project site.

14.2 You agree to comply (and procure that persons under your control or supervision comply) with such instructions, practices, policies or procedures as are implemented by us pursuant to, or for the purposes of, clause 14.1.

14.3 You shall indemnify us against any expense, loss, damage or claim resulting from any breach by you, or persons under your control or supervision, of any practices, policies or procedures put in place pursuant to clause 14.1.

**15. PRIVACY OF INFORMATION**

15.1 You authorise us:

- (a) to collect, retain and use information about you from any person for the purpose of assessing your creditworthiness;
- (b) to disclose information about you:
  - (i) to any person who guarantees, or who provides insurance, or who provides any other credit support, in relation to your obligations to us;
  - (ii) to such persons as may be necessary or desirable to enable us to exercise any power or enforce or attempt to enforce any of our rights, remedies and powers under these Terms.

**16. NOTICES**

16.1 Any notice may be given by phone, in person, posted, or sent by facsimile or email to you or where you are a company, to any of your directors.

**17. CONFIDENTIALITY**

17.1 You shall at all times treat as confidential all non-public information and material received from us and shall not publish, release, or disclose the same without our prior written consent. Confidential information includes any new Intellectual Property and our prices.

**18. COSTS**

18.1 You must pay our costs (including legal costs, as between solicitor and client) of and incidental to the enforcement or attempted enforcement of our rights, remedies and powers under these Terms.

**19. CREDIT INFORMATION**

19.1 You consent to us, or any financier or credit-rating agency, making enquiries of and obtaining any information about your financial standing and credit worthiness.

**20. JURISDICTION**

20.1 These Terms are governed by the laws of New Zealand. You may take legal action against us only in a New Zealand Court.

**21. DISPUTES**

21.1 Where any dispute arises between you and us concerning the quotation, the services or these Terms, the party raising the dispute must provide written notice of its dispute to the other party.

21.2 Within 10 Business Days of receiving a notice of dispute, the parties shall meet and attempt to settle such dispute by negotiation in good faith.

21.3 If the dispute remains unresolved within a further 10 Business Days of the parties meeting in accordance with clause 21.2, either party is free to seek resolution of the dispute by whatever means available at law.

21.4 This clause 21 does not prevent a party from seeking urgent interlocutory relief.

**22. FORCE MAJEURE**

22.1 If we have given you a time for completion of the design or implementation of the Project (or any part of it), such time is approximate only and is not deemed to be of the essence.

22.2 We shall not be liable for delay or failure to perform our obligations under these Terms if the cause of delay or failure is beyond our reasonable control, which may include but is not limited to an act of God, fire, flood, adverse weather conditions, or delays or failures caused by our sub-contractors or agents.

**23. GENERAL**

23.1 These Terms replace any earlier representations, warranties, understandings and agreements (whether oral or written), and together with the quotation provided to you constitute the entire agreement between us and you relating to their subject matter.

23.2 You shall not transfer or assign your rights, powers or obligations under these Terms without our prior written consent.

23.3 If you have entered into these Terms as the trustee of a trust and you have no right to or interest in any of the assets of the trust except in your capability as trustee of the trust, your liability shall be limited to the value of the assets of the trust which now or in the future are (or, but for your wilful neglect or default, would be) in the hands of the trustees for the time being of the trust. This clause does not limit any liability you have to us as a personal guarantor.

23.4 No failure or delay by us in insisting upon the strict performance of these Terms or exercising any right under these Terms will operate as a waiver of those matters.

23.5 We may change these Terms at any time. Any change applies from when it is published on our website [www.windshadow.co.nz](http://www.windshadow.co.nz).

**24. DEFINITIONS**

24.1 In these Terms unless the context otherwise requires:

"Business Day" means a day of the week when trading banks are open for business in New Zealand (excluding Saturdays and Sundays).

"Default" has the meaning set out in clause 7.

"GST" means Goods and Services Tax, as at the appropriate rate from time to time.

"Intellectual Property" means all intellectual property rights including, without limitation, copyright, patent and design rights, drawings, documents, data, ideas, procedures, calculations and all other statutory and common law rights and interests.

"Project" means the construction of effluent ponds, media containment systems, windbreaks, sun protection systems and other environmental shelter systems.

"Project Completion Certificate" means the certificate supplied by us confirming completion of the Project

"Property" means the real property on which the Project is or is to be located.

24.2 The rule of construction known as the contra proferentem rule does not apply to these Terms.

24.3 Words importing the singular include the plural and vice versa.

24.4 Headings are for convenience only and do not form part of, or affect the interpretation of, these Terms.

24.5 References to a party include that party's permitted successors, personal representatives, executors, administrators and permitted assigns.

24.6 References to a "person" include a body corporate, trust, partnership or other organisation (whether having separate legal personality or not), natural person, as well as any governmental or regional body.

24.7 References to a statute include references to:

- (a) regulations, orders, rules or notices made pursuant to that statute;
- (b) all amendments to that statute and those regulations, orders, rules or notices, whether by subsequent statute or otherwise; and
- (c) any statute passed in substitution of that statute.