

Bluebird Foods Limited - Terms and Conditions of Sale

1. **Interpretation:** "**Customer**" means the entity purchasing Products under these Terms; "**GST**" means goods and services tax as defined in the GST Act; "**GST Act**" is a reference to *Goods and Services Tax Act 1985* as amended; "**Insolvency Event**" means circumstances in which the Customer is unable to pay its debts as they fall due or otherwise takes any corporate action or any steps are taken or legal proceedings are started for: (i) its winding-up, dissolution, liquidation, or re-organisation, other than to reconstruct or amalgamate while solvent on terms approved by Seller; (ii) the appointment of a controller, receiver, administrator, official manager, trustee or similar officer of it or of any of its revenues and assets; or (iii) seeks protection or is granted protection from its creditors, under any applicable legislation; "**Products**" means the goods supplied by the Seller under these Terms; "**PPSA**" means *Personal Properties Securities Act 1999*; "**Seller**" means Bluebird Foods Limited (Co no. 163343) of 124 Wiri Station Road, Manukau, Auckland 2104, and "**Terms**" means these terms and conditions of sale, as may be amended from time to time by the Seller.
2. **General:** These Terms apply to, and are incorporated into any quote or order between the Customer and the Seller, to the exclusion of the Customer's conditions of purchase or any other document or terms.
3. **Supply:** Seller agrees to supply to the Customer and the Customer agrees to purchase from Seller the Products in accordance with these Terms.
4. **Purchase Orders:** To obtain supply of the Products, the Customer must issue a written purchase order to the Seller in the form requested by the Seller (unless otherwise agreed by Seller). The purchase order must specify the quantity (which shall comply with any minimum order sizes specified by the Seller) and nature of the Products required by the Customer, and the requested delivery date and address. Seller may, in its absolute discretion, accept or reject a purchase order. A purchase order is not binding until it is accepted by Seller. A purchase order shall only be amended or cancelled with the written consent of Seller, such amendment or cancellation to be on such terms as Seller may specify in its discretion, including that fees may apply.
5. **Delivery:** Seller will use reasonable commercial efforts to deliver the Products to the delivery address on the date specified in the purchase order, unless the date specified is less than 4 business days after the date on which the purchase order is received, in which case Seller will deliver the Products as soon as practicable after receipt of the purchase order. Unless otherwise agreed in the order, the Products will be transported using the Seller's preferred carriers or agents. Seller will not be liable for penalties or damages (direct or indirect) or compensation for late delivery. Where the Customer does not take delivery when the Products are ready, Seller is entitled to store the Products without liability and at the Customer's cost and risk.
6. **Loss or damage during transit:** The Seller will bear the loss or damage to Products in transit where delivery is by its nominated carrier and delivery charges are included in the price of the Products. In all other cases, the Customer is responsible for loss or damage occurring in transit. Delivery occurs:
 - (a) where Seller's nominated carrier is used, when Seller's nominated carrier delivers the Products to the nominated delivery address; and
 - (b) in all other cases, when the Products leave the Seller's premises.
7. **Risk and title:** Risk of loss or destruction of or damage to a consignment of the Products passes to the Customer on delivery of the Products to the Customer or collection of the Products by the Customer. Title to the Products only passes to the Customer on full payment for the Products by the Customer.
8. **PPSA:**
 - (a) Until the Products have been paid for in full, the Customer must not: (i) sell the Products other than in the ordinary course of its business, in which case the Customer grants to the Seller a *security interest* in either every payment to the Seller for the Products or the portion of every payment for the manufactured product that relates to the Product (both as *proceeds* of the Products and as original *collateral*); and (ii) sell, assign, charge or otherwise encumber or grant any interest over any debts and other obligations which any third party may owe to the Seller as a result of the use, manufacture or resale of the Products.
 - (b) The Customer irrevocably authorises the Seller at any time, to enter any premises upon which the Products are stored to enable the Seller to inspect the Products and, if the Customer has breached these Terms or suffers an Insolvency Event, to reclaim possession of the Products. The Customer indemnifies the Seller against any liability to any person in connection with the entry or reclamation.
 - (c) The Customer acknowledges and agrees that: (i) these Terms constitute a *security agreement* for the purposes of section 36 of the PPSA; (ii) this condition 8 creates a *security interest* in all present and after acquired Products and any *proceeds* as security for the Customer's obligations to the Seller; (iii) the Seller is a *secured party* in relation to the Products and any *proceeds* of the Products, and is entitled to register its interest on the Personal Property Securities Register ("**PPSR**") as a *security interest*, and if applicable, a *purchase money security interest*; (iv) the Seller may, by notice to the Customer, require the Customer to take all steps requested by the Seller to ensure the Seller has a *perfected security interest* and if applicable, a *purchase money security interest* in the Products and the *proceeds* and the Customer must comply with that notice; and (v) it will do everything, at its own expense, generally to obtain, maintain, register and enforce the Seller's *security interest* in accordance with the PPSA.
 - (d) The Customer will:
 - (i) sign any further documents and provide any further information, such information to be complete, accurate and up-to-date in all respects, which the Seller may reasonably require to register a financing statement or financing change statement on the PPSR;
 - (ii) indemnify, and upon demand reimburse, the Seller for all expenses incurred in registering a financing statement or financing change statement on the PPSR or releasing any Products charged thereby;
 - (iii) not register a *financing change statement* or a *change demand* on the PPSR without the prior written consent of the Seller;
 - (iv) give the Seller not less than 14 days prior written notice of any proposed change in the Customer's name and/or any other change in the Customer's details; and
 - (v) immediately advise the Seller of any material change in its business practices of selling the Products which would result in a change in the nature of proceeds derived from such sales.
 - (e) The Customer waives any right to receive a copy of a verification statement in accordance with section 148 of the PPSA.
 - (f) If the Seller does not, at any time, have priority over all other secured parties in respect of the Products, then the Customer and the Seller will, in accordance with their entitlement to do so under section 107(1) of the PPSA, be deemed to have contracted out of section 108 and the parties agree to contract back into section 108 with the words "with priority over all other secured parties" deleted.
 - (g) Nothing in sections 114(1)(a), 133 and 134 of the PPSA will apply to these Terms, or the security under these Terms, and the Customer waives the Customer's rights under sections 116, 120(2), 121, 125, 126, 127, 129 and 131 of the PPSA.
 - (h) A term used in italics in this condition 8 has the same meaning as in the PPSA.
9. **Prices:** The prices for the supply of the Products during the Term are as set out in the Seller's price list, as varied by Seller from time to time by notice to the Customer effective from the date of the notice. The prices are exclusive of GST and other taxes, duties and other such levies which will be payable by the Customer. The Customer must keep confidential all prices, rebates and other discounts offered or paid by Seller.
10. **Invoicing and payment:**
 - (a) Seller will provide an invoice to the Customer in respect of each delivery of the Products. The Customer must pay the amount of all invoices in full, without set off, on the following terms as notified by the Seller to the Customer: (i) cash on delivery; (ii) within 7 days of the date of invoice; (iii) by the 20th of the month following the date of delivery, or such other payment terms agreed by the parties. Payment shall be made by direct debit. If payment is not made when due, Seller may, without limiting its rights: (i) vary or withdraw any credit at its discretion; (ii) withhold further supply until full payment of all amounts due from the Customer to the Seller (whether in connection with a supply under these Terms or pursuant to any other contract between the Seller and the Customer); (iii) charge interest at the Seller's banker's current bank overdraft rate plus 2% pa on all overdue monies calculated on a daily basis from the due date until payment in full; and (iv) require immediate payment in full of all amounts payable to the Seller.
 - (b) Seller may, in its discretion, make payment of any rebates or discounts agreed with the Customer by either: (i) applying the rebate or discount to the invoiced amount prior to issuing an invoice; or (ii) by making a separate payment to the Customer.
 - (c) The Seller reserves the right to offset any amount due by the Customer against any amount payable by the Seller to the Customer.
11. **Returns:** Products that are damaged or spoiled before delivery must be notified to Seller within 24 hours of delivery and confirmed in writing to Seller. Only damaged, spoiled or incorrect Products notified to Seller in accordance with this condition 11 may be returned to Seller upon Seller providing its written agreement to accept the returned Products. The Seller will not accept Products that have a best before date that has expired or that have been discontinued.
12. **GST:** If this Agreement or any supply under or in respect of this Agreement becomes subject to GST, the Customer must pay, at the same time and in the same manner, the amount of the GST which is paid or payable for the supply. Seller will provide tax invoices that are necessary to ensure that the Customer can claim any input tax credit in relation to any GST payable in respect of any supply.
13. **Intellectual Property ownership:** All intellectual property rights in the Products (including the formulations and specifications for the Products) are owned by Seller. Nothing in this Agreement transfers ownership of the intellectual property rights in the Products from Seller to the Customer.
14. **Confidential Information:** Each party acknowledges that it may receive confidential information from the other party. The parties must treat all confidential information as confidential and must not use, exploit or disclose the confidential information to any person (except the parties' employees and then only to such extent as may be required to enable the parties to comply with the provisions of these Terms) without the prior written consent of the other party. The parties will use the confidential information only for the purpose for which it has been provided. These obligations as to confidentiality survive the expiry or termination of these Terms.
15. **Warranties:**
 - (a) The Customer agrees that the Products are supplied to the Customer for business purposes in terms of sections 2 and 43 of the Consumer Guarantees Act 1993 and that the provisions of the Consumer Guarantees Act 1993 do not apply to the supply to the Customer.
 - (b) Except as expressly set out in these Terms, and subject to any terms, warranties or conditions that by law may not be excluded or modified, all conditions, warranties, terms, and obligations expressed or implied by law or otherwise relating to the performance of Seller's obligations under these Terms, or any goods or services supplied, or to be supplied, by Seller under these Terms, are excluded.
16. **No Liability:**
 - (a) Any provision of these Terms that excludes any terms, conditions or warranties, or limits the liability of a party will apply only to the extent permitted by law and these Terms will be construed subject to such terms, conditions, warranties and limitations.
 - (b) Subject to condition 16(a), where any terms, conditions or warranties may not be excluded, restricted or modified, or may be excluded, restricted or modified only to a limited extent, the liability of Seller to the Customer under such implied terms, conditions or warranties is limited, at the option of Seller, to the repair or replacement of the Products, or payment of the cost of repairing or replacing the Products.
 - (c) In no event will Seller, its officers, employees or agents be liable for any consequential, incidental, special or indirect loss or damage, any loss of business or revenue, loss of profit, loss of opportunity, loss of goodwill or loss of business reputation arising out of or in connection with the supply of Products, even if due to the negligence of Seller, its officers, employees or agents.
17. **Recalls:** If the Customer is directed to assist in any suspension of supply or recall of Products for any reason by Seller or an authority, the Customer must cooperate and comply with all such reasonable directions to ensure the most effective response to the suspension or recall. The sole cost and expense of such suspension or recall will be borne by: (a) Seller to the extent the costs and expenses are reasonable and necessary where the reason for the suspension or recall is fault in the manufacture of the Products; and (b) the Customer where the reason is its act or omission.
18. **Force Majeure Events:** Seller may suspend delivery or reduce the amount to be delivered if Seller is unable to deliver the Products by reason of circumstances beyond its reasonable control, including (without limitation) strikes, lock-outs, accidents, war, fire, flood, explosion, shortage of power, breakdown of plant or machinery, shortage of raw materials from normal source of supply, act of God or any order or direction of any government, government authority or instrumentality. If the effects of the force majeure event continue for more than one calendar month, Seller at its absolute discretion may terminate any purchase order affected by the force majeure event. The Customer will have no claim against Seller, and Seller will not be liable for any loss arising from any suspension, reduction or failure to deliver arising from the circumstances referred to in this condition or any termination pursuant to this condition 18.
19. **Alteration to range:** Seller reserves the right, at its absolute discretion, to add to or remove from the range of products, including the Products, supplied by Seller, and may do so immediately on written notice to the Customer.
20. **Default:** If an Insolvency Event occurs in relation to the Customer, or fails to pay an invoice, Seller may by notice to the Customer, at its option and without prejudice to any other right it may have, suspend or terminate these Terms or require payment before or on delivery of the Products (notwithstanding the terms of payment applicable to the Products), or cancel any undelivered or uncompleted purchase orders.
21. **Anti-bribery:** The Customer shall comply with all laws, rules and regulations relating to anti-bribery laws. The Customer agrees that it will not corruptly make any offer, payment, promise of gifts or money or any other thing of value to any government official or employee, political party or political candidate (**Government Official**) for the purpose of influencing any act or decision of such Government Official, inducing such Government Official to act in violation of their lawful duty or securing any improper advantage.
22. **Governing Law:** These Terms shall be governed and construed under the laws of New Zealand. The parties submit to the non-exclusive jurisdiction of the courts of New Zealand.
23. **Waiver:** The Seller's acceptance of payment, or delay or failure to act will not prejudice its rights or constitute a waiver.
24. **Assignment:** The Customer's rights arising out of or under these Terms may only be assigned with the prior written consent of Seller.
25. **Amendment:** These Terms may be varied by the Seller by giving 30 days' writing in notice to the Customer. Any purchase orders placed by the Purchaser after such date will be subject to these Terms as varied.
26. **Severance:** If any of these Terms or any part thereof is unenforceable, invalid or illegal, it is to be read down so as to be enforceable, valid and legal. If this is not possible, the clause (or where possible, the offending part) is to be severed from this Agreement without affecting the enforceability, validity or legality of this Agreement and the remaining clauses (or parts of those clauses) which will continue in full force and effect.