



THE VITA GROUP

TERMS AND CONDITIONS OF SUPPLY

(April 2009 Revision)

1. Definitions

1.1 In these Conditions the following words shall have the following meanings:-

"Buyer" means the person to whom Goods are supplied by the Company.

"Company" means Vitafoam Products Canada Limited.

"Conditions" means the standard terms and conditions of supply set out in this document.

"Contract" means the contract for the sale and purchase of the Goods made between the Buyer and the Company incorporating these Conditions.

"Goods" means the goods (including any instalment of the goods or any parts for them) which the Company is to supply in accordance with these Conditions.

"Incoterms" means the international rules for the interpretation of trade terms of the International Chamber of Commerce as in force at the date when the Contract is made.

"Price" means the price for the Goods as set out in the estimate.

"Sale of Goods Act" means the Sale of Goods Act in force in the Province of Ontario, Canada, as amended from time to time.

"Writing" includes telex, cable, facsimile transmission, email communication and comparable durable means of communication.

1.2 Any reference in these Conditions to a particular piece of legislation or a provision of a particular piece of legislation shall be construed as a reference to that particular piece of legislation as amended, re-enacted or extended at the relevant time and includes any subordinate legislation for the time being in force made under it.

1.3 The headings in these Conditions are for convenience only and shall not affect their interpretation.

1.4 A reference to person shall include bodies corporate and unincorporate.

1.5 Any phrase introduced by the terms "including", "include", "in particular" or any similar expression shall be construed as illustrative and the words following those terms shall not limit the sense of the words preceding those terms.

1.6 Unless the context otherwise requires, any term or expression which is defined in or given a particular meaning by the provisions of Incoterms shall have the same meaning in these Conditions but if there is any conflict between the provisions of Incoterms and these Conditions, the latter shall prevail.

2. Making the Contract

2.1 The estimate which the Company provides to the Buyer is open for a period of 30 days only from the date thereof, provided that the Company has not previously withdrawn it. Any order issued by the Buyer is an offer to buy the Goods subject to these Conditions and shall be subject to acceptance by the Company and a Contract will only be formed when the Company has accepted the Buyer's offer to buy in Writing.

2.2 All orders are placed under these Conditions alone and are accepted subject to the Company's then current minimum order quantities for the particular Goods. The Company reserves the right to request advance payment for orders below such quantities.

2.3 These Conditions apply to the exclusion of any other terms and conditions (i) which a Buyer might seek to impose, even though such other terms and conditions may be submitted in a later document or purport to exclude or supersede any Conditions inconsistent with them; or (ii) as may be contained in any other acceptance or counter-offer made by the Buyer.

2.4 The Buyer shall be responsible to the Company for ensuring the accuracy of the terms of any order (including any applicable specification) submitted by the Buyer and for giving the Company any necessary information relating to the Goods within a sufficient time to enable the Company to perform the Contract in accordance with its terms.

2.5 Any advice or recommendation given by the Company or its employees or agents to the Buyer or its employees or agents as to the storage, application or use of the Goods which is not confirmed in writing by the Company is followed or acted on entirely at the Buyer's risk and accordingly the Company shall not be liable for any such advice or recommendation which is not so confirmed.

2.6 The Company reserves the right to make any changes in the specification of the Goods as necessary to conform with any applicable statutory requirements provided always that such changes do not materially affect the quality or performance of the Goods.

2.7 No variation of these Conditions is permitted unless expressly accepted by an authorised representative of the Company in writing.

3. Cancellation and Returns

3.1 No order which has been accepted by the Company may be cancelled by the Buyer except with the agreement in writing of the Company and on terms that the Buyer shall indemnify the Company in full against all loss (including loss of profit), costs (including the cost of all labour and materials used) damages, charges and expenses incurred by the Company as a result of cancellation.

3.2 Goods supplied in accordance with the Contract cannot be returned without the prior permission of the Company. The Company will not accept or take responsibility for such Goods returned without its prior written permission. Duly authorised returns shall be sent to the Company's premises at the Buyer's expense.

4. Price

4.1 The Company reserves the right at any time prior to delivery to adjust the price of the Goods to take account of any increase in the cost of raw materials, labour or services or any currency fluctuations affecting the cost of imported materials or any other price relevant circumstances which may not reasonably be controlled by the Company.

4.2 Unless otherwise stated all prices quoted are FOB where delivery takes place at the Company's premises and in the event of delivery takes place anywhere else, all costs or charges in relation to packaging, loading, unloading, carriage and insurance shall be borne by the Buyer, in addition to the purchase price paid for the Goods. For the avoidance of doubt, all sums due to the Company under these Conditions are exclusive of GST which shall be payable by the Buyer in addition, if applicable, in accordance with the relevant regulations in force at the time of making the taxable supply.

4.3 The cost of pallets and returnable containers will be charged to the Buyer in addition to the price of the Goods, but full credit will be given to the Buyer provided such items are returned undamaged to the Company before the due date for payment.

5. Additional Costs

The Buyer agrees to pay for any loss or extra cost incurred by the Company; (i) through the Buyer's instructions or lack of instructions or through failure or delay in taking delivery; (ii) caused by any change in delivery dates, quantities or specifications for the Goods which is requested by the Buyer; or (iii) through any act or default on the part of the Buyer its servants, agents or employees.

6. Terms of Payment

6.1 Unless the Company otherwise agrees in writing payment for Goods becomes due and payable under these Conditions on the 20th of the month following the month of delivery of the Goods.

6.2 Time for payment shall be of the essence.

6.3 No payment shall be deemed to have been received until the Company has received cleared funds.

6.4 The Company reserves the right to charge interest at 3% per annum above the prime bank lending rate from time to time on all overdue accounts, such interest being deemed to accrue on a day to day basis from the due date for payment until the obligation to make payment is discharged.

6.5 The price of the Goods shall be due in full to the Company in accordance with clause 6.1 and the Buyer shall not be entitled to exercise any set off, lien or other similar right or claim.

6.6 If the Buyer shall commit an act of insolvency as set out at Clause 10.8 then it will be deemed to have repudiated the Contract.

6.7 The Company reserves the right at any time at its discretion to demand security for payment before continuing with or delivering any order (or part thereof).

6.8 If upon the terms applicable to any order the Price shall be payable by instalments or if the Buyer has agreed to take specified quantities of Goods at specified times, a default by the Buyer of payment for any due instalment or the failure to give delivery instructions in respect of any quantity of Goods outstanding shall cause the whole of the balance of the Price to become due and payable forthwith.

7. **Delivery**

- 7.1 Unless otherwise agreed in writing by the Company delivery will be deemed to have been effected:-
- 7.1.1 at the Company's premises if the Buyer's transport is used; or
7.1.2 when the Goods are delivered to the Buyer's premises or such other premises as may be agreed by the Company and the Buyer if the Company's transport is used.
- 7.2 Where delivery is to take place anywhere other than the Company's premises, the Buyer shall provide at the delivery address and at its own expense adequate and appropriate equipment and manual labour for loading the Goods. Where the Goods are delivered by the Company anywhere other than the Company's premises, it shall be the absolute responsibility of the Buyer to ensure that the Goods are off-loaded into the correct storage area.
- 7.3 All times or dates given for delivery of the Goods are approximate only and the Company shall not be liable for any delay in delivery of the Goods however caused. Time of delivery is not of the essence. The Goods may be delivered by the Company in advance of the quoted delivery date on giving reasonable notice to the Buyer.
- 7.4 The Company reserves the right to make delivery by instalments and to tender a separate invoice in respect of each instalment.
- 7.5 When delivery is agreed to be by instalments or the Company exercises its right to deliver by instalments under Clause 7.4 hereof and there is delay in the delivery of any one or more instalments for whatever reason this will not entitle the Buyer to damages or to treat the Contract as repudiated.
- 7.6 Deviations in quantity of the Goods delivered (representing not more than 10 per cent by value) from that stated in the order (whether surplus or shortfall) shall not give the Buyer any right to reject the Goods or to claim damages and the Buyer shall be obliged to accept and pay pro rata at the Contract rate for the quantity of the Goods delivered.
- 7.7 The quantity of any consignment of Goods as recorded by the Company upon despatch shall be conclusive evidence of the quantity received by the Buyer on delivery unless the Buyer can provide conclusive evidence to the contrary.
- 7.8 Where delivery is refused by the Buyer or is delayed or suspended at the request of the Buyer or where the Company is unable to deliver the Goods due to circumstances beyond its reasonable control, the Company on giving notification of its readiness to deliver shall be entitled either to:-
- 7.8.1 treat the Contract as fulfilled and place the Goods into storage. Delivery will be deemed to have taken place for invoicing payment and the passing of risk. The reasonable cost of storage and insurance of the Goods shall be for the Buyer's account; or
7.8.2 sell the Goods at the best price readily obtainable and, after deducting all reasonable storage and selling expenses, account to the Buyer for the excess over the Price under the Contract or charge the Buyer for any shortfall below the Price under the Contract.
- 7.9 Any liability of the Company for non-delivery of the Goods shall be limited to replacing the Goods within a reasonable time or issuing a credit note at the pro rata Contract rate against any invoice raised for such Goods.

8. **Export Terms**

- 8.1 Where the Goods are supplied for export from Canada, the provisions of this Clause 8 shall apply (subject to any special terms agreed in writing between the Buyer and the Company) notwithstanding any other provision of these Conditions.
- 8.2 The Buyer shall be solely responsible for complying with any legislation or regulations governing the importation of the Goods into the country of destination and for the payment of any duties on them.

9. **Inspection/Shortages**

- 9.1 Where delivery occurs in accordance with clause 7.1.1 or clause 8, the Buyer shall be responsible for arranging for testing and inspection of the Goods at the Company's premises before shipment. The Company shall have no liability for any claim which is made after shipment in respect of any defect in the Goods which would be apparent on inspection or in respect of any damage during transit.
- 9.2 Where delivery occurs in accordance with clause 7.1.2, the Buyer is under a duty wherever possible to inspect the Goods on delivery.
- 9.3 No liability will attach to the Company for non-delivery, partial loss or damage to the Goods occurring prior to delivery or for any claim that the Goods are not in accordance with the Contract unless claims to that effect are notified in writing by the Buyer to the Company (and in the case of claims for non-delivery, partial loss or damage with a copy to the carrier if the Company's transport has not been used to deliver the Goods):
- 9.3.1 within seven days of delivery for partial loss or damage or non-compliance with the Contract; or
9.3.2 within fourteen days of the date of the invoice for non-delivery.
- 9.4 In the event of a valid claim for non-delivery, partial loss or damage the Company undertakes at its option either to reprocess or replace the Goods at its expense but shall not be under any further or other liability to any person in connection with such non-delivery, partial loss or damage or non-compliance.
- 9.5 If the Buyer shall fail to give notice in accordance with Clause 9.3 above the Goods shall be deemed to be in all respects in accordance with the Contract and the Buyer shall be bound to accept and pay for the same accordingly.

10. **Risk and Property**

- 10.1 Risk of damage to or loss of the Goods shall pass to the Buyer:-
- 10.1.1 in the case of Goods to be delivered at the Company's premises, at the time where the Company notifies the Buyer that the Goods are available for collection; or
10.1.2 in the case of Goods to be delivered otherwise than at the Company's premises, at the time of delivery or, if the Buyer wrongfully fails to take delivery of the Goods, the time when the Company has tendered delivery of the Goods.
- 10.2 Notwithstanding delivery and the passing of risk in the Goods, or any other provision of these Conditions, title and property in the Goods, including full legal and beneficial ownership, shall not pass to the Buyer until the Company has received in cash or cleared funds payment in full for all goods delivered to the Buyer under this and all other contracts between the Company and the Buyer for which payment of the full price of the goods thereunder has not been paid. Payment of the full price of the goods shall include the amount of any interest or other sum payable under the terms of this and all other contracts between the Company and the Buyer under which the goods were delivered.
- 10.3 Until such time as the property in the Goods passes to the Buyer, the Buyer shall:
- 10.3.1 hold the Goods as the Company's fiduciary agent and bailee;
10.3.2 keep the Goods separate from those of the Buyer and third parties and properly stored, protected and identified as the Company's property;
10.3.3 not destroy or obscure any identifying mark or packaging on or relating to the Goods; and
10.3.4 maintain the Goods in a satisfactory condition and keep them insured on the Company's behalf for their full price against all risks to the reasonable satisfaction of the Company. On request the Buyer shall produce the policy of insurance to the Company.
- 10.4 Notwithstanding clause 10.3 the Buyer may resell the Goods at their full market value or use the Goods in the ordinary course of its business.
- 10.5 Until such time as the property in the Goods passes to the Buyer (and provided the Goods are still in existence and have not been resold), the Company may at any time require the Buyer to deliver up the Goods to the Company and, if the Buyer fails to do so forthwith, enter on any premises of the Buyer or any third party where the Goods are stored and repossess the Goods.
- 10.6 The Buyer shall not be entitled to pledge or in any way charge by way of security for any indebtedness any of the Goods which remain the property of the Company, but if the Buyer does so all monies owing by the Buyer to the Company shall (without limiting any other right or remedy of the Company) immediately become due and payable.
- 10.7 The Company shall be entitled to recover payment for the Goods notwithstanding that property in the Goods has not passed to the Buyer.
- 10.8 The Buyer's right to possession of the Goods shall terminate immediately if:
- 10.8.1 the Buyer has a bankruptcy order made against him or makes an arrangement with his creditors, or otherwise takes the benefit of any statutory provision for the time being in force for the relief of insolvent debtors, or has a receiver and/or manager, administrator or administrative receiver appointed over its undertaking or any part thereof, or documents are filed with the court for the appointment of an administrator of the Buyer or notice of intention to appoint an administrator is given by the Buyer or its directors or by a qualifying charge holder, or a resolution is passed or a petition presented to any court for the winding-up of the Buyer or for the granting of an administration order in respect of the Buyer, or any proceedings are commenced relating to the insolvency or possible insolvency of the Buyer; or
10.8.2 the Buyer suffers or allows any execution, whether legal or equitable, to be levied on his/its property or obtained against him/it, or fails to observe or perform any of his/its obligations under the Contract or any other contract between the Company and the Buyer, or is unable to pay its debts or the Buyer ceases, or threatens to cease, to trade; or
10.8.3 the Buyer encumbers or in any way charges any of the Goods.
- 10.9 Where the Company is unable to determine whether any Goods are goods in respect of which the Buyer's right to possession has terminated, the Buyer shall be deemed to have sold all goods of the kind sold by the Company to the Buyer in the order in which they were invoiced to the Buyer.

1. **Stoppage**

- 11.1 If (i) the Buyer shall fail to accept the Goods or any instalment or part instalment thereof; or (ii) the Buyer shall fail to pay any sum due to the Company; or (iii) any of the events set out in Clause 10.8 occur; or (iv) the Company reasonably apprehends that any of the events set out in clause 10.8 is about to occur in relation to the Buyer and notifies the Buyer accordingly, the Company in its discretion and without prejudice to any other right or claim may by notice in writing immediately determine wholly or in part any and every contract between the Company and the Buyer or may (without prejudice to the Company's right subsequently to determine the contract for the same cause should it so decide) by notice in writing immediately suspend further deliveries of Goods without any liability to the Buyer until any default by the Buyer be remedied, and if the Goods have been delivered but not paid for, the Price shall become immediately due and payable notwithstanding any previous agreement or arrangement to the contrary.
- 11.2 For the avoidance of doubt it is hereby declared that nothing in these Conditions shall affect the rights given to the Company by the Sale of Goods Act or any statutory amendment or re-enactment thereof.

12. **Warranties and Conditions**

- 12.1 The Company warrants that, at delivery, it has title to and the unencumbered right to sell the Goods.
- 12.2 Every description or specification of the Goods given by the Company is given in good faith based on average results of standard tests but any conditions or warranties express or implied that the Goods shall correspond with such description or specification are hereby expressly disclaimed and the use of any such description or specification shall not constitute a sale by description.
- 12.3 Any conditions or warranties (whether express or implied by statute, common law or arising from conduct or a previous course of dealing or trade custom or usage) as to the quality or fitness of the Goods for any particular purpose even if that purpose is made known expressly or by implication to the Company are hereby expressly disclaimed.
- 12.4 Notwithstanding that a sample of the Goods may have been exhibited to and inspected by the Buyer or the results of standard tests upon a sample furnished to the Buyer it is hereby declared that such sample was so exhibited and inspected or tested solely to enable the Buyer to judge for itself the quality of the Goods and not so as to constitute a sale by sample. The Buyer shall take the Goods at its own risk as to their corresponding with the sample or as to their quality, condition and/or sufficiency for any purpose.
- 12.5 Without prejudice to the foregoing provisions of this clause 12 the application, use and processing of the Goods is the absolute responsibility of the Buyer and the Buyer shall be deemed to have carried out its own tests to ensure the suitability of the Goods for their intended purpose and applications.

13. **Liability**

- 13.1 Nothing in Clause 13 shall be deemed to exclude or restrict the Company's liability for death or personal injury resulting from gross negligence.
- 13.2 **Exclusion**
- 13.2.1 This clause 13.2 only covers defects caused by faulty design, manufacture, materials or workmanship. It does not impose any liability upon the Company in respect of any defect in the Goods arising out of the act, omissions, negligence or default of the Buyer, its servants or agents including in particular but without limitation any failure by the Buyer to comply with any recommendations of the Company as to storage, use or handling of the Goods.
- 13.2.2 The Company agrees that if any defect covered by Clause 13.2 is discovered during the 3 month period commencing with the date of dispatch, the Company will either repair the Goods at its own expense, replace them or refund the Price of the Goods pro rata. If the Company complies with this clause 13.2.2 it shall have no further liability for breach of the warranty in clause 12.
- 13.2.3 The Buyer cannot claim the benefit of this Clause 13.2 unless:
- (a) it informs the Company of the relevant defect in writing within seven working days of discovering it and gives the Company the opportunity to inspect the Goods; and
- (b) it returns the Goods to the Company;
- (c) the total price for the Goods has been paid by the due date for payment; and
- (d) the Goods are unused and in an unaltered state.
- 13.2.4 The risk of accidental loss or damage to the Goods whilst being returned will be borne by the Buyer.
- 13.2.5 Where the Goods are for delivery by instalments any defect in any instalment shall not be a ground for cancellation of the remainder of the instalments and the Buyer shall be bound to accept delivery thereof.
- 13.2.6 The Company shall not be liable for imperfect work caused by any inaccuracies in any drawing, bills of quantities or specifications provided by or on behalf of the Buyer.
- 13.2.7 The Company shall not be liable in respect of any defect arising from fair wear and tear, wilful damage, negligence, abnormal working conditions, failure to follow the Company's instructions, misuse or alteration of or repair of the Goods without the Company's approval.
- 13.3 The Company shall not be liable by reason of any representation (unless fraudulent), or implied warranty, condition or other term, or any duty at common law, or under the express terms of the Contract, for loss of profit or loss of business or business opportunity or for any indirect, special or consequential loss or damage, costs, expenses or other claims for compensation whatsoever (whether caused by the negligence of the Company, its employees or agents or otherwise) which arise out of or in connection with the supply of the Goods (including any delay in supplying or any failure to supply the Goods in accordance with the contract or at all) or their use or re-sale by the Buyer and the entire liability of the Company for any one claim or for the total of all claims arising from any one act or default of the Company (whether arising from the Company's negligence or otherwise) under or in connection with the Contract shall not exceed the Price or £100,000 whichever is lesser.
- 13.4 Nothing in these Conditions excludes or limits the liability of the Company:
- 13.4.1 for death or personal injury caused by the Company's negligence or the negligence of its personnel acting in the course of their duties;
- 13.4.2 for fraud or fraudulent misrepresentation; or
- 13.4.3 for any matter which it would be illegal for the Company to exclude or attempt to exclude its liability.

14. **Force Majeure**

The Company shall be entitled to delay or cancel delivery or to reduce the amount of Goods delivered if it is prevented from or hindered in or delayed in manufacturing, obtaining or delivering the Goods by normal route or means of delivery through any circumstances beyond its control including but not limited to strikes (whether involving employees of the Company, the Buyer or third parties), lock-outs, accident, war, fire, reduction in or unavailability of power at manufacturing plant, breakdown of plant or machinery or shortage or unavailability of raw materials from normal source of supply.

15. **Sales Promotion Documentation**

Whilst the Company takes every precaution in the preparation of its catalogues, technical circulars, price lists and its other literature, these documents are for the Buyer's general guidance only and the particulars contained therein shall not constitute representations by the Company and shall not form part of the Contract and the Company shall not be bound thereby.

16. **Intellectual Property Rights**

The Buyer shall indemnify the Company against all costs, claims and damages incurred or threatened arising out of any alleged infringement of patents, trade mark, copyright or other intellectual property right occasioned by the manufacture or sale of the Goods made to the specification or special requirements of the Buyer. The Company does not warrant and the Buyer is responsible for ensuring that its use of the Goods will not infringe any patent or other intellectual property rights of a third party.

17. **Tools**

Any tools, artwork, cutting boards and the like made or purchased for the manufacture of the Goods shall remain the property of the Company even if the Buyer has been charged for the cost of such items.

18. **Service Requirements**

Unless expressly agreed the Company does not undertake to hold stocks of or manufacture particular products after the end of the contract period. Requests for delivery after the contract period will be treated as a new enquiry for which the Company will re-quote.

19. **General**

- 19.1 Any notice required or permitted to be given by either party to the other under these Conditions shall be in Writing addressed to that other party at its registered office or principal place of business or such other address as may at the relevant time have been notified by the relevant party pursuant to this provision and such notice shall be delivered by hand, by registered mail or overseas post or by fax. Notice served by hand or by facsimile shall be deemed to be served immediately PROVIDED THAT in the case of notices served by fax, a successful facsimile transmission receipt is obtained.
- 19.2 The Company is a member of the group of companies whose holding company is Vita Cayman Limited and accordingly the Company may perform any of its obligations or exercise any of its rights hereunder by itself or through any other member of its group, provided that any act or omission of any such other member shall be deemed to be the act or omission of the Company.

- 19.3 The Contract is personal to the Buyer and the Buyer shall not assign or transfer or purport to assign or transfer to any other person any of its rights or sub-contract any of its obligations under the Contract.
- 19.4 No waiver by the Company of any breach of the Contract by the Buyer shall be considered as a waiver of any subsequent breach of the same or any other provision. Failure or delay by the Company in enforcing or partially enforcing any provision of the Contract shall not be construed as a waiver of any of its rights under the Contract.
- 19.5 If any provision of these Conditions is held by any competent authority to be invalid or unenforceable in whole or in part such provision (or part thereof) shall be deemed severable and the validity of the other provisions of these Conditions and the remainder of the provision in question shall not be affected
- 19.6 Nothing in this Agreement shall be construed as creating a partnership or joint venture of any kind between the parties or as appointing any party as agent for the other party for any purpose and neither party shall have the authority to bind the other party or to contract in its name for any purpose.
- 19.7 Except as otherwise provided in these Conditions, these Conditions and the estimate shall be the entire agreement between the parties in relation to the matters discussed herein and no other terms shall apply to it. These Conditions and the estimate shall prevail over any inconsistent terms implied by law or by trade, custom, practice or course of dealing and any such inconsistent terms are hereby expressly excluded. Each party's order forms and similar documentation are to be deemed to be procedural only and shall have no effect on these Conditions and the estimate unless they are specifically drawn to the attention of and accepted by the other parties in writing. No conduct by any party shall be deemed to constitute acceptance of any terms put forward by the other or others.
- 19.8 The Contract shall be governed by and construed in accordance with the laws of the Province of Ontario, Canada and all disputes arising in connection with the Contract shall be submitted to the jurisdiction of the courts of the Province of Ontario, Canada.