



## TERMS AND CONDITIONS OF SUPPLY

### 1. APPLICATION OF THESE TERMS

- 1.1 These terms and conditions of sale ("**Terms**"), together with the Market Rules, Bidder Contracting Information and your contract confirmation in respect of a Trading Event, apply to the supply of products by the Fonterra entity noted in the contract confirmation for which you are the Winning Bidder in that Trading Event.

### 2. CONTRACT CONFIRMATION

- 2.1 Once an agreement for the sale of products has been formed in accordance with the Market Rules, Fonterra may invoice you for all of the relevant products in accordance with clauses 6 and 7.
- 2.2 Fonterra may from time to time enter into agreements with third parties under which those third parties (who may not be in New Zealand) will manufacture and/or supply part or all of the products referred to in a contract confirmation.

### 3. PRODUCT SHIPMENT

- 3.1 Fonterra will, subject to clause 3.6, ship the Winning MT to the Winning Bidder at any time during the shipment period specified for the relevant Contract Period. Fonterra will use all reasonable endeavours to ensure that the Product is shipped ex-New Zealand so that the Product arrives with 20 days prior to, and up to 30 days after the scheduled delivery month. Where there is no agreed delivery schedule, Fonterra will use reasonable endeavours to supply the products to the Purchaser at an even rate across the delivery period envisaged by the contract confirmation. Any claims from the Purchaser for overdue deliveries apply only upon receipt by Fonterra of a notice of default.
- 3.2 If Fonterra is unable for any reason to supply any product referenced in the contract confirmation, Fonterra may offer to supply the Purchaser with substitute product having specifications which are not materially lower than provided in the contract confirmation, or offer to supply an alternative product. If the Purchaser does not agree to Fonterra supplying the Purchaser with a substitute or alternative product Fonterra may cancel the relevant shipment without liability.
- 3.3 While the price specified in a Trading Event for products will be stated on a FAS Incoterms Basis, supply of that products will occur on the Incoterms Basis set out in the contract confirmation and the Purchaser will be required to pay additional amounts to Fonterra in accordance with clause 6.2. for supply on this basis. Supply will only be made on an Incoterms Basis that is specified in your Bidder Contracting Information.
- 3.4 Unless the Incoterms Basis noted in the contract confirmation provides otherwise, the Purchaser shall be solely responsible, at its cost, for meeting all import and other regulatory costs and requirements relating to the products shipped to the relevant territories, and for any damage or loss occurring whilst the products are in transit. The Purchaser shall also be responsible for ensuring the products meet all legal and regulatory requirements in the country or territory in which the products are being shipped and/or used by the Purchaser.
- 3.5 The Purchaser must notify Fonterra in writing within 30 days of first having access to the product if there is a shortfall in volume or the Purchaser shall be deemed to accept that the volume is correct.

- 3.6 Where the volume of all products won by the Purchaser for a Trading Event equates to less than eight (8) MT, the bid will not be progressed and will be treated as “closed” as there is insufficient volume to make a full container load to be shipped. Where any Winning MT is eight (8) MT or greater, but less than half the volume required to ship a full container load to the Purchaser, Fonterra may cancel the winning bid. Where such Winning MT equals or exceeds half the capacity of the relevant container, Fonterra may round the volume of products to ensure a full container load (or other applicable load unit). Delivery of such a rounded quantity of products over the amount of the winning volume will be deemed to constitute delivery in satisfaction of the amount allocated to the Purchaser in the Trading Event. The amount which the Purchaser is required to pay for such products will be proportionately increased.
- 3.7 If the arrangements for the shipment and delivery of the products becomes commercially impractical in Fonterra's reasonable opinion, Fonterra shall discuss alternative arrangements with the Purchaser, such as a commercially reasonable substitute location or using a commercially reasonable substitute method of supply. If this is not agreed to by the Purchaser, Fonterra may cancel the relevant shipment without liability.
- 3.8 If the Purchaser requests Fonterra to move an order out or bring it forward, or the Purchaser is otherwise delayed in taking delivery of the product as agreed in the contract confirmation and/or delivery schedule, Fonterra may recover from the Purchaser an administration fee, financial hedging costs/fees, product storage, logistics and any related holding costs resulting from such change in delivery or delay. If the Purchaser is unable to take delivery of the product as agreed in the contract confirmation, Fonterra may cancel the applicable shipment and any subsequent shipments without resulting liability. Fonterra may then resell the products to a third party, and the Purchaser shall indemnify Fonterra for any loss or costs (including any product write-off costs) for any storage, disposal, write-down, transport, logistics and any other costs incurred by Fonterra.

#### **4. DEFECTS AND ACCEPTANCE**

- 4.1 The Purchaser must notify Fonterra in writing within 30 days of delivery of the product if there is any apparent physical damage or defect or a purported shortfall in volume of product so delivered. In addition, the Purchaser must notify Fonterra in writing as soon as the Purchaser becomes aware of any quality or latent defect issue in the products (including any products of the Purchaser which incorporate any Fonterra products) that the Purchaser becomes aware of after the expiry of the 30 days delivery notification period.
- 4.2 The Purchaser shall keep any claimed defective product stored separately from all other product and in the state or condition in which they were supplied so that Fonterra has an opportunity to inspect them. The Purchaser shall provide all assistance reasonably requested by Fonterra to assess the claim, including providing access to its premises and any analysis or test results carried out by the Purchaser. If Fonterra accepts that it is responsible, the Purchaser will, at Fonterra's cost, either destroy the products or make them available for collection by Fonterra (or its agent).
- 4.3 Except where contrary to legal requirements, the Purchaser shall notify Fonterra in advance of the Purchaser making any notification to any government agency arising from or relating to any product (defective or otherwise). Fonterra shall not be liable for any defect in, or damage to, products (including that relating to the inappropriate storage, use or care of the products) or their packaging to the extent the Purchaser has done, or failed to do, anything that has caused or contributed to the claimed defect or damage, or if the claim is outside the product warranty period. The Purchaser must not settle or compromise a claim by a third party concerning such products without Fonterra's prior written consent.
- 4.4 The Purchaser shall co-operate with, and provide all reasonable assistance to, Fonterra in relation to any recalls or withdrawals from sale of Fonterra products (or any of the Purchaser's products which incorporate Fonterra products) for any reason, with the objective being to optimise the respective parties' reputation and goodwill whilst ensuring public health and safety is maintained at all times.

#### **5. RISK AND TITLE**

- 5.1 Risk in all products passes to the Purchaser on delivery (as per applicable Incoterms basis) even though title may not. Title in all products remains with Fonterra until such time as full payment is made in cleared funds for all amounts owing by the Purchaser for the products supplied. Until the Purchaser has paid Fonterra in full, Fonterra may retake, sell or dispose of the Product supplied and unpaid, which shall not affect any other rights Fonterra may have in connection with Purchaser's failure to perform.
- 5.2 Until payment has been received the Purchaser hereby grants to Fonterra a security interest in each and every part of the products (including any of the Purchaser's products incorporating the products

supplied by Fonterra) and any proceeds thereof, for any amounts owing by the Purchaser to Fonterra from time to time.

## **6. PRICE AND TAXES**

- 6.1 Unless otherwise agreed in writing, the price for the products supplied shall be the price specified by Rule A2.3(a) of the Market Rules as adjusted to incorporate any additional charges or other matters stated in the Bidder Contracting Information or contract confirmation, multiplied by the actual quantity of products supplied, as rounded in accordance with clause 3.6. The price per the contract confirmation may be increased or decreased in case of changes in an order as per clause 3.6 of these Terms.
- 6.2 Unless the Incoterms basis expressly provides otherwise, the price shall exclude applicable sales taxes, customs, excise, duties, levies, value added or goods and services related tax. The price shall be increased to reflect any such costs being imposed on Fonterra and the Purchaser shall hold Fonterra harmless in respect of any such costs.

## **7. PAYMENT AND INVOICING**

- 7.1 Fonterra will not ship any product unless payment arrangements have been agreed with the Purchaser, which may involve letter(s) of credit, documentary collection, bank guarantee or deposit. Any payments made pursuant to any such arrangement shall be made net of any bank charges and must equate to the amount invoiced for the applicable products. If no such arrangements are in place shipment will be rolled to an agreed date and the Purchaser shall hold Fonterra harmless against any direct costs incurred by Fonterra resulting from such delay.
- 7.2 Where Fonterra has agreed in writing that the Purchaser will pay for products based on the date of the bill of lading for those products, Fonterra must receive payment by that agreed date or it may refuse to commence supply of any products. Where Fonterra has not extended credit to the Purchaser, Fonterra will provide an invoice for the relevant price and fees applicable to each shipment. Any supply delays and associated costs incurred due to a delay in any payment being received by Fonterra are the Purchaser's responsibility.
- 7.3 Payment of all invoices must be received on the due date specified in the contract confirmation or, if no due date is specified, within 15 days of invoice, in full without deduction, set-off or counterclaim. In the event the Purchaser grants Fonterra a direct debit mandate, a term of 30 days to direct debit will apply. If the Purchaser is required by law to make any deduction or withholding on account of tax from any sum payable to Fonterra, then the sum so payable will be increased to ensure that, after the making of such deduction or withholding, Fonterra receives a net sum equal to the sum that it would have received and so retained had no such deduction or withholding been made.
- 7.4 The Purchaser must notify Fonterra within 7 days of receiving the invoice if the Purchaser believes that the invoice is not correct, including full details of the claimed error. The Purchaser must make payment of the undisputed amount due on any disputed invoice on the due date. Once the dispute is resolved, the Purchaser must pay the resolved amount due within 14 days. Where an invoice remains unpaid (whether in whole or in part) after the due date, and the Purchaser has not notified Fonterra of any genuine and reasonable basis for non-payment, the parties agree that there is no discrepancy or error with respect to the invoice.
- 7.5 If an invoice remains unpaid after the due date for payment Fonterra may:
- (a) charge penalty interest at the rate of 1.5% monthly (or, if less, the maximum amount permitted by law), such interest to accrue daily and compound monthly from the due date until payment has been received by Fonterra in cleared funds. Fonterra may also recover any collection charges including legal expenses incurred by Fonterra in attempting to recover any overdue amount from the Purchaser with a minimum of 15% of the amounts due;
  - (b) withhold or defer any future shipment pending payment without liability to Fonterra; and/or
  - (c) use applicable remedies (other than arbitration referred to in clause 11.8) such as obtaining judgment in the New Zealand courts that may be enforced against the Purchaser where this is available in accordance with local jurisdiction.
- 7.6 All references to amounts of money are references to US Dollars or, if different, to the currency set out in the relevant contract confirmation or shipment schedule, or as otherwise agreed between the parties, and are payable in that currency.

## **8. DEFAULT**

8.1 If the Purchaser is in breach of these Terms, or defaults, or in Fonterra's reasonable opinion, is likely to default, in any payment due to Fonterra, or where a liquidator, receiver, controller, trustee or other insolvency administrator is appointed, or any similar situation occurs in respect of the Purchaser or any of its assets, Fonterra may:

- (a) withhold or cancel the relevant shipment and/or any subsequent shipment; and/or
- (b) retain any deposit the Purchaser may have paid and/or draw on any relevant L/C, bank guarantee or standby L/C; and/or
- (c) reclaim and/or resell the products in the Purchaser's possession or under its control and may enter premises where Fonterra believes that the products are stored or held to do so, and recover from the Purchaser all costs of doing so; and/or
- (d) cancel the applicable product supply contract,

and all monies owing and outstanding by the Purchaser on any account whatsoever will become immediately due and payable (without the requirement for notice from Fonterra). Fonterra will not be liable to the Purchaser for any losses it incurs as the result of exercising the above rights.

## **9. WARRANTIES**

9.1 Fonterra warrants only (to the exclusion of any implied warranties or guarantees) that each product at the point of delivery meets the specifications (including as to residual shelf life) as set out in the Fonterra selling specification for the product type described, as supplemented by the contract confirmation and/or shipment schedule. To the maximum extent permitted by law, Fonterra makes no other representations or warranties in respect of the products, including representations or warranties concerning fitness for purpose, compliance with any laws, regulations or rules of any market in which the products are used, sold or otherwise dealt with, or appropriateness for the Purchaser's needs of any product, and the Purchaser must assure itself of these matters.

9.2 Fonterra may from time to time provide advice, recommendations and statements with respect to the products. However, Fonterra does not warrant or guarantee the accuracy or completeness of that advice, recommendations or statements or the results obtained through the use of the products. Fonterra expressly disclaims any liability for any damage to the Purchaser from reliance on such advice, recommendations or statements, which shall be at the Purchaser's own risk having made its own appropriate enquiries. Any sample, description or visual representation or details of product provided to the Purchaser (including on any part of the Information Website or Bidding Website) are representative only and the actual product supplied may differ.

## **10. LIMITATION OF LIABILITY**

10.1 Fonterra will not in any circumstances be liable for any claim in contract, tort (including negligence) or equity, under statute or otherwise unless notice of the claim is given in writing to Fonterra within 30 days of the Purchaser first becoming aware of a claim arising.

10.2 Notwithstanding any other provision of these Terms, Fonterra will not be liable for any loss and/or damage to person or property, any loss of revenue, profits, goodwill, business or anticipated business, anticipated savings, any business interruption, loss of data, or product recall costs, or for any indirect or consequential loss or damage, regardless of whether or not that loss or damage was, or ought to have been contemplated by Fonterra. Fonterra will not be liable for any loss and/or damage alleged to arise from the supply of goods for any special or particular purpose, and the parties by signing these Terms agree that no such purpose has been communicated to Fonterra and is expressly disclaimed.

10.3 If the products are delayed in being shipped to the Purchaser due to circumstances within Fonterra's reasonable control, Fonterra's maximum aggregate liability for any direct costs incurred by the Purchaser as a direct result of such delay is limited to five percent (5%) of the invoice value of the shipment the subject of the delay. This is the Purchaser's sole remedy in the event of delay.

10.4 If the products do not (i) comply with the agreed specifications or (ii) there is a total failure by Fonterra to supply the products (in each case for reasons which Fonterra is responsible), Fonterra may, following discussion with the Purchaser, refund all or part of the price of the products (to the extent payment has been made), or replace or rework all (or the unrefunded) portion of the products. In addition to this

refund and/or replacement remedy (and subject at all times to clauses 10.1 and 10.2), where the Purchaser has incurred any direct costs or direct damages resulting from either (i) or (ii) above (in each case for reasons which, and to the extent, Fonterra is responsible), Fonterra's maximum aggregate liability is (to the maximum extent permitted by law) limited to twenty percent (20%) of the relevant invoice value of the non-conforming products or the products failed to be delivered.

In respect of any other claim by the Purchaser against Fonterra, whether made in contract, tort (including negligence) or equity, under statute or otherwise, that directly or indirectly arises out of or in connection with any product supply governed by these Terms (in each case for reasons which, and to the extent, Fonterra is responsible, and subject at all times to clauses 10.1 and 10.2), where the Purchaser has incurred any direct costs or direct damages Fonterra's maximum aggregate liability is (to the maximum extent permitted by law) limited to twenty percent (20%) of the relevant invoice value of the products the subject of the claim.

- 10.5 Any reworking of the products under clause 10.4 shall be effected at such place as Fonterra may specify and Fonterra may require the Purchaser to arrange for the transport, at Fonterra's cost, of any such products to be reworked or made good.
- 10.6 Where the Purchaser contends that costs or damages arising from any third-party claim are Fonterra's liability (and as a precondition to Fonterra accepting any such liability), the Purchaser irrevocably grants Fonterra the sole control of the defence and all related settlement negotiations and other proceedings, and the Purchaser shall assist and co-operate with Fonterra as reasonably requested regarding any third-party claim in relation to the products.
- 10.7 The Purchaser shall indemnify Fonterra for any liability, costs, damages or claims suffered by Fonterra and caused directly or indirectly by the Purchaser's handling, storage, use or sale of the products, or by any negligent act or omission or breach of any law applicable to the handling, storage, use or sale of the products (including as incorporated into another good or service) by the Purchaser.

## **11. GENERAL**

- 11.1 All notices under these Terms must be in writing and delivered by one party to the other at the address that the other specifies from time to time. Where any notice is required to be given by the Purchaser to Fonterra under these Terms in respect of any damage, defect or shortfall in the contracted volume of products, the Purchaser shall do so within the time period stated in these Terms or Fonterra shall not be liable in respect of any claim or potential claim. The Purchaser shall provide full details of the alleged problem with the products, and subsequently any other information reasonably requested by Fonterra.
- 11.2 The Purchaser agrees that any packaging accompanying the products which identifies the product as being manufactured or supplied by Fonterra must be disposed of in a manner that prevents its re-use or, if it is to be re-used, must be modified in appearance so that no reference or connection to Fonterra can be made. Unless expressly otherwise agreed in writing, the Purchaser acknowledges and warrants that any products purchased under these Terms are purchased solely for its own use and that the Purchaser will not on-sell the products in any market.
- 11.3 Any confidential information or intellectual property provided by Fonterra in connection with the products, including any price list, the contract confirmation and shipment schedule, remains at all times Fonterra's confidential and proprietary information and may be used by the Purchaser solely to complete the relevant shipment and for no other purpose and must otherwise be kept in strict confidence by the Purchaser. The Purchaser agrees that damages are not an adequate remedy for any breach of this clause and that Fonterra may seek an injunction or other interim relief to protect its rights. Fonterra will hold in confidence any information which the Purchaser identifies in writing to Fonterra as being confidential.
- 11.4 All intellectual property which is owned by, or is proprietary to, or which is created as a result of or in connection with the provision of the products, shall remain owned exclusively by Fonterra. The Purchaser has no right or interest in or licence to use any of Fonterra's intellectual property (including trade marks) without Fonterra's prior written consent.
- 11.5 The Purchaser shall not give or make any undertaking, assertion or representation in relation to the Products without Fonterra's prior approval in writing.
- 11.6 The United Nations Convention on Contracts for the International Sale of Goods does not apply to these Terms or any transaction conducted in accordance with, or pursuant to, these Terms.

- 11.7 These Terms supersede and exclude all discussions, representations, terms and/or conditions of trade, and all written or oral agreements, arrangements and understandings between Fonterra and the Purchaser. The Purchaser agrees that no proceedings may be brought against Fonterra for an order under section 43 of the NZ Fair Trading Act in relation to sections 9, 12A, 13 or 14(1) of that Act.
- 11.8 These Terms are governed by the laws of New Zealand to the exclusion of the law of any other country to the maximum extent permitted by law. Any dispute, difference or claim arising out of or in connection with a product supply contract or these Terms, if not resolved by any informal dispute mechanism agreed between the parties, will be referred to and finally resolved by arbitration in accordance with the Singapore International Arbitration Centre ("**SIAC**") Arbitration Rules in force at the time of the dispute arising ("**Rules**"). The place of arbitration will be Singapore. The tribunal will consist of one arbitrator appointed in accordance with the Rules. For the purpose of article 6 of the Rules, the appointing authority will be the SIAC International Panel. The language of the arbitration will be English.
- 11.9 Any personal information collected by the Purchaser or Fonterra in connection with these Terms must only be used or disclosed for the purposes of ensuring performance of these Terms and any future like arrangement. This may include disclosure within the parties' respective organisations and to other parties involved in performing these Terms. Fonterra and the Purchaser agree to comply with relevant privacy laws in respect of any personal information collected in connection with these Terms, any shipments and any future like arrangement.
- 11.10 Any notice given by a party, or failure by a party to insist on strict compliance with, or any delay in exercising a party's rights under, these Terms is not a variation or waiver of any provision or of any right available to that party.
- 11.11 The Purchaser may not assign or novate any or all of its rights or obligations under these Terms to a third party or purport to do so without Fonterra's prior written consent (which may be given or withheld in Fonterra's complete discretion). Fonterra may assign or transfer the benefits and burdens of this agreement to any affiliate of Fonterra at its discretion and without the Purchaser's consent.
- 11.12 In addition to Fonterra's rights under clause 3.7 of these Terms, and subject to Fonterra's right to recover costs under clause 3.8, neither Fonterra nor the Purchaser shall be liable for the failure to perform or delay in the performance of its obligations pursuant to these Terms to the extent such failure or delay is caused by or results from a Force Majeure Event. The party affected by the Force Majeure Event shall promptly notify the other party using the fastest possible means of communication available to it under the circumstances, describe the circumstances of the Force Majeure Event, and promptly notify the other Party when the Force Majeure Event (or its impact on such party) has been abated. In the event a Force Majeure Event persists for more than 60 calendar days, the party not prevented to perform by the Force Majeure Event may dissolve the relevant agreement as far as affected by the Force Majeure Event, without being obliged to pay any compensation.

*Force Majeure Event* means an event or circumstance beyond the reasonable control of the affected party, its suppliers or auxiliary persons, which hinders or prevents the performance of its obligations under these Terms and which cannot be foreseen or if foreseeable is unavoidable, including without limitation, a natural hazard outside human control, or other natural disaster, an act of government or any sovereign or military, confiscation, nationalization, requisition, governmental sanction, embargo or similar action, any act of foreign enemies, hostilities, civil war, revolution or other act of war or terror, civil unrest, invasion, a blockade, insurrection, riot, epidemic or pandemic (as defined by the World Health Organisation), landslide, flood, drought, tsunami, earthquake or fire, public power outages, labour strikes (strikes and other labour unrest that affect only one party and are not caused by a general or mass strike will not constitute an excusable delay), or the order of any court or government authority.

Where the Force Majeure Event stems from regional weather related conditions, Fonterra is not obliged to transfer milk between regions and between processing plants where this interferes with scheduled production or is not otherwise commercially viable for Fonterra to transfer such milk. Where overall milk volumes have been impacted by a Force Majeure Event, Fonterra may allocate order volumes on a pro rata basis as it determines in its sole discretion.

- 11.13 The parties agree to take reasonable steps to mitigate any loss or damage that party may suffer under these Terms.

- 11.14 Clerical errors or omissions, whether in compilation or otherwise in any information contained in the Information Website or Bidding Website, Bidder Contracting Information contract confirmation or shipment schedule, invoice or other such documentation, are subject to correction by Fonterra.
- 11.15 Fonterra may amend these Terms at any time and the amended Terms will apply in accordance with the Market Rules.

## 12 DEFINITIONS

12.1 In these Terms, unless the context otherwise requires:

- (a) Fonterra means the Fonterra Group member specified by Fonterra in your Bidder Contracting Information and/or contract confirmation) and its officers, employees, agents, contractors and advisers;
- (b) Bidder Contracting Information means the bidder specific information made available to you in accordance with the Market Rules prior to the Trading Event at which the products were purchased;
- (c) “contract confirmation” means the contract confirmation or other such documentation or communication (written or oral) issued after the Trading Event which confirms, supplements or modifies the details of your Winning Bid in a Trading Event. If no contract confirmation is issued then the contract confirmation will comprise those provisions of the Bidder Contracting Information selected by Fonterra us to apply to the supply of the product;
- (d) Expected Shipment Period in respect of a product, means the period between the first expected delivery date and the last expected delivery date specified for the applicable Contract Period as specified in the contract confirmation and/or shipment schedule for that product;
- (e) Incoterms means the international rules for the interpretation of trade terms as published by the International Chamber of Commerce, Paris, France, in effect at the time of the contract;
- (f) Incoterms Basis means, in respect of any product, the basis for delivery in Incoterms which is specified in relation to that product in the contract confirmation for that product, or which is otherwise agreed between us. If no Incoterm is so specified or agreed by us, then the applicable Incoterm will, at our election, be either:
  - (i) the Incoterm held in our customer information system in respect of your previous shipment; or
  - (ii) CFR;
- (g) Market Rules means the rules governing the Trading Platform and Trading Events as published on the Information Website from time to time;
- (h) “products” means any goods or products in respect of which you are the Winning Bidder in a Trading Event, including any services supplied or deemed to be Supplied by us incidental to the Products and/or under these Terms; and
- (i) “specifications”, in respect of a product, means the relevant specifications and product bulletins listed on the Information Website for the Trading Event in which the Product was purchased by you, as confirmed, supplemented or modified by the Bidder Contracting Confirmation and/or contract confirmation.

12.2 Terms which are capitalised in these Terms but which are not defined in these Terms shall have the meaning given to those terms in the Market Rules.