



## Terms and Conditions of Sale

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### 1. Definitions

- 1.1 "Conditions" means these Terms and Conditions of Sale.
- 1.2 "Customer" means the person, firm, corporation or other business entity identified on the face of an Order as the purchaser of Goods.
- 1.3 "Goods" means the Supplier products described on the face of an Order.
- 1.4 "Order" means a purchase order issued by a Customer to Supplier for the purchase and sale of Goods by Supplier to Customer, together with these Conditions (which are incorporated into and form a part of a purchase order).
- 1.5 "Specific Information" means any specific information set forth on the face of an Order that the Supplier has acknowledged in writing to the Customer, such as the types, descriptions, specifications quantities and delivery date of Goods to be delivered to the Customer.
- 1.6 "Supplier" means M&I Materials Inc. and, its designated representatives and successors and assigns.
- 1.7 "Supplier's Premises" means the premises of M&I Materials Inc. or those contracted by M&I Materials Inc.

### 2. Basis of Purchase

- 2.1 An Order constitutes an offer by the Customer to purchase Goods from the Supplier. The Supplier's acceptance of any Order is expressly limited to, and expressly made conditioned on, Customer's acceptance of these Conditions. No order will be binding on the Supplier until it has received the Order, making amendments where necessary as they relate to Section 1.5, and has formally acknowledged the Order by the submission of the Supplier's Sales Order Acknowledgment form to the customer.
- 2.2 These Conditions shall govern an Order to the exclusion of terms and conditions stipulated, incorporated or referred to by the Customer at any time, except for any Specific Information.
- 2.3 Any quotation given by the Supplier is subject to these Conditions and shall remain valid for 30 days from its date, but the Supplier reserves the right to withdraw or revise any quotation during that period.
- 2.4 The Supplier objects to and rejects any different or additional terms other than these Conditions and the Specific Information. Any provision of these Conditions may only be changed or added to if agreed in writing and signed by a duly authorised representative or officer.

### 3. Prices

- 3.1 Prices as stated in an Order are subject to increase at any time until delivery to reflect any increase in the cost to the Supplier due to any:
  - a) factor outside the control of the Supplier, including changes in legislation;
  - b) change in the Specific Information requested by the Customer;
  - c) delay caused by the Customer by failure to give adequate instructions and information to the Supplier, the sufficiency of which will be determined in the Supplier's sole discretion; or
  - d) alteration in any price list.
- 3.2 Supplier's prices, including prices shown in any price list, are subject to alteration by Supplier at any time without prior notice to Customer.
- 3.3 Prices are for deliveries in the U.S. and unless otherwise quoted include delivery but not offloading.
- 3.4 Prices for deliveries outside the U.S unless otherwise quoted are Ex – Works as defined by Incoterms 2010
- 3.5 All prices are exclusive of sales or similar tax, which will be charged to the Customer additionally, if applicable.



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### 4. Delivery

- 4.1 Any date quoted for delivery shall be approximate only and the Supplier shall not be liable for any damages, loss or expense of Customer for a delay in shipping or delivery however caused. If a time for shipping or delivery is stated in the Order it shall not be of the essence.
- 4.2 Where the Goods are to be delivered in instalments, a delivery shall constitute a separate contract. Any failure by the Supplier to make any delivery or part delivery of any instalment or any claim by the Customer in respect of any one or more instalments shall not entitle the Customer to withhold payment in respect of any delivery already made or treat the Order as a whole as repudiated.
- 4.3 Delivery shall take place at the Supplier's premises (the "Place of Delivery"), unless otherwise stated in the Order.
- 4.4 If the Customer fails to take delivery of the Goods at the Place of Delivery [or to give delivery instructions within 14 days after notification from the Supplier of readiness to despatch, then (without prejudice to any other claim or remedy which the Supplier may have) the Supplier shall be entitled as follows to:
  - a) treat the payment for the Order as having become due;
  - b) store the Goods at any premises until actual delivery entirely at the Customer's expense and risk. If the Customer fails to pay the charges for such warehousing, then the Supplier shall have the right to sell all or any of the Goods to defray the cost of sale and warehousing and charge the Customer any difference between the proceeds of sale and the price of the Goods stated in the Order.

### 5. Payment and Credit Terms

- 5.1 Payment must be made in full by electronic bank transfer within 30 days from the date of the Supplier's invoice for each delivery, subject to credit approval by the Supplier. If payment is not made in full by the due date, then the Supplier shall (without prejudice to any other rights) be entitled as follows to:
  - a) terminate the Order in which case the Customer shall have no claim whatsoever against the Supplier;
  - b) suspend further deliveries of Goods and work on Goods that have not yet been delivered under the Order;
  - c) charge interest from the date when payment became due through to the date of actual payment at a rate equal to the lesser of 2% per annum above the [then-applicable HSBC Bank USA base lending rate or the maximum amount permitted by law on the unpaid balance, together with the costs of collection and attorneys' fees.
- 5.2 If the Customer defaults in making any payment to the Supplier or the Supplier receives information which, in the Supplier's judgment, throws doubt on the creditworthiness of the Customer, then the Supplier shall have the right to:
  - a) demand immediate payment of all outstanding invoices and to demand payment on account for Orders which have been acknowledged by the Supplier but for which invoices have not yet been submitted. If payment in advance is not made in respect of such Orders the Supplier may, without any liability whatsoever, cancel such Orders.

### 6. Description and Performance; Acceptance of Goods

- 6.1 Drawings, descriptive matter, illustrations, weights, dimensions, and specifications issued by the Supplier (collectively, the "Performance Figures") are intended to be accurate but are approximate only and do not constitute any condition or warranty. Except as described in Section 6.3, the Supplier shall not be liable for failure of the Goods to meet any Performance Figures it provides.
- 6.2 The Supplier reserves the right at its absolute discretion at any time to change any specification issued by it.



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- 6.3 If the Goods do not meet the Performance Figures in a material respect (which shall be determined in the Supplier's sole discretion), the Supplier shall have the opportunity to rectify the failure. If the failure cannot be rectified, or if the Supplier fails to rectify the failure, the Customer may either reject or accept the Goods.
- 6.4 Subject to Section 11, the Supplier shall not be liable to the Customer for any loss (including consequential loss) damage, cost, or expense suffered or incurred by the Customer directly or indirectly as a result of a failure to meet the Performance Figures.

### 7. Inspection

- 7.1 The Supplier shall not be responsible for carrying out any tests to the Goods unless specifically required to do so on terms agreed in writing between the Supplier and the Customer. Any such testing or inspection requirements may result in an additional charge to the Customer.

### 8. Warranty

- 8.1 EXCEPT AS SET FORTH IN SECTION 8.2, THE SUPPLIER MAKES NO WARRANTY REGARDING GOODS DELIVERED UNDER ANY ORDER AND DISCLAIMS ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, WHETHER CREATED BY CONTRACT OR BY OPERATION OF LAW, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. ANY RECOMMENDATION OR SUGGESTION RELATING TO THE USE, STORAGE, HANDLING OR PROPERTIES OF THE PRODUCTS SUPPLIED BY M & I MATERIALS INC. OR ANY MEMBER OF ITS GROUP, EITHER IN SALES AND TECHNICAL LITERATURE OR IN RESPONSE TO A SPECIFIC ENQUIRY OR OTHERWISE, IS GIVEN IN GOOD FAITH BUT IT IS FOR THE CUSTOMER TO SATISFY ITSELF OF THE SUITABILITY OF THE PRODUCT FOR ITS OWN PARTICULAR PURPOSES AND TO ENSURE THAT THE PRODUCT IS USED CORRECTLY AND SAFELY IN ACCORDANCE WITH THE MANUFACTURER'S WRITTEN INSTRUCTIONS.
- 8.2 The Supplier warrants that the Goods will conform to the specifications at the time of delivery to the Customer. If, within a 12 month period from the date of despatch of the Goods a defect (as defined as a material deviation from the specifications) in the Goods is found to exist and reported to the Supplier in writing, the Supplier will, at its sole option, repair or replace the defective goods free of charge provided they are returned appropriately packed and carriage paid to the Supplier's premises. The Supplier shall not be under any liability to repair or replace the Goods if:
- a) damages are sustained in transit;
  - b) the defect is a result of ordinary wear and tear;
  - c) the defect is a result of wilful damage or negligence of the Customer;
  - d) if the Goods have been used for a purpose other than those for which they are designed;
  - e) if repairs to the Goods have been attempted by the Customer or a third party without the Supplier's approval;
  - f) if the total price of the Goods has not been paid in full by the due date;
  - g) if the defect is attributable to the specification provided by the Customer; or
  - h) if the Customer has not promptly notified the Supplier of its discovery of the defect
- 8.3 The Supplier has reasonable grounds to believe that it has ensured, as far as reasonably practicable, that its Goods are manufactured so that they will be safe when properly used by appropriately trained personnel. Nevertheless the Goods should only be used for the purpose they are designed and in accordance with any written instructions or advice from the Supplier.

### 9. Damage, Shortage or Loss in Transit

- 9.1 In the event the Supplier agrees that the Place of Delivery an Order not the Suppliers own or contracted premises, The Company shall not be liable for any claim for non-delivery, partial or full loss or damage to the Goods unless the Customer has notified the Supplier in writing (copied to the carrier):-



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- a) within 7 days of receipt of the Goods for partial loss or damage;
- b) within 14 days of the date of despatch of the Goods for loss or non-delivery.

9.2 If the Supplier accepts the Customer's claim the Supplier shall be entitled, at its sole discretion to repair or replace the Goods.

### 10. Intellectual Property Rights

10.1 In the event of any claim being made by the Customer that any Goods supplied under an Order infringe any patent, copyright, design, trademark or other industrial or intellectual property right of any third party, the Supplier shall indemnify the Customer against all damages and costs awarded against Customer in connection with any claim provided that:-

- a) the Supplier is given full control of any proceedings or negotiations;
- b) the Customer shall give the Supplier all reasonable assistance for the purpose of such negotiations or proceedings;
- c) the Customer shall not pay or accept any such claim without the prior written consent of the Supplier;
- d) the Customer shall do nothing which would or might adversely affect any insurance coverages which it may have in relation to such infringement and this indemnity shall not apply to the extent that the Customer recovers any sums under any such policy;
- e) the Supplier shall be entitled to the benefit of all damages and costs awarded in favour of the Customer which are payable by any other party in respect of any such claim.

10.2 Without prejudice to any duty of the Customer at common law the Supplier shall be entitled to require the Customer to take such steps to mitigate or reduce any loss which may arise from such infringement.

10.3 The Supplier shall not indemnify the Customer for any claim in respect of any design, specification or instruction provided by the Customer or in respect of the Goods if they are used for any purpose or in a manner or in a foreign country not specified or disclosed to the Supplier by the Customer or to any claim resulting from the use of the Goods in association or combination with any other Goods not supplied by the Supplier.

10.4 The Customer shall indemnify, hold the Supplier harmless, and at the Supplier's option, defend the Supplier from and against (a) any loss, liability, claim, cause of action, suit or proceeding based on an allegation that any Good furnished under any Order in compliance with the Customer's instructions or specifications or the use of such Good constitutes an infringement or misappropriation of any patent, trademark, trade secret, copyright or other proprietary rights or otherwise conflicts with the rights of any third party and (b) any judgment or other recovery arising from or related thereto. The Customer shall promptly pay or secure any judgment or recovery and shall pay the Supplier's costs and expenses, including attorneys' fees, in defending any such allegation.

### 11. Supplier's Liability

11.1 EXCEPT AS EXPRESSLY SET OUT IN SECTION 11.2 AND 11.3, IN NO EVENT SHALL THE SUPPLIER BE LIABLE TO THE CUSTOMER FOR ANY LOSS OR DAMAGE ARISING DIRECTLY OR INDIRECTLY OUT OF ANY ACT OR OMISSION BY THE SUPPLIER, NOR SHALL THE SUPPLIER BE LIABLE, AND CUSTOMER HEREBY WAIVES ANY CLAIMS AGAINST THE SUPPLIER AND RELEASES THE SUPPLIER FROM ANY LIABILITY, FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL OR PUNITIVE LOSS OR DAMAGES ARISING OUT OF OR IN ANY WAY RELATED TO ANY ORDER OR THE GOODS SOLD THEREUNDER, WHETHER ARISING IN CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, WARRANTY, STATUTE OR OTHERWISE, WHETHER AT LAW OR IN EQUITY, INCLUDING LOSS OF USE, LOST PROFITS AND LIABILITY FOR INTELLECTUAL PROPERTY INFRINGEMENT OR MISAPPROPRIATION AND PRODUCT LIABILITY CLAIMS.



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- 11.2 The Supplier shall be liable for death or personal injury which is due to its negligence in performing its obligations under an Order.
- 11.3 The Supplier shall be liable for any direct physical damage to the tangible property of the Customer which is due to the negligence of the Supplier in performing its obligations under an Order provided that its total liability shall not exceed [\$1 million] This sum represents the Supplier's total liability in respect of any single or a series of claims arising from the same cause (except for death or personal injury).

### 12. Third Party Claims

- 12.1 The Customer shall indemnify, hold harmless, and at the Supplier's option, defend, the Supplier and its Affiliates for all claims, damages, losses, costs, and expenses including any indirect, incidental, consequential, special or punitive loss or damages arising out of or in any way related to any Order or the Goods sold thereunder, whether arising in contract, tort (including negligence), strict liability, warranty, statute or otherwise, whether at law or in equity, including loss of use, lost profits incurred by the Supplier in connection with any claim paid or agreed to be paid by the Supplier to any third party who has purchased the Goods from the Customer or who has or may be affected by the uses of the Goods.

### 13. Insolvency or Default

- 13.1 If the Customer shall:
  - a) commit any material breach of the Contract at any time;
  - b) be unable to pay its debts or to have no reasonable prospect of being able to do so;
  - c) have an application made to the court for an interim order or a proposal is made for a voluntary arrangement in respect of it or a petition is presented or bankruptcy order is made against it;
  - d) go into liquidation or have a receiver or administrative receiver appointed in respect of its assets;
  - e) reach any agreement with its creditors;the Supplier may without notice and without further liability to the Customer suspend or terminate any outstanding Orders and stop any Goods in transit and without any prejudice to any remedy which the Supplier may lawfully enforce treat any invoices for Goods delivered to the Customer as having become immediately due and payable.

### 14. Title to Goods and Risk

- 14.1 Until all payments due from the Customer to the Supplier have been received, the Supplier shall retain legal and beneficial title to the Goods
- 14.2 Risk of loss for the Goods shall pass from the Supplier to the Customer at the time the Supplier tenders the Goods at the Place of Delivery but until such time as the Customer secures title to the goods pursuant to Section 14.1, the Customer shall:
  - a) store the Goods separately from any other goods, clearly marked and identified as being the property of the Supplier;
  - b) be entitled to sell the Goods in the normal course of business.
- 14.3 If any of the events referred to in Section 13 occurs, the Supplier or its designee shall be entitled to enter onto any land or premises occupied or owned by the Customer to repossess the Supplier's Goods and to dispose of the same.
- 14.4 The Supplier expressly reserves the right to sue for the price of the Goods.
- 14.5 If payments received from the Customer do not refer to a particular invoice, the Supplier may appropriate such payments to any outstanding invoice of Customer.

### 15. General

- 15.1 In the event that any of these Conditions or part of any condition is declared invalid or unenforceable by a court of competent jurisdiction all of the other Conditions or parts of conditions shall remain in full force and shall not be affected for the remainder of any term of the Contract.



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- 15.2 Failure by the Supplier to enforce any of these Conditions shall neither prejudice nor restrict its rights nor shall any waiver of its rights operate as a waiver of any subsequent or continuing breach by the Customer. No waiver shall be binding upon the Supplier unless in writing and signed by the Supplier.
- 15.3 All notices which are required to be given shall be in writing and shall be sent to the address of the Supplier as set out in the Order.
- 15.4 For sales within the U.S., an Order shall be governed by and construed under the laws of the State of Texas, notwithstanding any choice of laws provision that might apply the laws of another jurisdiction. The 1980 United Nations Convention on Contracts for the International Sale of Goods or any version thereafter shall not apply to any Order. The Customer expressly submits to the exclusive venue and jurisdiction of any state or federal court located in the State of Texas for the adjudication of any matter arising out of or relating to any Order.
- 15.5 The Customer shall not assign any Order or any interest therein or otherwise transfer any of its rights or obligations thereunder without the prior written consent of the Supplier. Any actual or attempted assignment without such consent shall be void and shall entitle the Supplier to cancel the Order.
- 15.6 An Order shall bind the parties, as well as their legal representatives, successors and permitted assigns. No course of dealing or usage of trade shall be applicable to any Order unless expressly incorporated into such Order. An Order constitutes the entire agreement between the Supplier and the Customer with respect to the subject matter of such Order and supersedes all previous and contemporaneous proposals, negotiations and other communications, oral and written, between the parties concerning the same subject matter.