

# NORTH AMERICAN EXPORT GRAIN ASSOCIATION, INC.

## FREE ON BOARD EXPORT CONTRACT U.S.A./CANADA

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Revised as of March 30, 2018

# NO.2

Contract No. \_\_\_\_\_

New York, N.Y. \_\_\_\_\_ 20 \_\_\_\_\_

1. **Seller** \_\_\_\_\_
2. **Buyer** \_\_\_\_\_
3. **Broker/Agent** \_\_\_\_\_
4. **Quantity** \_\_\_\_\_  
in bulk, including dockage, 5% more or less at buyer's option, and at market price (per Clause 10) as follows: If the first delivery under this contract is for a quantity between contract minimum and contract maximum (both inclusive), no further deliveries shall be made. If this contract is to be executed by more than one vessel, the loading tolerance of 5% more or less shall apply on the difference between the mean contract quantity and the quantity that has been delivered on all prior vessels. Any delivery which falls within this difference, plus or minus 5%, shall complete the contract.
5. **Weight** Quantity to be final at port of loading in accordance with customary weight certificates. 1,016 kilograms shall be equal to 2,240 pounds.
6. **Commodity** \_\_\_\_\_  
in accordance with the official grain standards of the United States or Canada, whichever applicable, in effect on the date of this contract. Delivery of higher (better) grades of grain of the same type and description is permissible.
7. **Quality** Quality and condition to be final at port of loading in accordance with official inspection certificates and/or other certificates as may be required in this contract.  
  
In case of delivery at St. Lawrence ports, quality and condition to be final in accordance with Lake and/or loading ports official inspection certificates; Lake inspection certificates to be properly identified at ports of loading.  
  
Each party hereby authorizes the other party to request in both parties' names an appeal inspection under the U.S. Grain Standards Act, if applicable, or as may be required in this contract at any time prior to or during the loading of the vessel, and whether or not such request was filed before commencement of loading. The cost of such appeal inspection, unless otherwise stipulated in this contract, shall be borne by the party requesting it.  
  
The commodity is not warranted free from defect, rendering same unmerchantable, which would not be apparent on reasonable examination, any statute or rule of law to the contrary notwithstanding.
8. **Delivery** Delivery shall be made between \_\_\_\_\_ and \_\_\_\_\_, both inclusive (the "delivery period"), at discharge end of loading spout, to buyer's tonnage in readiness to load, in accordance with custom of the port and subject to the elevator tariff to the extent that it does not conflict with the terms of this contract. Incorporation of a loading rate guaranty in this contract shall not entitle seller to delay delivery.  
  
Buyer shall give vessel nominations ("preadvice") in accordance with Clause 15, in time for seller to receive minimum \_\_\_\_\_ days notice of probable readiness of tonnage and quantities required (the "preadvice period"). Buyer to keep seller informed of changes in expected date of vessel readiness.  
  
Time for the preadvice shall be deemed to commence to count at 1200 noon, local time at place of receipt, on the business day of receipt by seller and shall be counted in consecutive periods of 24 hours.  
  
Seller shall, if applicable, declare port and berth of loading within a reasonable time (but not later than \_\_\_\_\_ days) after receipt by seller of the preadvice, except that seller shall not be obligated to make such declaration earlier than (a) the 8th day prior to commencement of the delivery period for port declaration and (b) the 5th day prior to commencement of the delivery period for berth declaration.  
  
The vessel shall not be prevented from filing and from taking its place in the vessel line-up at the designated port/berth during the preadvice period or before commencement of the delivery period, notwithstanding which, seller shall not be obliged to effect delivery to the vessel before the expiration of the preadvice period or before commencement of the delivery period. For the purposes of this contract a vessel shall be considered filed when it (a) has tendered valid notice of readiness to load to the charterer or its agent, at the port of loading, (b) has given written advice of such tender to the loading elevator, complete with all customarily required documents, such advice having been presented between the hours of 0900 and 1600 local time on a business day or between the hours of 0900 and 1200 noon on Saturday (provided not a holiday) and (c) is ready to receive grain in the compartments required for loading under this contract.  
  
Buyer shall be allowed to make one substitution of a vessel, provided the substituting vessel is of the same type and approximately the same size and position. If the original or the substituting vessel is unable to lift the commodity by reason of the vessel having sunk or having suffered incapacitating physical damage, an additional substitution shall be made of a vessel of the same type and approximately the same size, and with a position agreeable to buyer and seller. Such agreement shall not be unreasonably withheld. The nomination of the substituting vessel shall be subject to the preadvice requirements of this clause, regardless of any preadvice previously given, unless the estimated time of arrival of the substituting vessel is the same as the estimated time of arrival of the original vessel when nominated. No substitution of vessels other than as provided in this clause shall be made. If this is a "named vessel" contract, no substitution other than after a casualty as described above shall be permitted.  
  
Bills of lading and/or mate's receipts to be considered proof of date of delivery in the absence of evidence to the contrary. Any delivery in part fulfillment of this contract shall be considered as if made under a separate contract.
9. **Days** In any month containing an odd number of days, the middle day shall be reckoned as belonging to both halves of the month.

10. **Price** \_\_\_\_\_ per \_\_\_\_\_ free on board buyer's tonnage at \_\_\_\_\_  
 If this contract is for a flat price, any variance in quantity from the mean contract quantity shall be settled basis the FOB market value (as defined in paragraph (a) and (b) below).
- If the contract price is to be established on an exchange of futures, futures shall be exchanged prior to delivery of the commodity or at least 5 calendar days prior to the last trading day of the applicable futures month, whichever is earlier, to the nearest 5,000 bushels of the mean contract quantity. If deliveries under this contract result in a variance from the mean contract quantity, there shall be another exchange of futures as soon as possible after the last date of loading to bring the resulting amount of futures exchanged to the nearest 5,000 bushels of the quantity delivered. All exchanges of futures shall be made within the range of prices prevailing on the futures market on the date of the exchange. The variance from the mean contract quantity shall be settled basis the market value of the premium (as defined in paragraph (a) and (b) below).
- (a) The FOB (flat price) market value, or the market value of the premium, as the case may be, shall be that prevailing on the close of the appropriate market in the country of origin of the commodity on the last date of loading, if such be a business day, otherwise on the close of such market on the previous business day.
- (b) In the event the parties do not agree on the market value by the time the shipping documents are ready to be transmitted to buyer, seller shall invoice the entire shipment provisionally at contract price. Thereafter, final invoice for the difference between contract price and market value shall be presented as soon as possible and payment shall be made immediately.
11. **Payment** \*(a) Net cash by irrevocable divisible letters of credit issued or confirmed by a prime U.S. bank in New York (or \_\_\_\_\_ by mutual agreement), available by sight drafts accompanied by shipping documents per Clause 12 (or warehouse receipts if option (c) of Clause 18 is exercised). Such letters of credit, in a form acceptable to seller, shall be established not later than 5 days prior to the beginning of the delivery period, and shall be valid at least until the 30th day after expiration of the delivery period. Should delivery be delayed beyond the delivery period, buyer, if requested by seller, shall amend letters of credit accordingly and buyer shall increase the amount of the letter of credit to provide for carrying charges, if applicable. All bank charges shall be for buyer's account.
- or--
- \*(b) Net cash in U.S. Dollars, by telegraphic transfer to the bank designated by seller, against presentation of and in exchange for shipping documents per Clause 12 (or warehouse receipts if option (c) of Clause 18 is exercised). Such presentation shall be made in the city of \_\_\_\_\_  
 All bank charges in connection with payment shall be for buyer's account.
- or--
- \*(c) \_\_\_\_\_
- \*Delete paragraphs which are not applicable.
12. **Shipping Documents** Payment to be made against bills of lading or mate's receipts (at seller's option), and weight and inspection certificates. However, if practicable, seller shall follow instructions of buyer in establishing bills of lading containing such clauses as buyer's/vessel's agents or owners usually endorse or attach. Buyer shall accept such bills of lading but seller assumes no responsibility for their correctness.
13. **Notice of Delivery** Notice of delivery stating vessel's name, dates of bills of lading (or mate's receipts), quantities and qualities loaded (including percentage of dockage if applicable) shall be given or passed on by seller to buyer without undue delay. Notices of delivery shall be subject to correction of any errors.
14. **Insurance** Marine and war risk (plus strikes, riots, civil commotions and mine risk) insurance, covering seller's/buyer's interests as they may appear, is to be covered by buyer with first-class approved companies and/or underwriters and to be confirmed by such companies and/or underwriters to seller at least 5 days prior to the expected readiness of the vessel. If this confirmation is not received by seller by such time, seller may place such insurance for buyer's account and at buyer's risk and expense.
15. **Communications** All notices under this contract shall be given by letter, if delivered by hand on the day of writing, or by any other method of rapid written communication. Any notice received after 1600 hours (local time at place of receipt) on a business day shall be deemed to have been received on the following business day, except that for notices given and received by parties which are both located in the Continental United States and/or Canada, the reference herein to 1600 hours shall signify 1600 hours New York City time (E.S.T. or E.D.T., as in effect on date of receipt of the notice).
16. **Circles**
- (a) For the purposes of this clause, a circle shall consist of a series of contracts in which each seller is also a buyer of a commodity of the same description and quality, for delivery at the same ports and with compatible delivery periods.
- (b) If this contract forms part of a circle, each party may agree with the other parties in the circle to forego actual delivery and to participate in a clearing agreement for the settlement of contract price differences. Monies due and owed to parties in the circle shall be payable on the middle day of the contract delivery period.
- (c) If a circle can be shown to exist but no clearing agreement has been reached by the 10th calendar day following the last day of the delivery period, actual delivery shall not be made and payment shall be made by each buyer to its seller of the excess of seller's invoice amount over the lowest invoice amount in the circle. Such payments shall be made promptly after the 10th calendar day following the last day of the delivery period.
- (d) Should any party in a circle fail to make payment on the due date as required under paragraph (b) or (c) above for reasons cited in Clause 23 or for any other reason, payment shall be made between each buyer and its seller of the difference between the seller's invoice amount at contract price and the market value of the commodity on date of insolvency or default, as the case may be. Such payment shall be made latest on the 2nd business day after the due date under paragraph (b) or (c) above. Payments already made under paragraph (b) or (c) above shall be refunded.
- (e) All circle settlements shall be based on the mean contract quantity.
- If a circle under paragraph (b), (c) or (d) above exists, Clause 21 shall not apply and Clauses 18 and 20 shall not be invoked. Payments due on a non-business day shall be made not later than the following business day.
- All payments made after the delivery period shall include carrying charges from the day following the last day of the delivery period, to the date of payment, at the rates stipulated in this contract. These carrying charges shall be settled individually between each buyer and its seller.
- (f) The parties agree that any dispute arising out of the voluntary clearing agreement entered into in accordance with paragraph (b) above shall be subject to arbitration as to any party thereto. Such arbitration shall be conducted in accordance with the provisions of Clause 30.
17. **U.S./Canadian Government Rules and Regulations** Buyer and seller agree to comply with the U.S. and/or Canadian regulatory requirements applicable to this contract, including, but not limited to, those governing any export subsidy, destination controls, government financing of agricultural commodities and the monitoring of export purchases and sales. Any losses, fines, penalties, expenses, costs or damages incurred as a result of failure to perform in accordance with this provision shall be borne by the party responsible for such failure.

**18. Failure to Take Delivery**

If vessel fails to file before the end of the delivery period, buyer shall be in breach of contract and seller shall carry the grain for buyer's account and risk as provided in Clause 19. In the event that buyer has not given vessel nominations conforming to the applicable provisions of Clause 8 by the 15th calendar day following the last day of the delivery period, or if the vessels having been nominated within such time, fail to file by the 35th calendar day following the last day of the delivery period, seller may, in its discretion: (a) continue to carry the commodity for buyer's account and risk, (b) declare buyer in default, or (c) tender to buyer proper warehouse receipts in a quantity equal to the mean quantity open under this contract, in exchange for which buyer shall pay at contract price plus accrued carrying charges, but less out-weighing and outbound weighing and inspection charges. Such tender of warehouse receipts shall be deemed due performance of the contract by seller.

**SPECIAL PROVISIONS FOR CONTRACTS PROVIDING FOR DELIVERY AT ST. LAWRENCE, GREAT LAKES OR HUDSON BAY PORTS:**

- (1) Seller shall be barred from declaring option (b) above while the navigation in the designated delivery area is officially closed for the ice season, and for 20 days thereafter.
- (2) However, if options (a), (b) and (c) above become available to seller only while the navigation is officially closed, the seller may declare option (b) during the first 10 days it becomes available to him; thereafter, he shall be barred from declaring it, until the 21st day after the official opening of navigation.
- (3) If seller carries the grain into the new season for buyer's account, buyer shall have the right to nominate vessels per Clause 8, regardless of whether vessels were already nominated during the delivery period.

**19. Carrying Charges**

If the commodity is being carried for buyer's account and risk as provided in Clause 18, it is mutually agreed that carrying charges, consisting of storage, insurance and interest, shall accrue as follows:

- (a) Storage and insurance from the day following the last day of the delivery period up to and including the dates of delivery (or if seller exercises option (b) or (c) of Clause 18, the date applicable thereto), both dates inclusive, at the following rates:  
 \_\_\_\_\_ U.S. cents per bushel per day \_\_\_\_\_  
 \_\_\_\_\_ U.S. cents per bushel per day \_\_\_\_\_
- (b) Interest from the day following the last day of the delivery period up to and including the last day of delivery (or if seller exercises option (b) or (c) of Clause 18, the date applicable thereto), both dates inclusive, at the following rates:  
 \_\_\_\_\_

Carrying charges for the delivery completing this contract shall be computed on the mean contract quantity less the amounts previously delivered (if any), irrespective of whether or not buyer has availed himself of the loading tolerance option under Clause 4. It is further expressly agreed that carrying charges as provided herein are to be construed in the nature of liquidated damages and, as such, that no further proof of damages shall be required in substantiation thereof.

**20. Strikes or Other Causes Of Delay in Delivery**

- (a) This clause shall apply by reason of the causes enumerated in paragraph (b) below:
  - (1) if delivery by seller of the commodity, or any part thereof, is prevented or delayed at the port(s) of delivery and/or elevator(s) of delivery or elsewhere,  
and/or,
  - (2) if the forwarding of the commodity to such port(s) and/or elevator(s) is prevented;

PROVIDED that seller shall have sent notice to buyer not later than 2 business days after the date of commencement of the causes, or not later than 2 business days after the 1st day of the delivery period, whichever occurs later (except that subsequent sellers shall not be bound by these deadlines, provided they pass along the notice to their buyer, without delay); and PROVIDED further that seller shall, at buyer's request, furnish a certificate of the North American Export Grain Association, Inc., certifying the existence and the duration of the causes. Such certificate shall be final.

- (b) The causes of delay and/or prevention ("causes") referred to in paragraph (a) above shall be:
  - (1) Riots, strikes, lockouts, interruptions in or stoppages of the normal course of labor,
  - (2) Embargoes or exceptional impediments to transportation,
  - (3) Action by Federal, State or local government or authority.
- (c) The obligation of seller to make delivery shall be suspended while the causes are in effect, until the termination of the causes and/or the resumption of work after the termination of the causes, whichever is later. Seller shall not be responsible for further delays after resumption of work (whether such termination or resumption of work occurs prior to, during or after the delivery period) except that, if a vessel nominated under this contract is not loaded in the proper rotation but is bypassed by vessels (other than liners) which had filed after the vessel nominated under this contract, seller shall pay to buyer damages equal to the actual working time lost (weather working days, Saturdays, Sundays and holidays excluded) to buyer's vessel during the loading of the bypassing vessels, at the demurrage rate in the Charter Party for the vessel nominated under this contract.

If the Charter Party of the vessel under this contract does not indicate a demurrage rate, the damages are to be calculated at a reasonable demurrage rate predicated on the then current market, to be agreed upon amicably or to be determined by arbitration.

- (d) (1) If the causes commence before or during the delivery period and terminate during or after delivery period, then the delivery period shall be deemed to be extended by a number of days equivalent to the period starting with the commencement of the causes or the commencement of the delivery period, whichever is later, and ending with the termination of the causes, and/or the resumption of work after the termination of the causes, whichever is later.
- (2) If the causes commence during the additional time afforded to buyer under Clause 18 with respect to vessel nominations and filings, then the right of seller to exercise option (b) or (c) under Clause 18 shall be deemed to be delayed by a number of days equivalent to the period starting with the commencement of the causes and ending with the termination of the causes and/or the resumption of work after the termination of the causes, whichever is later.
- (3) Clause 20 may apply if a vessel has filed during the delivery period and the cause commences after the end of the delivery period.

- (e) Carrying charges, if due under Clauses 18/19, shall begin to accrue on the day following the last day of the delivery period, as extended by paragraph (d)(1) above; however, if this clause becomes operative while carrying charges are already accruing, then such charges shall continue to accrue as they would in the absence of the causes.

- 21. Prohibition** In case of prohibition of export, blockade or hostilities or in case of any executive or legislative act done by or on behalf of the government of the country of origin or of the territory where the ports of loading named herein are situated, restricting export, whether partially or otherwise, any such restriction shall be deemed by both parties to apply to this contract and to the extent of such total or partial restriction to prevent fulfillment and to that extent this contract or any unfulfilled portion thereof shall be cancelled without prejudice to seller's entitlement to carrying charges. Seller shall advise buyer without delay of the reasons therefore, and if required by buyer, seller shall provide certification of the North American Export Grain Association, Inc., as sufficient evidence for cancellation under this clause.
- 22. Default** In case of default by either party, the other party shall be at liberty, after giving notice, to resell or repurchase, as the case may be, without undue delay and the defaulting party shall make good the loss, if any, to the other party but the defaulting party shall not be entitled to any profit. If the non-defaulting party has not repurchased or resold the commodity by the 10th calendar day after the giving of notice of default, the market value on the said 10th day shall be used for settlement purposes. If such 10th day falls on a non-business day, the market value on the previous business day shall govern. In the event of a default by buyer, the sale price under this contract shall automatically be increased by the value of carrying charges calculated up to the date of resale, or the 10th calendar day after the giving of notice of default, whichever is applicable.
- 23. Insolvency** Either party shall, at any time after sending notice, have the right to terminate this contract and to recover the loss (if any) in the event that:
  - (a) the other party suspends payment or commits an act of bankruptcy;
  - OR--
  - (b) reasonable grounds for insecurity having arisen with respect to the financial capacity of the other party to perform under this contract, and a written demand for adequate assurance of due performance having been made, such assurance is not received within a period of time not exceeding 5 days.
- 24. Construction** For the purposes of this contract, except as otherwise expressly provided or unless the context otherwise requires, plural terms include the singular.
- 25. Passage of Title** Anything in this contract to the contrary notwithstanding, seller shall retain title to the commodity until seller has been paid in full (per Clause 11), it being understood that risk of loss shall pass to buyer on delivery at discharge end of loading spout (per Clause 8).
- 26. Limitation of Liability** The seller shall not be liable under this contract, except as expressly stated herein, after delivery of the commodity at the discharge end of the loading spout and presentation of the contractually required documentation. The buyer assumes all claims, losses, costs, and damages ("expenses") and risks whatsoever at the discharge end of the loading spout including, but not limited to, compliance with any requirements by customs, quarantine and other authorities except for the U.S. and/or Canadian regulatory requirements applicable to this contract. All such expenses and risks arising from events or actions after the delivery of the commodity at the discharge end of the loading spout shall be the sole responsibility of the buyer, who shall indemnify and hold the seller harmless for all such expenses and risks incurred (including attorney fees).
- 27. International Convention** The following shall not apply to this contract:
  - (a) the Uniform Law on the International Sale of Goods and the Uniform Law on the Formation of Contracts for the International Sale of Goods;
  - (b) the United Nations Convention on Contracts for the International Sale of Goods of 1980; and
  - (c) the United Nations Convention on the Limitation Period in the International Sale of Goods, concluded at New York on 14 June 1974, and the Protocol Amending the Convention on the Limitation Period in the International Sale of Goods, concluded at Vienna on 11 April 1980.
- 28. Governing Law** The parties agree that this contract shall be governed by the laws of the State of New York, notwithstanding any choice of law provision to the contrary.
- 29. Other Conditions**
- 30. Arbitration** Buyer and seller expressly agree that any controversy or claim arising out of, in connection with or relating to this contract, or the interpretation, performance or breach thereof, shall be settled by arbitration in the City of New York before the American Arbitration Association (AAA), or its successors, in accordance with the International Arbitration Rules of the American Arbitration Association, as those Rules may be in effect at the time of such arbitration proceeding, which Rules are hereby deemed incorporated herein and made a part hereof, and under the laws of the State of New York. The number of arbitrators shall be three.

Each party shall designate one arbitrator from the list of Grain Arbitrators maintained and supplied by the North American Export Grain Association, Inc. The two party appointed arbitrators shall select a third panelist from the list of Special Grain Arbitrators or the AAA list of International Arbitrators and this person shall serve as Chairperson of the panel.

AAA shall maintain a list of Special Grain Arbitrators who are included on the North American Export Grain Association, Inc. list of Grain Arbitrators. If the tribunal is not formed by this procedure, the AAA shall appoint the panel in the same manner, two arbitrators from the North American Export Grain Association, Inc. supplied list of Grain Arbitrators and the Chairperson of the panel from the list of Special Grain Arbitrators or the AAA list of International Arbitrators.

The language of the arbitration shall be English. In disputes involving a "string" of contracts, two or more arbitrations may be consolidated before the same tribunal, at the written request of any party. The tribunal in consolidated arbitrations shall be mindful of differences in terms between the various contracts and in the action of the parties, and vary the award from contract to contract, if indicated. The arbitration award shall be final and binding on the parties and judgment upon such arbitration award may be entered in the Supreme Court of the State of New York or any other court having jurisdiction thereof. Buyer and seller hereby recognize and expressly consent to the jurisdiction over each of them of the American Arbitration Association or its successors, and all of the courts of the State of New York. The parties agree that arbitration awards may be released by the AAA to the North American Export Grain Association, Inc., for distribution to the interested public. Buyer and seller agree that this contract shall be deemed to have been made in New York State and be deemed to be performed there, any reference herein or elsewhere to the contrary notwithstanding.

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**BUYER**

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**SELLER**