

TERMS AND CONDITIONS OF SUPPLY

1.1. In this Agreement, unless the context requires otherwise, each of the following words and expressions shall have the meaning stated opposite it and cognate expressions shall have a corresponding meaning, namely:

1.1.1. **Agreement** means these Terms and Conditions as set out herein, together with all annexures hereto, as well as the Credit Application form to which these Terms and Conditions are annexed, which together form a binding agreement between the Parties;

1.1.2. **Applicant** means the person or entity stipulated as such on the Credit Application Form to which this Agreement is annexed;

1.1.3. **Business Day** means any day other than a Saturday, Sunday or public holiday officially recognised as such in the Republic of Namibia;

1.1.4. **CFR** means the Cost and Freight incoterm, which means that delivery takes place when the Goods are loaded onto the ship at the port of export;

1.1.5. **CIF** means the Cost, Insurance and Freight incoterm, which means that delivery takes place when the Goods are loaded onto the ship at the port of export;

1.1.6. **CPT** means the Carriage Paid To incoterm, which means that delivery takes place when the Supplier hands the Goods over to the first carrier or transporter in the country of export;

1.1.7. **DAT** means the Delivered At Terminal incoterm, which means that delivery takes place when the Goods are unloaded at the appointed terminal or port of import;

1.1.8. **EXW** means the Ex Works Incoterm, which means that the Supplier delivers the Goods by making same available for collection from its nominated premises;

1.1.9. **FCA** means the Free Carrier incoterm, which means that the Supplier delivers the Goods, cleared for export, to the carrier nominated by the Applicant at the named place;

1.1.10. **FOB** means the Free On Board incoterm, which means that the Supplier delivers the Goods the moment the Goods pass the ship's rail at the nominated port of shipment;

1.1.11. **GIV** means Goods Issue Voucher;

1.1.12. **Goods** means the various foodstuffs ordered by the Applicant and supplied by the Supplier;

1.1.13. **GRV** means Goods Received Voucher;

1.1.14. **Incoterms** means the series of pre-defined international commercial terms published by the International Chamber of Commerce (2012 edition);

1.1.15. **Supplier** means Profoods Namibia (Pty) Ltd, a company with limited liability duly incorporated in terms of the laws of Namibia, with its registered office at Shop 32, Bougain Villas, 78 Sam Nujoma Drive, Klein Windhoek, Windhoek Namibia.

1.1.16. **Parties** means the parties to this Agreement, being the Applicant and Supplier collectively and **Party** shall mean either one of them, as the context may require; and

1.1.17. **NAD** or **Namibian Dollar** means the lawful currency of the Republic of Namibia.

1.2. In this Agreement, unless the context clearly indicates otherwise:

1.2.1. words importing any one gender shall include the other gender;

1.2.2. the singular shall include the plural and vice versa;

1.2.3. an expression which denotes a natural person includes a juristic person and *vice versa*;

1.2.4. the words "include" and "including" mean "include without limitation" and "including without limitation". The use of the words "include" and "including" followed by a specific example or examples shall not be construed as limiting the meaning of the general wording preceding it; and

1.2.5. any reference in this Agreement to "days" shall be construed as calendar days.

1.3. The head notes to the paragraphs to this Agreement are inserted for reference purposes only and shall not affect the interpretation of any of the provisions to which they relate.

1.4. If any provision in clauses 1 or 2 is a substantive provision conferring rights or imposing obligations on any Party, notwithstanding that such provision is contained in such clauses, effect shall be given thereto as if such provision were a substantive provision in the body of the Agreement.

1.5. Save where clearly indicated to the contrary, expressions defined in this Agreement shall bear the same meanings in any schedule hereto unless such schedule contains an alternative definition for the expression.

1.6. Where any term is defined within the context of any particular clause in this Agreement, the term so defined, unless it is clear from the clause in question that the term so defined has limited application to the relevant clause, shall bear the meaning ascribed to it for all purposes in terms of this Agreement, notwithstanding that that term has not been defined in this interpretation clause.

1.7. When any number of days is prescribed in this Agreement (including Business Days), same shall be reckoned exclusively of the first and inclusively of the last day unless the last day falls on a Saturday, Sunday or public holiday, in which case the last day shall be the next succeeding day which is not a Saturday, Sunday or public holiday.

1.8. When any number of Business Days is prescribed in this Agreement, same shall be reckoned inclusively of the first and exclusively of the last Business Day.

1.9. Should the day for the performance of any obligation in terms of this Agreement fall on a day which is not a Business Day, then such obligation shall be performed on the immediately succeeding Business Day.

1.10. This Agreement shall be binding on and enforceable by the successors-in-title, administrators, trustees, permitted (in terms of this Agreement) assigns or liquidators of the parties as fully and effectually as if they had signed this Agreement in the first instance and reference to any Party shall be deemed to include such Party's successors, administrators, trustees, permitted assigns or liquidators, as the case may be.

1.11. The expiration or termination of this Agreement shall not affect such provisions of this Agreement as expressly provide that they will operate after any such expiration or termination or which of necessity must continue to have effect after such expiration or termination, notwithstanding

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that the applicable clauses do not expressly provide for such continued effect.

1.12. Any reference in this Agreement to legislation or subordinate legislation is to such legislation or subordinate legislation at the date of signature hereof and as amended and/or re-enacted from time to time.

1.13. Any reference in this Agreement to a Party shall include a reference to that Party's assigns expressly permitted under this Agreement and, if such Party is liquidated or sequestered, be applicable also to and binding upon that Party's liquidator or trustee, as the case may be.

1.14. Should this Agreement be signed on a date that results in the use of any tenses herein being inappropriate, the terms shall be read in the appropriate tense.

1.15. This Agreement shall be governed by and interpreted in accordance with the laws of the Republic of Namibia.

2. PREAMBLE

The Supplier shall supply the Goods to the Applicant as and when required on the terms and conditions recorded in this Agreement.

3. CONFIRMATION OF ORDER

3.1. The Supplier shall issue the Applicant with a Sales Order recording the relevant specifications of the Goods ordered, including its quantity, quality, packaging, country of origin, estimated date of arrival (indicated as either being during the first or second half of a particular month) and price as soon as reasonably possible after the Supplier having placed an order.

3.2. The Applicant shall, if it accepts the Sales Order, sign same return a copy to the Supplier by hand, fax or email.

3.3. Once the Applicant has signed the Sale Order, a binding agreement of sale comes into force, to which the terms of this Agreement are incorporated. Unless in the event of a breach as expressly provided for in this Agreement, the Applicant shall not be entitled to cancel that agreement.

4. ARRIVAL DATE SUBJECT TO FLUCTUATION

The Parties agree to and record that the estimated date of arrival as referred to above is subject to constant fluctuation and change due to circumstances out of the Supplier's control. As such, the Supplier is not in any way bound to the estimated date of arrival as stipulated in the Sales Order. Any deviation in the actual date of arrival, irrespective of how substantial such deviation may be, will not amount to a breach of this Agreement.

5. COSTS OF TRANSPORT, IMPORT AND EXPORT CLEARANCE, INSURANCE AND THE LIKE

5.1. The costs of any and all transport, import and export clearance and duties, insurance and other related charges shall be borne by the Party required to do so in terms of the applicable incoterm indicated on the Credit Application.

5.2. Where the Applicant requires the Supplier to undertake any services not required by it in terms of the applicable incoterm, the Supplier shall either render those services itself or appoint a third party at its discretion to do so and shall invoice the Applicant for those services.

6. PAYMENT TERMS

6.1. The Supplier shall issue the Applicant with its invoice for all Goods delivered and/or services rendered upon the date of delivery as contemplated by clause 7.3 below.

6.2. The Supplier's invoice shall become due and payable after the number of days indicated under "payment terms" in the Credit Application.

6.3. All payments shall be made in Namibian Dollars by means of electronic funds transfer into the bank account designated on the Supplier's invoice. Any bank charges raised in respect of clearing any payments from a bank account outside of the Republic of Namibia shall be for the Applicant's account.

6.4. Interest at the Supplier's financial institution's Prime rate plus 2% per annum will accrue to any outstanding balance due and owing to the Supplier.

7. OWNERSHIP AND PASSING OF RISK

7.1. Irrespective of the date of delivery, until such time as the Applicant has paid all amounts due to the Supplier for the supply, transport, import and/or export (as the case may be) of the Goods, the ownership in such Goods shall remain vested in the Supplier. The Supplier shall, in its sole discretion, without notice to the Applicant be entitled to take possession of any such Goods if any payment is outstanding.

7.2. The Goods shall be regarded as having been sold "voetstoets" without warranty against latent defects therein. No liability whatsoever shall arise furthermore on the part of the Supplier for any representation or warranty made or alleged to have been made at any time in respect of Goods sold by the Supplier to the Applicant.

7.3. The risk in and to the Goods shall pass from the Supplier to the Applicant on delivery. Delivery shall take place in accordance with the agreed delivery terms stipulated in the Credit Application. For avoidance of doubt, delivery shall take place on the following terms at the following instances:

7.3.1. EXW – Delivery shall take place once the Supplier has made the Goods available for collection by the Applicant from the Supplier's nominated premises;

7.3.2. FCA and CPT – Delivery shall take place once the Applicant's nominated carrier has collected the Goods from the Supplier's nominated premises;

7.3.3. FOB, CFR and CIF – Delivery shall take place once the Supplier has loaded the Goods or caused the Goods to be loaded onto the ship at the nominated port of export;

7.3.4. DAT – Delivery shall take place once the Supplier offloads the Goods at the port or terminal of import.

8. GOODS DELIVERED CONTRARY TO SALES ORDER

8.1. Subject to the provisions of clause 7.2 above, in the event of the Goods delivered to the Applicant not complying with the specifications stipulated in the Sale Order, the Applicant shall notify the Supplier accordingly within 48 (forty-eight) hours of the Applicant having physically received the Goods at its nominated premises. Said notice shall include:

8.1.1. Photos of the Goods, packaging and barcodes;

8.1.2. A copy of the GIV and GVR and all other applicable delivery notes;

8.1.3. Details regarding the alleged shortcomings of the Goods.

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8.2. In the event of a dispute arising between the Parties as to the characteristics or quality of the Goods delivered, the Parties shall appoint SGS SA (www.sgs.com) to inspect the Goods in question and to compile a relevant report, which the Parties agree to be bound by.

8.3. The Cost of the inspection shall be borne by the Party against who's interests the report finds.

8.4. In the event of the Supplier conceding that the Goods do not accord with the specifications stipulated in the Sales Order, or the SGS report referred to above finding so, the Applicant shall return the Goods to the Supplier at the Supplier's cost and the Supplier shall reimburse the Applicant for any payments in respect of those Goods it may have made to the Supplier.

9. CHANGE OF OWNERSHIP

9.1. The Applicant undertakes to notify the Supplier, in writing, within seven (7) days of any change in ownership of the Applicant's business, or should the Applicant be a company, of its share transactions whereby the majority shareholding is affected, failing such notice the entire balance owing, whether due or not, will immediately be deemed to be due and payable by the Applicant. In addition to the foregoing, the Applicant acknowledges that immediately upon any change of ownership in the Applicant any outstanding amount whether due or not shall be deemed to be forthwith payable by the Applicant to the Supplier.

10. CANCELLATION OF ORDERS, CESSATION OF SUPPLY & ACCELERATION OF DEBT

10.1. The Supplier is entitled to cancel in its sole discretion any Sales Order and hence not to supply any Goods ordered to the Applicant at any time by giving the Applicant notice to that effect. In such an event, the Supplier shall neither be in breach of this Agreement nor incur any liability to the Applicant whatsoever.

10.2. The Applicant further agrees that in the event of:

10.2.1. the Applicant committing any Act of Insolvency as defined in section 8 of the Insolvency Act no. 24 of 1936 as amended, or being provisionally liquidated, or giving notice of its intention to surrender its estate as factually or commercially insolvent; or

10.2.2. a provisional order for the winding up of the Applicant being made; or

10.2.3. the Applicant resolving to have it places under Business Rescue proceedings in terms of the Companies Act of 2008; or

10.2.4. the Applicant proposing a formal or informal compromise with the suppliers of the Applicant or any one or more of them; or

10.2.5. any judgment being entered against the Applicant and remaining unsatisfied for 7 (seven) days;

10.2.6. the Applicant failing to make any payment due to the Supplier by the due date; or

10.2.7. the Applicant committing any breach of any of the provisions of this credit agreement;

then the Supplier shall be entitled to cease supplying the Applicant with any further goods and the entire amount owing by the Applicant to the Supplier in respect of goods delivered to it at that time shall become due and payable immediately.

10.3. A certificate signed by the secretary / manager or any director of the Supplier reflecting the amount owing by the Applicant to the Supplier in respect of the credit facilities granted to the Applicant in terms hereof relating to the Applicant's dealings with the Supplier and of the fact that such an amount is due, owing and unpaid shall be *prima facie* proof of the effects therein stated for the purpose of any action, proof of debt on insolvency or for any purpose whatsoever where the amount of such claim is required to be established and it shall rest with the Applicant to prove that such amount is not owing and/or due and unpaid.

10.4. The Applicant renounces the benefits of the following legal exceptions, the meaning, force and effect whereof and of the renunciation of which the Applicant acknowledges being fully acquainted with:

10.4.1. *Non Numeratae Pecuniae* (being a defence available to the Applicant where no monies were actually received);

10.4.2. *Non Causa Debiti* (being a defence available to the Applicant where the debt arose without proper cause or reason);

10.4.3. *Errore Calculi* (being a defence available to the Applicant where there was an error on calculating the amount owed);

10.4.4. No Value Received; and

10.4.5. Revision of Accounts.

10.5. The Supplier shall at any time whilst any amount is still owing to him in terms of this Agreement be entitled within 5 (five) days of giving a written request to inspect any of the Applicant's financial records, including, but not necessarily limited to, its bank statements, management accounts and other accounting records.

10.6. The Applicant undertakes to pay all legal costs as between attorney and own client and collection commission at the maximum rate permissible which may be incurred by the Supplier arising out of any breach hereof or in recovering or endeavouring to recover from the Applicant the whole or any portion of the indebtedness of the Applicant to the Supplier hereunder.

11. SECURITY – CESSION OF BOOK DEBTS

11.1. The Applicant does hereby irrevocably and *in rem suam* cede, pledge, assign, transfer and make over unto and in favour of the Supplier, all of its right, title, interest, claim and demand in and to all claims / debts / book-debts of whatsoever nature and description and how so ever arising which the Applicant may now or at any time hereafter have against all and any persons, companies, corporations, firms, partnership, associations, syndicates and other legal personae whomsoever ("the Applicant's Debtors") without exception as a continuing covering security for the due payment of every sum of money which may now or at any time hereafter be or become owing by the Applicant to the Supplier from whatsoever cause or obligation howsoever arising which the Applicant may be or become bound to perform in favour of the Supplier. The Applicant hereby undertakes to furnish the Supplier with a list of the applicant's debtors upon signature hereof.

11.2. If and whenever the Supplier shall so require, the Applicant shall by not later than 7 (seven) days after receipt of written notice by the Supplier deliver to the Supplier a schedule of all amounts which will have been owing to the Applicant by its debtors on the last day of the preceding month, reflecting thereon the amount so owing by each of the debtors and the name and last known address of each

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such debtor, provided that any failure or omission on the Applicant's part so to deliver any such schedule or any error or omission in any schedule so delivered by the Applicant shall not affect any of the rights of the Supplier in terms of this cession.

11.3. Should it transpire that the Applicant at any time entered into prior deeds of cession or otherwise disposed of any of the right, title and interest in and to any of the debts which will from time to time be subject to this cession, then this cession shall operate as a cession of all the Applicant's reversionary rights. Notwithstanding the terms of the foregoing cession, the Applicant shall be entitled to institute action against any of its debtors provided that all sums of money which the Applicant collects from its debtors shall be collected on the Supplier's behalf and provided further that the Supplier shall at any time be entitled to terminate the Supplier's right to collect such monies or debts.

11.3. The Applicant agrees that the Supplier shall be entitled at any time or times hereafter to give notice of this cession to all or any of the Applicant's debtors.

12. SECURITY – SURETY

12.1. The person(s) signing this Agreement on behalf of the Applicant, who warrants that he or she is duly authorised thereto (hereinafter "**the Signatory**"), by his or her signature hereto (which appears below) do, in addition to the above, hereby bind him- or herself in his or her private and individual capacity as surety for and co-principal debtor *in solidum* with the Applicant in favour of the Supplier for the due and punctual performance of any obligation of the Applicant and for the payment to the Supplier by the Applicant of any amounts to the maximum credit limit, as well as any interest due and/or other costs which may at any time become owing to the Supplier by the Applicant from whatsoever cause arising and including, but without limiting the generality of the foregoing, any claims for damages and actions against the Applicant acquired by way of cession. This suretyship shall be a continuing covering guarantee / surety which may only be cancelled, in writing, by the Supplier and then only, provided that all sums then owing by the Applicant (whether due or not) to the Supplier have been paid in full.

12.2. The Signatory hereby renounces the benefits of the legal exceptions "*non causa debiti*", "*ordinis seu excursionis et divisionis*" and "cession of action", with the full meaning, force and effect of which he or she declares him- or herself to be fully acquainted. The Signatory furthermore bind him or herself irrevocably to all the terms contained in this document.

12.3. The Signatory agrees that the amount recoverable from him or her in terms of this suretyship shall, notwithstanding anything to the contrary herein and, in particular, notwithstanding the reference to a credit limit herein, be the full amount owing by the Applicant to the Supplier at any time and not be limited as to the amount or in any other manner whatsoever.

12.4. It is further agreed that if more than one person has appended his other signature hereto, there shall come into existence a separate, distinct and independent contract of suretyship / guarantee which is brought into existence by each separate signatory hereto. If for any reason this suretyship / guarantee is not binding, for whatsoever reason, on anyone signatory then the obligations of the remaining signatories shall nevertheless be and remain of full force and effect.

12.5. Should any party binding themselves as surety be married in community of property, such party herewith confirms to the Supplier that his or her spouse is aware of this surety and consents to their joint estate being bound as surety to the Supplier.

13. CONSENT TO CREDIT CHECK

13.1. The Applicant understands that the personal information given herein is to be used by the Supplier for the purposes of assessing his/her/its credit-worthiness. The Applicant confirms that the information given by him/her/it is accurate and complete. The Applicant further agrees to update the information supplied, as and when necessary, in order to ensure the accuracy of the above information, failing which the Supplier will not be liable for any inaccuracies.

13.2. The Supplier has the Applicant's consent at all times to contact and request information from any persons, credit bureaux or businesses, including those mentioned in this credit application from and to obtain any information relevant to the Applicant's credit assessment including, but not limited to, information regarding the amounts purchased from suppliers per month, length of time Applicant has dealt with such supplier, type of goods and services purchased and manner and time of payment.

13.3. The Applicant agrees that information given in confidence to the Supplier by a third party on the Applicant or the Applicant's business will not be disclosed to the Applicant.

13.4. The Applicant hereby consents to and authorises the Supplier at all times to furnish personal and credit information concerning the Applicant's dealings with the Supplier to a credit bureau and to any third party seeking a trade reference regarding the Applicant in his dealings with the Supplier.

14. NOTICES AND DOMICILIA

14.1. Each of the Parties chooses *domicilium citandi et executandi* ("**domicilium**") for the purposes of the giving of any notice, the payment of any sum, the serving of any process and for any other purposes arising from this Agreement at their respective addresses set forth in below:

14.1.1. The Supplier: The Address stated at paragraph 1

14.1.2. The Applicant: At the address stipulated on the Application Form to which this Agreement is annexed

14.2. Each of the Parties shall be entitled from time to time, by written notice to the others to vary its domicilium to any other address within the Republic of Namibia which is not a post office box or *poste restante*.

14.3. Any notice given and any payment made by a Party to any of the others (the "**addressee**") which:

14.3.1. is delivered by hand during the normal business hours of the addressee at the addressee's domicilium for the time being shall be presumed, until the contrary is proven by the addressee to have been received by the addressee at the time of delivery;

14.3.2. is posted by prepaid registered post from an address within the Republic of Namibia to the addressee at the addressee's domicilium for the time being shall be presumed, until the contrary is proven by the addressee, to have been received by the addressee on the tenth (10th) day after the date of posting.

14.4. Where, in terms of this Agreement any communication is required to be in writing, the term

"writing" shall include communications by facsimile or electronic mail. Communications by facsimile shall, unless the contrary is proven by the addressee, be deemed to have been received by the addressee 24 (twenty-four) hours after the time of transmission. Communications by way of electronic mail shall, unless the contrary is proven by the addressee, be deemed to have been received by the addressee 12 (twelve) hours after the time of transmission.

14.5. Notwithstanding the provisions of the foregoing clauses, in the event that a written notice or any process is actually received by a Party, such receipt shall be valid for all purposes under this Agreement notwithstanding that it was not received at a Party's chosen domicilium.

15. APPLICABLE LAW

The laws of the Republic of Namibia shall in all regards apply to and govern this Agreement.

16. SEVERABILITY

The parties agree that each clause of this Agreement is severable, the one from the other, and if any clause is found to be defective or unenforceable for any reason by any competent court, then the remaining clauses shall be and continue to be of full force and effect.

17. GENERAL PROVISIONS

17.1. No alteration, cancellation, variation of, or addition to this Agreement shall be of any force or effect unless reduced to writing and signed by all Parties to this Agreement or their duly authorised representatives.

17.2. This document contains the entire Agreement between the Parties relating to the matters provided for in this Agreement and no Party shall be bound by any undertakings, representations, warranties, promises or the like not recorded in this Agreement.

17.3. No indulgence, leniency or extension of time which any Party (the "Grantor") may grant or show to any other Party, shall in any way prejudice the Grantor or preclude the Grantor from exercising any of its rights in the future.

17.4. This Agreement cancels and supersedes all prior negotiations and Agreements entered into between the Parties relating to the matters set forth in this Agreement.

18. EXECUTION

This Agreement and the annexures or schedules hereto:

18.1. may be executed in separate counterparts, none of which need contain the signatures of all of the parties, each of which shall be deemed to be an original and all of which taken together constitute one agreement;

18.2. shall be valid and binding upon the parties thereto, notwithstanding that one or more of the parties may sign a facsimile copy thereof and whether or not such facsimile copy contains the signature of any other party.