



**STANDARD  
TERMS & CONDITIONS  
of  
OHORONGO CEMENT (PROPRIETARY)  
LIMITED**

**1 AUGUST 2021**

**OHORONGO CEMENT (PTY) LTD (REGISTRATION NR 2003/762)  
11 VAN DER Bijl Street, Northern Industrial, Windhoek, Namibia**

## STANDARD TERMS AND CONDITIONS

of Ohrongo Cement (Proprietary) Limited

### 1. DEFINITIONS

In this document (hereinafter referred to as “**the Standard Terms and Conditions**”) “**the Company**” will mean OHORONGO CEMENT (Pty) Ltd., registration number 2003/ 762 and includes any business unit of OHORONGO CEMENT, “**the Customer**” will mean anyone who buys the Product from, or places orders for the Product from the Company (“**the Orders**”), and “**the Product**” will mean cement in bags or in bulk.

### 2. CONTRACT

- 2.1. These sales and delivery conditions set out herein will apply to all Order(s) placed by the Customer to the Company for the Product; and/or on acceptance of delivery of the Product; and/or upon signature and approval by the Company of the credit application.
- 2.2. Unless the contrary is recorded in writing and signed by an authorised representative of the Company, every contract of sale between the Company and the Customer will be governed by the terms and conditions contained herein and these terms will override any terms or conditions purported to be imposed by the Customer.
- 2.3. No variation, alteration, cancellation of or addition to these terms will bind the Company unless reduced to writing and signed by an authorised representative of the Company or contained in an invoice or other document issued by the Company.

### 3. QUOTATIONS AND PLACING ORDERS

- 3.1. The Company will, at the Customer’s request, deliver a written quotation (“**the Quotation**”) by a duly authorised official (sales staff or department) to the Customer, which Quotation will be binding on the Company for a period of **7 (seven)** days from the date thereof, or for such other period as advised by the Company, whereafter it will lapse and be of no further force or effect.
- 3.2. A verbal quotation will not be binding on the Company.
- 3.3. The quotation bearing the latest date specific to the Customer’s enquiry will supersede all previous quotations issued by the Company.
- 3.4. The Customer will be required to provide detailed instructions regarding the commencement of supply and the rate of delivery of all materials for the duration of the contract at the time of placing an Order to allow the Company to facilitate availability and continuity as far as reasonably possible.

#### 4. RECORDING OF TELEPHONE CALLS

The Company may record all telephone conversations between itself and the Customer. The Customer hereby acknowledges that it is aware of such practice and agrees that such recording may be used to verify conversations pertaining to the execution of Orders and as evidence in the event of a dispute between the Company and the Customer.

#### 5. PRICE AND INDEBTEDNESS

5.1 The price payable by the Customer for the Product will be as contained in the Order and/or the Quotation and/or email correspondence, subject to reasonable adjustments for an increase in transport costs (including but not limited to an increase in the cost of fuel), taxation rates applicable to the sale of the Product, the introduction of any new tax, levy or tariff payable by the Company in respect of the manufacture or supply of the Product and any variance in the volumes/ quantities/ mass and or Product specifications of the Product quoted to that ordered.

5.2 An invoice or a certificate of balance generated by the Financial Manager of the Company will constitute *prima facie* proof of the Customer's indebtedness to the Company.

#### 6. OWNERSHIP AND RISK

6.1. Notwithstanding the delivery of the Product to the Customer, ownership will not pass to the Customer until the Company has received payment in full in respect of the Product.

6.2. In the event of payment not being made timeously, the Company reserves the right to recover possession of the Product immediately without notice and without the necessity to first cancel the contract of sale in respect of such Product.

6.3. Risk in and to the Product will pass to the Customer upon delivery of the Product to the Customer's chosen delivery location. Should the Customer provide its own transport from the site, depot or any storage facility, delivery is deemed to take place once the Product is loaded onto the Customer's vehicle and the delivery note is signed as contemplated in 7.6.

6.4. In the event of delivery to unattended rail sidings, the risk in and to the Product will pass to the Customer on the arrival of the consignment of the Product at the siding and as proven by Transnamib Limited's records evidencing such delivery or any other proof of arrival.

#### 7. DELIVERY

7.1. As far as reasonably possible, the Company will deliver the Product to the Customer at the address specified by the Customer ("**the delivery site**", or "**ship- to-party**" address) within the timeframe as agreed upon between the Customer and the Company, provided that the delivery site offers adequate and safe access and routes to and from the points of delivery onsite. Deliveries will be

**effected** during normal business hours unless mutual agreement has been reached to the contrary. Additional charges for gravel road conditions will be charged for delivery to a site where a gravel road is the only accessible road. The Company reserves the right to decide whether to deliver to a site which can only be reached by gravel, based on the condition of the road.

- 7.2. The Customer is responsible for the off-loading of cement after he/she satisfied that the load and quantity is correct.
- 7.3. The Customer will be liable for:
  - 7.3.1. any damage during the handling or offloading, shrinkage or any other form of pilferage to the Product after the product was delivered in good order and the Customer signed the delivery document;
  - 7.3.2. all costs relating to the consignment of the Product being diverted to another delivery site other than specified ship-to-party; and
  - 7.3.3. any cost associated with a delay in offloading (demurrage charge). The Customer shall offload the truck within three (3) hours upon arrival of the truck. A demurrage fee of N\$ 1500-00 per hour will be charged after such offloading period lapsed. If, for whatever reason, the Customer cannot offload the truck, the Company should be informed immediately so that alternative arrangement can be made.
- 7.4. If the Customer wishes to divert the truck to another specified delivery site, the Company should be informed in advance and prior written consent shall be forwarded to the Customer. Any additional cost accrued will be for the Customer's account.
- 7.5. The Customer will bear the risk for any loss or damage (direct or consequential) to the transporter's (contracted by the Company) vehicle/ truck and/ or machinery and equipment incurred at the Customer's premises or at the delivery site as a result of the wilful misconduct or negligence of the Customer or its employees.
- 7.6. The Customer, its employees or agents will be deemed to accept the Product once the delivery note has been signed. The Company will not accept any damage claims, short delivery and/ or obsolete claims after the delivery note has been signed.
- 7.7. The Company, or any of its contractors, shall be entitled to refuse to enter or leave the Customer's premises or any delivery site if, at its sole discretion, it considers the conditions unsafe to either human being or to the vehicle/ truck.
- 7.8. Where the Customer opts to collect the Products using its own transport ("**Ex works**") -
  - 7.8.1. the Customer or its preferred transport agent should strictly adhere to the Company's

safety requirements, as well as to all legislation in respect of road transport and the Company will not accept any liability for non-compliance by the Customer, its employees or agents with such legislation; and

7.8.2. the Customer, its employees or agents will enter the premises of the Company at their own risk and will be subject to the Company's safety and security procedures applicable to the Company's premises.

7.9. Where the Products are delivered by rail, the following conditions apply -

7.9.1. At the Customer's election, the Product will be delivered by rail at the sidings nominated by the Customer, upon which the risk shall pass from the Company to the Customer.

7.9.2. The transport prices quoted by the Company will be limited to the rail cost. The Customer will be liable for any additional cost and levies (including demurrage charged by Transnamib) as well as the cost of transport from the siding.

7.9.3. All queries in respect of deliveries made by rail must be addressed to the Company within 10 (ten) days of delivery of the Product.

7.9.4. The Company will, if and when applicable, upon timeous receipt of any queries and/or claims from the Customer, lodge same with Transnamib and/or its agents or partners on behalf of the Company without accepting any legal responsibility therefore.

7.9.5. In the event that Transnamib and/or its agents or partners repudiates any claim, the Customer will be liable for the full amount owing to the Company in respect of such delivery.

7.9.6. Save where the provisions of this clause provide to the contrary, the provisions of 7.2, 7.3, 7.5, 10.3 and any additional terms and conditions of sale applicable to specific Products will apply to delivery of the Product by rail with the necessary changes.

7.10. Where the Products are delivered by road, the following additional terms and conditions shall apply –

7.10.1. The quantities delivered will be closest to the delivery capacity of the vehicle on which the Customer was quoted and the Customer will be obliged to accept and pay for the actual quantity specified on the delivery note of the goods despatched.

7.10.2. The Customer will avail itself of the requirements as set out in the Company's

procedure for damaged, short and broken bag claims and the procedure for pallets (which procedures will form part of this agreement and are available on request).

7.10.3. The Company reserves the right to charge:

- 7.10.3.1. A demurrage fee, where the off-loading time exceeds the agreed discharge time as specified on the quote in the case of manual off-loading (not with bulk);
- 7.10.3.2. A cancellation fee for same day cancellation of Orders;
- 7.10.3.3. A surcharge should an alternative plan to that specified in the quotation be utilised in Order to meet Orders at short notice.

7.10.4. The Customer is responsible to ensure that:

- 7.10.4.1. On arrival tanker seals are intact;
- 7.10.4.2. The seal numbers of the tanker correspond with those reflected on the delivery note;
- 7.10.4.3. The Product delivered is that ordered;
- 7.10.4.4. The weight of the load as determined by the Company's as sized weighbridge is that recorded on the delivery note; and
- 7.10.4.5. The Product is off-loaded into the correct silo or cembin;

7.10.5. Bulk cement cannot be returned by the Customer.

7.11. In the case of spreading of cementitious Products:

- 7.11.1. Spreading will be under the direct control of the Customer and/or its representatives and no guarantee is given as to the tolerance of the spread;
- 7.11.2. The Customer or his representative will break the tanker seal and will ensure that the tanker is fully discharged;
- 7.11.3. The Customer will avail itself of the Company's procedure relating to spreading of cementations Product (which procedures shall form part of this agreement and shall be available from the Company on request);
- 7.11.4. Should the Company elect to sell and / or deliver by volume, the Customer acknowledges that the quantity of each load will be measured in its disturbed state immediately after and at the point of loading and that a certain amount of settling during transport to the point of discharge is inevitable;
- 7.11.5. The Customer shall avail itself of the Company's Bulk cement offloading procedure to ensure safety discharging.

## **8. DELAY**

The Company accepts no responsibility for any delay in respect of delivery of the Product. It is specifically recorded that the Customer will not be entitled, as a consequence of any delay or of a non-delivery or for any reason to claim damages and/or set-off payment from the Company due to such delay or non-delivery.

## **9. SUSPENSION OF DELIVERABLES**

The Company will have the right , to suspend any delivery under any contract then in force between the Company and the Customer

- 9.1 If any amount, including interest, due and payable by the Customer to the Company is in arrears, until such amount has been paid;
- 9.2 If the road conditions are not suitable / impassible by the transporter (tanker, interlink);
- 9.3 If the site is not accessible due to two track or farm roads, too bushy road, sandy road.

## **10. DELIVERY NOTES**

10.1. Upon delivery of the Product to the delivery site as specified by the Customer, the Customer, its employee or agent will sign the delivery note.

10.2. Such delivery note will constitute *prima facie* proof:

- 10.2.1. of the type of Product;
- 10.2.2. of the quantity / volume / mass of the Product delivered;
- 10.2.3. of any variation to the SABS or prescribed specifications of the Product (on the Customer's oral or written request which variation will then specifically be recorded on the delivery note) delivered to the Customer;
- 10.2.4. that the tanker or drum seal, as the case may be, is intact;
- 10.2.5. whether water or any other foreign material has been added to the Product;
- 10.2.6. of the arrival and discharge times.
- 10.2.7. the passing of risk to the Customer.

10.3. The consignment note of Transnamib and/or its agents or partners in respect of delivery of the Product by rail and the customer rail siding or selected siding, will constitute *prima facie* proof of such delivery.10.4. In the event of a dispute arising in respect of any statement recorded on the delivery note or the consignment note as the case may be, the onus of disproving any of the statements so recorded on such note will be on the Customer.

## **11. WARRANTY / LIABILITY**

11.1. The Company warrants that the Product delivered complies with the details shown on the

delivery note, and complies with the South African Bureau of Standards EN 197-1 2011 and EN 197-2 2014, **ENV 413-1 (SABS specifications) as well as Namibia Standards Institute NAMS 197-1 : 2014 and NAMS 197-2 : 2014**, as amended from time to time and applicable to cement. Liability for breach of the warranty set out in clause 11.1 will only arise where the Customer has established, in addition to any other proof required by law, that:

- 11.1.1. the Customer has inspected the Product before use;
  - 11.1.2. inspection, sampling methods and interpretation of test results have been carried out in strict compliance with the specifications therefore, these being no less stringent than those prescribed by the SABS (and in the case of Road Base materials, samples are taken prior to compaction);
  - 11.1.3. the Customer has notified the Company verbally within 48 (forty-eight) hours of its tests revealing an alleged non-conformity with specification, provided that written notification was given within a maximum of 7 (seven) days after the tests revealing an alleged non-conformity;
  - 11.1.4. the Company was afforded every reasonable opportunity before it being submitted for tests in terms of 11.1.3 above, to inspect the Product or any sample taken therefrom and to submit the Product or sample to an independent accredited laboratory for testing;
  - 11.1.5. all records relating to the handling, sampling, curing and testing of the Product and the interpretation of any tests in respect thereof were made available to the Company for inspection;
  - 11.1.6. the Product was not stored, misused, neglected, contaminated, improperly handled or altered in any way and that no foreign material was added to the Product; and
  - 11.1.7. in the case of cementitious Product, the Customer must notify the Company of any damaged, short or broken bags in accordance with the procedure for damaged, short and broken bag claims, failing which claims will be invalid.
- 11.2. Under no circumstances will the Company be liable for any damages, whether direct, consequential, general or special damages, arising out of:
- 11.2.1. the use by the Customer of the Product or the supply of defective Product by the Company; or
  - 11.2.2. any other cause whatsoever, and the Customer hereby indemnifies the Company against all claims of whatsoever nature which may be made against the Company arising from the use by any person of the Product supplied in terms hereof.



11.3. Notwithstanding the provisions of 11.2, the Company's only liability in respect of the supply of defective Product will, in any event be strictly limited to:

11.3.1. the removal and replacement of such defective Product; or

11.3.2. the refund to the Customer of the cost at which the Customer purchased such defective Product.

11.4. The Company offers no warranty, express or implied in respect of the Product, its colour, consistency

or its suitability for a particular purpose even if such purpose is communicated to the Company, save that it will be manufactured in accordance with its specification.

## 12. EXCLUSION OF LIABILITY

12.1. The warranty given by the Company in clause 11 is given in lieu of any common law warranty.

12.2. In addition to the exclusions set out in 11, all and any liability in respect of the following is excluded:

12.2.1. warranties implied in law in respect of latent defects;

12.2.2. warranties in respect of suitability of the Product for the purpose;

12.2.3. any loss including consequential loss and loss of profits, whether in contract or in delict, including any loss or damage arising from any negligent act and omission of the Company, its servants, agents or contractors;

12.2.4. any injury or death arising from the supply of the Product or from any negligent act or omission of the Company, its servants, agents, or contractors.

## 13. FORCE MAJEURE

13.1. If the Company or the Customer ("**the Party**" or "**the Parties**", as the case may be) is prevented or restricted directly or indirectly from carrying out all or any of its obligations under this agreement by reason of strike, lock-out, fire, explosion, floods, riot, war, accident, Act of God, embargo, legislation, shortage of or a breakdown in transportation facilities, civil commotion, unrest or disturbances, cessation of labour, government interference or control, or any other cause or contingency beyond the control of the Party, the Party so affected will be relieved of its obligations hereunder during the period that such event and its consequences continue, but only to the extent so prevented, and will not be liable for any delay or failure in the performance of any obligations hereunder or loss or damages either general, special or consequential which the other Party may suffer due to or resulting from such delay or failure, provided always that written notice will forthwith be given of any such inability to perform by the affected party.

13.2. The Party invoking force majeure will upon termination of such event giving rise thereto forthwith give written notice thereof to the other Party. Should such force majeure continue for

a period of more than 90 (ninety) days, upon which either Party will be entitled forthwith to cancel this agreement in respect of any obligations still to be performed hereunder.

#### **14. GOVERNING LAW AND JURISDICTION**

- 14.1. This contract of sale will be interpreted and governed in all respects by the laws of the Republic of Namibia.
- 14.2. The Customer being resident in the Republic of Namibia, hereby consents to the jurisdiction of the Magistrate's Court in terms of Section 45 of the *Magistrate's Court Act, 1944*, and, in particular, consents to the jurisdiction of the Magistrate's Court of Windhoek, in respect of all proceedings connected with this contract of sale, notwithstanding that the amount claimed may exceed the jurisdiction of the Magistrate's Court, provided that the Company is entitled in its discretion to institute action in the High Court.
- 14.3. If the Customer is not resident in the Republic of Namibia, but carries on business in the Republic of Namibia, it hereby consents to the jurisdiction of the High Court of Namibia and all courts of appeal thereof.
- 14.4. If the Customer is a resident of or carries on business in any country other than Namibia, the Company will be also entitled to institute legal proceedings against the Customer arising out of this contract of sale in any court of competent jurisdiction in such country, even if the cause of action in question, exceeds the jurisdiction of such court, and the Customer hereby consents to the jurisdiction of such court.

#### **15. COST**

- 15.1. All costs, expenses and charges, including legal costs and collection commission ("**the costs**") incurred by the Company in enforcing its rights against the Customer will be borne and paid by the Customer whether or not legal proceedings are commenced.
- 15.2. Insofar as legal costs are concerned, they will be such as may be agreed between the Company and its attorneys or if there is no agreement or any agreement therefore is not enforceable, will be calculated on the scale as between attorney and own client.

#### **16. ARBITRATION**

- 16.1. Except where otherwise specifically provided for, any dispute other than a dispute which requires

the urgent attention of the Courts, at any time between the Parties or any failure by them to reach agreement in regard to any matter arising out of this agreement or its interpretation or effect, or arising in any way out of the termination or failure of any of them, shall be submitted to arbitration. The Parties shall agree on an expert to act as arbitrator (subject to clause 16.3) or if no agreement is reached within 30 (thirty) days after the dispute has arisen, the Parties shall approach the President of the Law Society of Namibia to appoint an arbitrator.

16.2. The arbitration referred to in 16.1 shall be held:

16.2.1. in Windhoek, Namibia;

16.2.2. in a summary manner, i.e. on the basis that it shall not be necessary to carry out either the usual formalities or procedures or the strict rules of evidence (except the rules relating to the admission of hearsay evidence);

16.2.3. immediately and with a view to its being completed if possible within 21 (twenty one) business days after it is demanded; and

16.2.4. on the basis that the expert shall be entitled, in arriving at a decision, to apply the principles of both law and equity, and to make such award of costs as he might deem appropriate, call upon any expert witness or witnesses in relation to any matter on which he considers the opinion, advice or assistance of such expert is required and lay down and determine such procedures (which may or may not include those, or any of them, specified in the arbitration laws of the Republic of Namibia) to be followed in relation to the hearing and conduct of proceedings.

16.3. The expert shall be, if the question in issue is:

16.3.1. primarily an accounting matter, an independent chartered accountant of not less than 10 (ten) years standing, agreed upon between the Parties to the dispute or failing agreement appointed by the President for the time being of the Namibian Society of Chartered Accountants;

16.3.2. primarily a legal matter, a practicing Senior Counsel of not less than 5 (five) years standing as such, agreed upon between the Parties to the dispute or failing agreement appointed by the Chairman for the time being of the Bar Council of Namibia;

16.3.3. any other matter, an independent person agreed upon between the Parties or failing agreement, nominated by the Director of the Law Society of Namibia.

16.4. If an agreement cannot be reached within 7 (seven) days after the determination has been demanded as to whether the question in issue falls under clauses 16.3.1, 16.3.2 or 16.3.3, then a practicing

Senior Counsel of not less than 5 (five) years standing as such, agreed upon between the Parties or, failing agreement, appointed by the Chairman for the time being of the Bar Council of Namibia as soon as possible thereafter, shall determine whether the question in issue falls under clauses 16.3.1, 16.3.2 or 16.3.3 so that an expert can be appointed and the determination can be held and concluded, if possible, within the prescribed period of 21 (twenty one) business days.

16.5. The expert:

16.5.1. will have regard to the desire of the Parties to dispose of such dispute expeditiously, economically and confidentially;

16.5.2. need not observe or take into account the strict rules of law in arising at his decision, which will be made as an expert and not as an arbitrator;

16.5.3. will determine the Party liable for his costs and the costs of an expert he consults and such Party will pay his costs; and

16.5.4. will be entitled to consult with attorneys, counsel or any other expert with regard to any matter or issue as he may deem fit.

16.6. The Parties irrevocably agree that the decision of the expert in such proceedings, in the absence of manifest error:

16.1.1. shall be final and binding on them;

16.1.2. shall not be subject to review or appeal;

16.1.3. shall be carried into effect; and

16.6.4. may be made an order of any court of competent jurisdiction.

16.7. This provision shall be severable from the rest of the agreement so that it shall operate and continue

to operate notwithstanding any actual or alleged voidness, voidability, unenforceability, termination, cancellation, expiry, or accepted repudiation, of this agreement.

## 17. SURETYSHIP

17.1 Should the Customer be an entity incorporated under the *Companies Act, 1973*, the *Close Corporation Act, 1988* or the *Companies Act, 2004*, a director, partner or member of the entity, as the case may be, agrees, by signing the annexed suretyship agreement to the credit application ("**the Suretyship Agreement**"), to undertake to bind him- or herself in his or her private and individual capacity as surety and co-principal debtor *in solidum* in respect of all amounts owing by the Customer to the Company in respect of any credit agreement entered into by the Customer with the Company.

- 17.2 By signing the Suretyship Agreement, the individual executing the Suretyship Agreement guarantees and agrees to be personally liable for failure of the performance of the Customer of any and all of the Customer's obligations under any credit agreement with the Company, including timely payment of any and all sums due to the Company. This Suretyship Agreement also applies in the event that the Customer is subject to a provisional or final order of liquidation or winding-up, or is placed under judicial management.
- 17.3 Clauses 17.1 and 17.2 shall apply *mutatis mutandis* to the scenario where the Customer is a natural person, whereas the Customer's next-of-kin or another designated person, who is sufficiently connected to the Customer, shall enter into the Suretyship Agreement.

## 18. COMMUNICATIONS AND NOTICES

- 18.1 Any notice or other communication under or in connection with these Standard Terms and Conditions shall be in writing in the English language and shall be delivered personally or sent by pre-paid mail or by telefax to the Party due to receive the same at its address as set out in the application or to such other address, as either Party may specify by notice in writing to the other.
- 18.2 In the absence of evidence of earlier receipt, any notice or other communication shall be deemed to have been duly given if two of the following occur:
- 18.2.1 if delivered personally, when left at the address referred to in clause 18.3;
- 18.2.2 If sent by express courier 7 (seven) days after dispatching it), or
- 18.3 All communications and notices to the Company shall be in writing and addressed to:
- 18.3.1 the Company:
- Physical: 11 van der Bijl Street, Northern Industrial, Windhoek, Namibia**
- Postal: P.O. Box 86842, Eros, Windhoek Namibia**
- Email: debtors@ohorong-cement.com**
- 18.3.2 the Customer at the address as set out in the application form signed and submitted by the Customer to the Company.
- 18.4 The Parties choose the physical addresses as set out in clause 18.3 as their *domicilii citandi et executandi* for all purposes under these Standard Terms and Conditions whether in respect of payment of money, the service or delivery of court or arbitration process, notices or other documents or all other communications.
- 18.5 Any Party may by written notice to the other Party change its telefax number, e-mail address or the address chosen as its domicilium address, to another telefax number, address which is not constituted exclusively by a post office box address; such change will become effective on the 5th (fifth) business day from the deemed receipt of the notice by the addressee.