

## PHILLIPS MANUFACTURING CO. TERMS AND CONDITIONS OF SALE

Except as otherwise stated in a writing signed by an authorized representative of Phillips Manufacturing Co., a Nebraska corporation ("Phillips"), these TERMS AND CONDITIONS OF SALE ("these Terms and Conditions"), apply to all sales of products (the "Products") by Phillips to the customer listed on the Invoice ("Customer").

- 1. Terms of Payment:** Unless otherwise specified on the Invoice, payment shall be due to Phillips on the 30th day following the date of the Invoice. Discounts will be allowed if taken within the time stated on the Invoice, which shall be calculated from the date of the Invoice. All amounts not paid when due shall be considered past due. Additional interest shall be payable by Customer on any amount not paid when due at the rate of one and one-half percent (1.5%) per month, or the maximum rate allowable by law, whichever is less. In addition to the amounts shown in the Invoice, Customer shall pay to Phillips any additional expenses incurred by Phillips as a result of any delay or change in shipment instructions. Customer shall reimburse Phillips for all collection costs, court costs, administration costs, investigation costs, attorneys' fees and all other incidental costs, charges or expenses incurred in the collection of past due amounts. All amounts due to Phillips shall be payable at Phillips' address set forth on the Invoice or at such other place as Phillips may designate in writing. All payments shall be made in United States currency.
- 2. Taxes:** Unless otherwise specifically stated, the prices and payment amounts do not include any taxes or tariffs now or hereafter levied or imposed on the production, sale, use or shipment of the Products. Customer shall be solely responsible for such taxes, and shall pay directly or reimburse Phillips with respect to any such taxes.
- 3. Delivery:** Unless otherwise provided on the Invoice, Phillips shall deliver the Products to the address indicated on the Invoice, at Phillips' expense. However, if the Invoice requires Customer to arrange or pay for delivery, Customer shall pay all expenses relating to shipment and delivery of the Products pursuant to the provisions of these Terms and Conditions. Phillips shall use reasonable efforts to comply with the delivery date specified on the Invoice (if any), but any such date is an estimate only, and dependent upon prompt receipt by Phillips of all necessary material and information from Customer. Phillips does not guarantee delivery on any specific date. Phillips shall not be liable for delay in the performance of orders or contracts, or in the delivery or shipment of goods, or for any damages suffered by the Customer by reason of such delay, if the delay is, directly or indirectly, caused by or in any manner arises from fires, floods, accidents, civil unrest, acts of God, war, governmental interference or embargoes, strikes, labor disputes, shortage of labor, fuel, power, materials or supplies, transportation delays or any cause beyond Phillips' control, whether the same as, or different from, the matters and things hereinbefore specifically enumerated, and if for such reasons, Phillips is unable to make delivery within a reasonable time after the time stipulated for delivery, Phillips, may at its option, cancel the Invoice without liability, except for return of any amounts paid on the Invoice. If Phillips lacks sufficient quantities of the Products to satisfy the orders of its customers, Phillips reserves the right to allocate products among its customers on such basis as it deems appropriate.
- 4. Title and Risk of Loss:** Unless otherwise provided in the Invoice, passage of title and risk of loss shall be as follows: (a) if Phillips is to deliver the Products to Customer (or to Customer's designated agent, carrier or transportation company), title and risk of loss shall pass to Customer upon Phillips' tender of delivery at the location designated on the Invoice; (b) if Customer, Customer's agent, carrier or transportation company of Customer's choosing is to pick up the Products from Phillips' facility or such other location designated in the Invoice, title and risk of loss shall pass to Customer when the Products is made ready for delivery from Phillips' facility or other location as designated in the Invoice; and (c) if the Products are to be shipped via common carrier, title and risk of loss shall pass to Customer when the Products are delivered to the common carrier.
- 5. Conditions:** All orders and contracts are accepted with the understanding that they are subject to Phillips' ability to obtain the necessary raw materials, and all orders or contracts as well as shipment applicable thereto are subject to Phillips' current manufacturing schedules, applicable law and government regulations, orders, directives and restrictions that may be in effect from time to time.
- 6. Product Specifications:** Product sold by Phillips are warranted to be within the Product Specifications published by Phillips, and subject to Phillips' standard tolerances for variations. Customer may obtain a copy of Phillips' Product Specifications from Phillips upon request.
- 7. Nonconformity:** All Products made by Phillips shall be inspected upon delivery. Should any of the Products prove defective due to faults in manufacture, or fail to meet Phillips' Product Specifications, Customer shall notify Phillips immediately, stating in full particulars the faults or failure to meet specifications of the Products. In the event Phillips confirms that any of the Products are defective, Phillips will either (at its option) replace the Products or adjust the matter fairly and promptly. Customer's failure to notify Phillips in writing of any deficiencies in the Products within **[(48) hours]** after receipt of the Products shall be Customer's acknowledgment that the Products were in good, safe and serviceable condition and fit for their intended use. Storage: All stucco and drywall accessories, as well as metal lath (per ASTM C1063) must be protected from the elements during storage and at job sites.

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- 8. Security Interest:** Customer hereby grants to Phillips a purchase money security interest to secure payment, performance and satisfaction of all present and future debts, obligations or other indebtedness of Customer to Phillips in the following property: all of Customer's products or inventory now or hereafter acquired from Phillips, together with all additions, accessories, attachments and parts now or hereafter used in connection therewith and all substitutions, replacements and proceeds of the foregoing. Customer, at Customer's sole cost and expense, hereby irrevocably (a) authorizes Phillips from time to time to file a copy of any initial financing statements, continuation statements and any amendments thereto to perfect its security interests, (b) authorizes Phillips to notify other creditors of Customer to the extent necessary to perfect its security interests, and (c) agrees to provide any other information required to make any such filings and to cooperate with Phillips and take all necessary actions, including without limitation, executing any and all additional documents, or taking such action requested by Phillips to avail itself, in addition to all other rights and remedies available at law, in equity or as contemplated in these Terms and Conditions, of all rights and remedies of a holder of a purchase money security interest under the Uniform Commercial Code. Customer shall provide Phillips with not less than forty-five (45) days' prior written notice of any name change, change in place of business, or, if more than one, its chief executive office, or its mailing address, its organizational number, type of organization, jurisdiction of organization or other legal structure. Customer hereby appoints Phillips as Customer's attorney-in-fact for the purposes of carrying out the provisions of this section and taking any action and executing any instrument which Phillips may deem necessary or advisable to accomplish the purposes hereof, which appointment is irrevocable and coupled with an interest.
- 9. Customer Responsibilities and Representations:** Customer shall be responsible for reviewing and understanding the Product Specifications, and for using and installing the Products in a safe and competent manner. Customer shall comply with all laws and regulations which govern installation of the Products. Further, Customer represents, warrants and agrees that: (a) it has full power and authority and legal right to enter into and perform under the Invoice and the execution, deliver and performance of the Invoice has been duly authorized by all necessary corporate, company or other legal actions on the part of Customer; (b) Customer is solvent, and upon effectiveness of the Invoice will be solvent; and (c) there are no pending or threatened actions before any court or administrative agency which will affect Customer's condition, business or operation or Customer's ability to perform its obligations under the Invoice or these Terms and Conditions.
- 10. Default:** An "Event of Default" shall occur if Customer fails to observe or perform any other covenant, agreement, condition or obligation to be observed or performed by Customer hereunder. Additionally, unless the Products are paid for in full in cash at the time of delivery, an Event of Default shall also occur if: (a) Customer fails to pay when due any payment amount; (b) Customer ceases doing business as a going concern, makes an assignment for the benefit of creditors or admits in writing its inability to pay its debts as they become due or becomes insolvent; (c) there is filed by or against Customer a proceeding in bankruptcy, or of reorganization, receivership, insolvency, liquidation, dissolution or similar relief; (d) a trustee, receiver, or liquidator is appointed for Customer, or of all or any substantial part of Customer's assets or properties; (e) any sale or other disposition of the Products other than in Customer's normal course of business; (f) Customer dies; (g) any guarantor of any liability or obligation described in the Invoice denies that it has any or further liability or obligations hereunder; (h) any representation or warranty made by Customer is or fails to be true and correct in any material respect; (i) any financial or credit information submitted by or on behalf of Customer is proven to have been false or misleading in any respect when submitted; or (j) Phillips determines, in its sole discretion, that any material adverse change has occurred in Customer's financial condition or in the prospect for full and punctual payment and performance of all Customer's obligations under the Invoice or these Terms and Conditions.
- 11. Remedies:** Upon the occurrence of an Event of Default, Phillips may (a) terminate then Invoice and terminate any open account or other credit accommodations, if any, at which time all payments, including any payment due at a later date, shall become immediately due and owing without further notice or demand, and/or (b) exercise any or all other rights and remedies available at law, in equity or as contemplated these Terms and Conditions, including without limitation, all rights and remedies of a holder of a purchase money security interest under the Uniform Commercial Code. In any case, upon an Event of Default, Phillips may recover all expenses incurred by reason of an Event of Default or the exercise of any remedy hereunder, including expenses of repossession, repair, storage, transportation, and disposition of the Products. Remedies provided in these Terms and Conditions shall be cumulative and non-exclusive.
- 12. Warranty:** PHILLIPS WARRANTS THAT THE PRODUCTS SHALL BE FREE FROM DEFECTS IN MATERIALS AND WORKMANSHIP, AND SHALL CONFORM WITH PHILLIPS' SPECIFICATIONS CONCERNING THE PRODUCTS. PHILLIPS SOLE OBLIGATION IN RESPECT OF ANY BREACH OF WARRANTY SHALL BE, AT PHILLIPS OPTION, TO REPAIR OR REPLACE THE PRODUCTS, SO THAT THE PRODUCTS CONFORM WITH PHILLIPS' SPECIFICATIONS. EXCEPT AS SPECIFICALLY SET FORTH HEREIN, PHILLIPS MAKES NO WARRANTY OR GUARANTY TO ANY CUSTOMER WHATSOEVER, EXPRESS OR IMPLIED, INCLUDING ANY WARRANTY AS TO MERCHANTABILITY OR FITNESS OR SUITABILITY FOR A PARTICULAR PURPOSE, VALUE, CONDITION, QUALITY, DESIGN, CAPACITY OR MATERIAL WORKMANSHIP.

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- 13. Limitation of Liability:** Phillips shall not be liable to Customer for loss, damage or claim that may arise in connection with the sale of the Products by Phillips or the use of the Products by the Customer, in excess of the amount paid by the Customer for the Products. NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THESE TERMS AND CONDITIONS OR THE INVOICE, PHILLIPS WILL NOT BE LIABLE TO CUSTOMER OR ANY OTHER PARTY FOR ANY LOSS OR DAMAGE TO REVENUES, PROFITS, OTHER ECONOMIC LOSS OR GOODWILL OR OTHER SPECIAL, INCIDENTAL, INDIRECT, PUNITIVE OR CONSEQUENTIAL DAMAGES OF ANY KIND, ARISING OUT OF, RELATING TO OR IN CONNECTION WITH THESE TERMS AND CONDITIONS OR THE INVOICE, OR THE TRANSACTIONS CONTEMPLATED HEREBY, WHETHER RESULTING FROM BREACH OF CONTRACT, BREACH OF WARRANTY, NEGLIGENCE, STRICT LIABILITY, TORT OR OTHER LEGAL THEORY, EVEN IF PHILLIPS HAS BEEN ADVISED, KNOWS OR SHOULD HAVE KNOWN OF THE POSSIBILITY OF SUCH DAMAGES, AND EVEN IF ANY OF THE LIMITED REMEDIES OF THIS ORDER FAIL TO FULFILL THEIR ESSENTIAL PURPOSE.
- 14. Insurance:** Until payment in full of all amounts due hereunder, Customer, at its sole cost and expense, shall procure, maintain and pay for comprehensive insurance for the Products for loss, theft, or damage for the full replacement value, and naming Phillips as a loss payee.
- 15. No Third Party Beneficiaries:** Nothing in the Invoice or in these Terms and Conditions is intended, or shall be construed, to give any person other than Customer or Phillips or their successors or assigns any legal or equitable right, remedy or claim under or with respect to the Invoice or these Terms and Conditions.
- 16. Delegation:** Phillips may, in its sole discretion, cause some or all of its obligations or rights hereunder to be performed or exercised by one or more of its affiliates, including, without limitation, the sale and transfer of title, the delivery of the Products, the issuance of invoices and the collection of payments. Customer, without requiring evidence of assignment or delegation of authority, shall accept performance of Phillips' obligations, and exercise of its rights by Phillips' affiliates, and shall accept and honor invoices issued by Phillips' affiliates.
- 17. Severability; Waiver:** If any provision or application of these Terms and Conditions shall be held invalid, illegal or unenforceable in whole or in part, the remaining provisions and applications of these Terms and Conditions shall not be affected, and shall remain valid and enforceable. No course of conduct or dealing and no delay or failure by Phillips in exercising any right or remedy under these Terms and Conditions or applicable law shall operate to amend, modify or waive any provision of the Invoice or these Terms and Conditions.
- 18. Governing Law; Venue; Waiver of Jury Trial; Attorney's Fees:** The Invoice and these Terms and Conditions shall be governed by and construed in accordance with laws of the State of Nebraska without regard to the conflicts of law principles thereof. The parties agree that all litigation between Phillips and Customer which may arise out of or in connection with the Invoice or these Terms and Conditions or any transaction between them shall be subject to the exclusive jurisdiction of the courts of Douglas County, Nebraska or of the federal courts sitting therein, and each hereby consents to the jurisdiction of such courts. Customer agrees that any and all processes directed to it in any such litigation may be served upon it outside of Nebraska with the same force and effect as if such service had been made within Nebraska. To the extent allowed by applicable law, Customer hereby waives any right it may have to a trial by jury in any action brought by or against Phillips. In the event of suit by Phillips on the Invoice or these Terms and Conditions on account of Customer's breach thereof, Phillips shall be entitled to recover the costs and expenses of such suit, including reasonable attorney's fees.
- 19. Entire Agreement; Modification:** These Terms and Conditions and the Invoice constitute the entire agreement between the parties hereto concerning the sale of the Products covered herein, and supersede any prior agreements, understandings, bids, quotations, offers, representations and warranties with respect to the sale of the Products covered herein. Any affirmation of fact and course of dealings, promise or condition in connection herewith or usage of the trade not incorporated in these Terms and Conditions shall not be binding on either party. This sale is expressly conditioned upon the application of these Terms and Conditions, and additional or different terms already or hereinafter proposed by Customer whether in a quotation, confirmation, acknowledgement, purchase order or otherwise shall not apply, and any references thereto shall be only for Customer's administrative convenience. No waiver, alteration or modification of the provisions hereof shall be binding unless set forth on the Invoice or in another writing signed and approved by Phillips' authorized representative.