

Member Update

Title: **GTA Contract No.5 - CFR /CIF Contract - Call for Second Round of Industry Comment**

Update No.: **17 of 13**

Date of Issue: **22 July 2013**

Distribution

- GTA Members – primary contact list. Please circulate to all appropriate internal parties

1. Issue

GTA has developed a draft Contract No. 5 - CFR/CIF Contract for use by GTA Members and is calling for a second round of industry comment. The contract has been primarily developed with the Australian grain export container trade in mind.

Industry was provided with the first draft of the contract for comment on 1 July 2013 (Member Update No. 12 of 13) the Drafting Committee has reviewed the submissions and made the appropriate amendments to the draft CFR/CIF Contract. Key elements of the contract have been noted below.

The second round of industry submissions in relation to this contract should be received by GTA at admin@graintrade.org.au by the **COB Friday 12 August 2013**.

2. Background

At the request of the GTA membership, GTA has prepared GTA Contract No. 5 - CFR/CIF Contract for Grain in Containers.

This contract form is intended to complement the GTA Contract No.4 – DCT.

In preparing this contract, GTA and the Drafting Committee, were aware of the wide-spread use of the GAFTA Contract No.88 – Contract for Full or Limited Container Loads.

The Committee nevertheless felt that a GTA CFR/CIF Contract would provide a helpful, regionally-specific alternative to the GAFTA form.

As with all GTA contracts, GTA hopes that this form can be a platform for negotiation and would not necessarily expect this form to be adopted in its entirety.

3. Intended Use

The contract is principally intended for use for smaller parcels of containers being sold into the Asian region and dealings with customers who are not averse to Australian jurisdiction.

4. Title and Risk

The contract provides that title will not pass until the Seller has received payment in full.

It also provides that risk will pass to the Buyer when the containers are delivered to the carrier and not when they are shipped on board.

As mentioned above, this makes the contract consistent with the GTA DCT contract. It also makes the contract consistent with the container-specific INCOTERM's CPT and CIP. While the Committee considered the use of these container-specific terms, it did not feel that these terms had achieved wide-spread usage and their use by GTA in this contract might cause confusion.

It was further considered that a Buyer's transit insurance would provide cover for any damage which may occur at the export container facility so long as the contract expressly states that the Buyer is on-risk at that time (notwithstanding that a traditional CFR/CIF contract provides that risk passes on actual shipment).

5. Extension of Shipment

The contract includes an extension of shipment clause.

The Committee considered that the rolling of vessels in Australian container trades was an unfortunate fact of life and so some provision for extension was required.

The period is however shorter, and at higher cost than the GAFTA equivalent to discourage sellers for attempting to "arbitrage" the shipping period in the contract.

6. Export/Import Documentation

The contract recognises the importance to both parties of clearly setting out in the contract the documentation and certification that the buyer may require the seller to provide to secure the import of the containers into the country of destination.

The contract also recognises that there will be occasions when the buyer identifies additional documentation only after the contract has been written, possibly contained in import permits.

7. Law and Arbitration

As this is a GTA contract and consistent with other GTA contracts the contract provides for New South Wales law, and GTA arbitration. Parties may need to be realistic about whether customers in other parts of the world will feel comfortable with agreeing Australian law and jurisdiction and may prefer a neutral law and jurisdiction (see draft copy of the CFR/CIF contract below).

GRAIN TRADE AUSTRALIA CONTRACT No 5.

CFR/CIF CONTRACT FOR GRAIN IN CONTAINERS

Sale Contract Number: [insert number]

Date:

SELLER: [insert Seller's full name and address and company number, if known] ("Seller")

BUYER: [insert Buyer's full name and address and company number, if known] ("Buyer")

BROKER: [insert Broker's full name and address and company number, if known] ("Broker")

COMMODITY: [insert eg Australian Origin Wheat]

QUANTITY: [insert weight]mt, +/-5% at Seller's option

QUALITY/SPECIFICATION: [insert grade eg APH; % moisture, protein, screenings]

PACKING: In bulk, in containers (20/40ft)/in bags in containers (20/40ft) .

PRICE: \$[insert price]mt, CFR/CIF* (insert destination)

SHIPMENT PERIOD: [insert date range and load port(s)]. The Shipped on Board date of bills of lading shall be accepted as proof of shipment in the absence of evidence to the contrary.

DOCUMENTS: [list commercial documents and documents required by Buyer to facilitate import]

OTHER TERMS: This contract incorporates the Grain Trade Australia Dispute Resolution Rules (including arbitration).

This Sale Confirmation and the accompanying GTA Standard CFR/CIF* Terms for Grain in Containers, which both the Seller and the Buyer acknowledge that they have read, understood and agreed, constitute the entire contract between the Buyer and Seller.

Signed by Seller
Date:

Signed by Buyer
Date:

GTA STANDARD CFR/CIF TERMS FOR GRAIN IN CONTAINERS

1. BROKERAGE:

- (a) Brokerage shall be deemed to be earned on the issuance of a Broker's Note.
- (b) Brokerage shall be credited when the deliveries or shipments are invoiced or when the contract is otherwise performed or terminated.
- (c) Brokerage commission shall be paid by the Seller on the mean contract quantity. Such brokerage or commission shall be due upon presentation of proper invoice.

2. CERTIFICATION OF QUALITY, GRADE AND CONDITION:

Quality, grade and condition will be final at load port as per certificate issued by container packer/recognised independent Superintendence Company, appointed by Seller at Seller's cost.*

3. SAMPLING AND ANALYSIS:

- (a) Representative samples of the Commodity shall be drawn during loading by the container packer in accordance with standard protocols as employed at the loading facility to satisfy the sampling requirements of DAFF and to obtain a representative sample of the entire contract/shipment.
- (b) Final determination of quality shall be established on the composite sample drawn on packing.

4. FREIGHT AND CLASSIFICATION:

Partial shipment and transshipment permitted.

5. PAYMENT:

This contract is specified on page 1 to be either T/T Sight; L/C, Prepayment or CAD. The payment terms for each contract are:

- (a) T/T Sight
 - (i) Buyer shall pay 100% of the invoice by telegraphic transfer within one working day after presentation of faxed/emailed copy of the following original commercial documents:
 - Bill of lading
 - Invoice
 - Certificates

- (ii) Seller will not release to Buyer any bill of lading issued in respect of unless Seller has received confirmation from Seller' bank that payment for such has been received into Seller' bank account in accordance with these terms.
 - (iii) Buyer must pay Seller interest at the Australian 90-day bank bill rate/LIBOR* plus 5% on any outstanding amount of the commercial invoice for every day that payment is not made in accordance with these terms. No obvious clerical error in the shipping documents shall entitle Buyer to reject or delay them or delay payment.
- (b) Letter of Credit
 - (i) Irrevocable letter of credit to be open at least 14 days prior to first day of Shipment Period.
 - (ii) Issuing bank to be of credit standing acceptable to Seller.
- (c) Pre-Payment

Full Payment must be received by Seller prior to Commodity being shipped.
- (d) Cash Against Documents (CAD)

6. OWNERSHIP AND PASSING OF TITLE:

Title to the Commodity will remain with Seller until full payment received by Seller.

7. INSURANCE:

- (a) The Commodity will be at Buyer's risk from delivery into the care of the Carrier at the load port container terminal.
- (b) If this is a CIF contract Seller must procure insurance in accordance with INCOTERMS 2010.

8. IMPORT PERMITS:

- (a) Buyer to obtain at its own risk and expense, any import licence or other official authorisation and carry out all customs formalities for the import of the Commodity and for their transport through any country.
- (b) Buyer is to advise Seller at time of contract of any requirements relating to import certification.
- (c) Buyer may advise Seller of any additional requirements (at Buyer's cost) relating to import certification (including providing a copy of an appropriate Import Permit for the total contract quantity including tolerance) up to 14 days prior to the first day of the Shipment Period but no later. If Seller cannot comply with Buyer's additional import requirements Seller must

notify Buyer as soon as practicable that unless the additional requirement is abandoned, Seller will;

- (i) Terminate the contract and claim damages for any losses incurred as a result of the termination; or
- (ii) Claim extension of the contract under Clause 13, save that Seller will not be required to make any allowance to Buyer.

9. DUTIES, TAXES, LEVIES, ETC:

All taxes, levies, licences, imposts of any nature on freight and cargo outside Australia (including but not limited to Terminal Handling Charges, container demurrage and detention) are for Buyer's account.

10. QUANTITY TOLERANCE:

Seller shall have the option of delivering five percent [5.0%] more or less than the contractual quantity at the contract price, unless otherwise agreed by the Parties.

11. WEIGHTS:

Bill of lading/waybill weights shall be final and binding with respect to weights.

12. ADDITIONAL CERTIFICATES:

Any Certificates required pursuant to the Terms of the Contract, other than Phytosanitary, Origin, and Weight and Grade Certificates, shall be supplied by and at the expense of the Buyer.

13. EXTENSION OF SHIPMENT PERIOD

If the Shipment Period is fewer than 31 days it may be extended by an additional period of not more than 5 days at Seller's option, provided that Seller serves notice claiming extension not later than the next business day following the last day of the originally stipulated period. The notice need not state the number of additional days claimed.

Seller shall make an allowance to Buyer, to be deducted in the invoice from the contract price, based on the number of days by which the originally stipulated period is exceeded, in accordance with the following scale:-

- (a) 1 to 2 additional days, 1%;
- (b) 3 or 4 additional days, 1.5%;
- (c) 5 additional days, 2% of the gross contract price.

If, however, after having served notice on the Buyer as above, Seller fails to ship within such extended period, then the contract shall be deemed to have called for shipment during the originally stipulated period plus 5 days, at

contract price less 2%, and any settlement for default shall be calculated on that basis. If any allowance becomes due under this clause, the contract price shall be deemed to be the original contract price less the allowance and any other contractual differences shall be settled on the basis of such reduced price.

14. NOTICES:

Notices given under this contract are to be dispatched by written letter delivered by hand on the day of writing, or by facsimile, or by email (return receipt acknowledging the message has been received is required) or by other method of rapid written communication, subject to the burden of proof of successful transmission to be with the sender. All notices shall be under reserve for errors in transmission. Any notices received after 1600 hours Sydney time on a business day shall be deemed to have been received on the business day following. In case of resale, all notices shall be passed on without delay by the Buyer to Seller. Should the notice be received after 1600 hours Sydney time on the last business day permissible under this contract, Seller shall pass it on as soon as practical, but no later than 1000 hours Sydney Time on the next business day thereafter. Upon request, Seller shall provide the Buyer with documentary evidence of Seller's receipt of notice.

15. NON-BUSINESS DAYS:

Should the time limit for doing any act or giving any notice expire on a Saturday, Sunday or any public holiday the time so limited shall be extended until the first business day thereafter. All business days shall be deemed to end at 1700 hours Mondays to Fridays inclusive.

16. STRIKES, ETC/FORCE MAJEURE:

Should Seller be prevented from shipping the Commodity by reason of fire, strikes, lockouts, riots, differences with or between work-men, accidents to or break-down of machinery, plant or equipment, civil commotions, policies or restrictions of governments, including restrictions of export and other licenses, or any cause comprehended in the term Force Majeure, at the port or ports of loading or elsewhere preventing transport of the Commodity to such ports, Seller must use its best endeavours to remove, overcome or minimise the effects of that Force Majeure event as quickly as possible. Seller must give prompt notice to the Buyer of its nature, likely duration, the obligations affected by it, the extent of its effect on those obligations, and the steps taken to rectify it. Performance of Seller's obligations is suspended to the extent to which it is affected by the Force Majeure Event and for the duration of the Force Majeure event. If a Force Majeure event continues for 30 days then the Buyer has the right to extend the Last Shipment Date by a further 30 days. If the Force Majeure Event continues after the expiry of these further 30 days then the contract shall be terminated automatically and neither party shall have a claim against the other for delay or non-performance provided that satisfactory evidence justifying the delay or non-performance be presented to the other party.

17. PROHIBITION:

This clause applies in the event of prohibition of export or any other executive or legislative act by or on behalf of the Federal Government of Australia or of a Government of a state of Australia where the port or ports of delivery named herein is/are situate, or of blockade or hostilities, restricting export, whether partially or otherwise, by the last day of the Shipment Period. Any total or partial restriction to prevent fulfilment whether by delivery or by any other means whatsoever and to that extent this contract or any unfulfilled portion thereof shall be extended by 30 days beyond the termination of the prohibition event. If prohibition continues for more than 30 days after the last day of the Shipment Period, this contract or any unfulfilled part thereof shall be cancelled. If Seller invokes this clause, it shall advise the Buyer with due despatch.

18. CHOICE OF LAW:

This contract shall be interpreted according to and governed by the laws in force in New South Wales, Australia.

19. TIME

Time is of the essence in relation to the performance of this contract.

20. ARBITRATION:

Any dispute arising out of this contract, including any question of law arising in connection therewith shall be referred to arbitration in accordance with the Dispute Resolution Rules of Grain Trade Australia ("GTA") in force at the date of this contract and of which both parties hereto shall be deemed to be cognizant except that this contract prevails to the extent of any inconsistency but no further. Neither party hereto, nor any persons claiming under either of them, shall bring any action or other legal proceedings against the other of them in respect of any such dispute until such dispute shall first have been heard and determined by the arbitration in accordance with the Dispute Resolution Rules of GTA, and it is hereby expressly agreed and declared that the obtaining of an Award from the arbitrators shall be a condition precedent to the right of either party hereto or of any person claiming under either of them to bring any action or other legal proceedings against the other of them in respect of any such dispute. Notice of appointment of an arbitrator must be given in writing by the party commencing arbitration within 6 months of the Vessel's arrival at the first discharge port named in this contract, otherwise all claims shall be deemed to be waived and no proceedings whatsoever whether by way of arbitration or litigation shall be commenced.

21. OTHER TERMS AND CONDITIONS:

The terms CFR and CIF are to be construed in accordance with INCOTERMS 2010.