

# **Boral Stone Products LLC**

## **Standard Terms and Conditions**

### **For the Sale of Goods and/or Services**



#### **1. ACCEPTANCE**

All Purchase Orders (as defined herein) or other proposed agreements for the sale of goods ("Goods") or the performance of services ("Services") by Boral Stone Products LLC ("Seller") are subject to acceptance, in writing, by Seller and are not binding on Seller unless so accepted. These Standard Terms and Conditions for the Sale of Goods and/or Services ("Standard Terms of Sale") are applicable to all Purchase Orders, quotations, schedules or ancillary agreements concerning the sale of goods and/or services, of any nature (collectively, the "Purchase Order"), and are the only terms and conditions which apply to the sale of Seller's goods or services except those specifically set forth in any Purchase Order and accepted by Seller. Any term or condition or standard of performance different from or in addition to these Standard Terms of Sale, whether set forth on the Purchase Order or otherwise proposed by Buyer, must be agreed to, in writing, by Seller in advance. Seller hereby expressly objects to and rejects any other terms and conditions proposed by Buyer by way of Purchase Order or otherwise, which are different from or in addition to these Standard Terms of Sale, unless accepted by Seller in writing. Buyer agrees that Buyer's submission of a Purchase Order to Seller or Buyer's acceptance of any Goods or Services provided by Seller shall constitute Buyer's acceptance of these Standard Terms of Sale.

#### **2. DELIVERY/RISK OF LOSS/TRANSPORTATION/INSURANCE**

Unless the parties specifically agree to other transportation terms, deliveries shall be FOB Seller's Facility. Unless otherwise agreed to by the parties, Goods shall be deemed to be delivered and risk of loss shall pass to Buyer at such time as possession of such Goods is given to a transportation carrier. Seller has the right to make partial deliveries when Seller reasonably deems appropriate. Unless otherwise agreed by the parties in writing, Seller has no obligation to obtain insurance for Buyer covering Goods in transit to Buyer.

#### **3. PRICES/TAXES**

Prices and charges for Seller's Goods and/or Services shall be invoiced at Seller's current prices and charges in effect at the time of shipment unless otherwise provided in a Purchase Order duly accepted, in writing, by an authorized employee or agent of Seller. Unless otherwise provided by law, Buyer shall pay to Seller any and all taxes, excises or other charges (other than taxes on or measured by Seller's net income) which are based upon or measured by the sale, transportation, delivery or use of the Goods sold and delivered hereunder or upon the Services performed by Seller. In addition, Buyer agrees that any claim regarding overpayment must be asserted within sixty (60) days from the date such Goods were invoiced to Buyer or the date such Services were performed. All claims not asserted within such sixty (60) day period shall be deemed irrevocably waived.

#### **4. FREIGHT**

Freight prepaid shipments shall be made by Seller's normal routing. Rail freight will be used at the discretion of Seller. Transportation and freight costs for prepaid shipments will be invoiced to Buyer. If Seller arranges transportation for Buyer, such arrangements shall be at Buyer's sole risk and expense, and transfer of title and risk of loss shall not be affected thereby. In the event of any general increase or any ruling or regulation affecting transportation that results in increased freight costs or in the event any extraordinary transportation costs are charged to Seller subsequent to its invoice to Buyer, including but not limited to fuel surcharges, Seller, in its sole discretion, may include all such costs on Buyer's next invoice following the charge or separately invoice Buyer for such costs.

#### **5. CANCELLATION**

Buyer's wrongful nonacceptance of Goods, or cancellation or repudiation of any Purchase Order to purchase Goods or Services shall entitle Seller to recover, in addition to any incidental damages caused by Buyer's wrongful nonacceptance, cancellation or repudiation, either (i) in the case of Goods, the risk of loss of which has passed to Buyer at the time of nonacceptance, cancellation or repudiation, or Goods which cannot reasonably be resold by Seller to a third party, or Services which have already been performed, the price of such Goods or Services, or (ii) in the case of Goods for which other buyers exist or

Services not yet performed, or where an action for the price is not otherwise permitted by law, damages equal to the profit (including reasonable overhead) which Seller would have realized had Buyer fully performed or, at Seller's option, 20% of the contract price as liquidated damages, plus, in the case of special orders, Seller's expenses, if any, incurred prior to receipt by Seller of notice of cancellation by Buyer, in connection with providing special services, developing special tooling, purchasing special supplies and the like. In each situation set out in (i) and (ii) above, Seller shall also be entitled to recover any applicable costs of collection, the lesser of 18% interest per annum or the maximum interest rate permitted by law, and Seller's reasonable attorney's fees ("Costs") incurred as a result of Buyer's wrongful nonacceptance.

## **6. QUANTITY VARIATIONS**

On any individual Purchase Order or release against a Purchase Order for Seller's Goods not stocked as a standard item, or not packed in standard cartons or packages, or on which special fabrications or constructions are involved, Seller reserves the right to ship to and invoice Buyer for a quantity of Goods, which may vary up to 10 percent (10%) over or under the quantity specified on the Purchase Order or release and Buyer shall accept delivery and pay for such revised quantity. Shortages or errors in quantity of Goods must be reported, in writing, by Buyer within thirty (30) days from receipt of shipment to secure an adjustment for the same. In addition, claims for proof of delivery of a shipment must be made within fifteen (15) days from the scheduled delivery date.

## **7. FORCE MAJEURE/ALLOCATION OF GOODS**

Seller will not be responsible for any failure or delay in the performance of all or any part of any Purchase Order caused by acts of God and nature, intervention of government, war or threat of war, acts of terrorism, conditions similar to war, sanctions, blockades, embargoes, strikes, lockouts or other causes or circumstances beyond the reasonable control of Seller. Seller shall not be required to resolve a strike, lockout or other labor problem in a manner which it does not, in Seller's sole discretion, deem advisable. Seller may experience shortages, as a result of raw material shortages or as a result of unexpected increases in demand for its Goods. Under such circumstances, or in the event of any contingency referenced above, Seller reserves the right to allocate its Goods, in its sole discretion. Buyer agrees to excuse Seller from any and all liability resulting from such shortages or such allocation decision. Seller specifically disclaims any express or implied representations contrary to this paragraph, which shall not be varied by any course of dealing between Buyer and Seller, but only by a writing signed by Seller. The provisions of this Section 7 shall be effective even though the shortage or contingency invoked by Seller shall have been in effect on the date a particular order was accepted.

## **8. LIMITED WARRANTY/DISCLAIMER OF WARRANTIES**

In the case of Goods sold by Seller with a separate written warranty, that warranty shall apply. Otherwise, the Seller warrants only that Goods shall be manufactured in accordance with Seller's specifications. THE WARRANTY REFERENCED OR PROVIDED ABOVE IS THE ONLY WARRANTY PROVIDED BY SELLER AND IS IN PLACE OF AND TO THE EXCLUSION OF ANY OTHER WARRANTY, WHETHER EXPRESS OR IMPLIED, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, ALL OF WHICH ARE EXPRESSLY EXCLUDED. In no event shall Seller be responsible for goods manufactured by other parties; such Goods shall carry only the warranty of the manufacturer.

## **9. BUYER'S REMEDIES/LIMITATION OF LIABILITY**

- a) Buyer's sole and exclusive remedy and the limit of Seller's liability for Goods or Services proven not to comply with Seller's warranty, whether based upon breach of warranty, negligence, strict liability, tort, breach of contract or any other legal theory, shall be, at Seller's option, (a) replacement of the Goods or Services, without charge, carriage paid to Buyer's facility; or, (b) refund of the purchase price paid in respect of such Goods or Services. Unless otherwise stated in a separate written warranty from Seller, to effect this remedy Buyer must make its claim for breach of warranty within 12 months from date of shipment of the Goods; otherwise, such claim shall be irrevocably waived.
- b) Seller's sole liability with respect to the Goods and Services, for any and all loss or damage to Buyer, or any other loss, damage, expense or claim, resulting from any cause whatsoever (whether based on damaged or defective goods, irrespective of whether such damages or defects are discoverable or latent, or Seller's limited warranty shall fail of its essential purpose, or any other reason), and whether based upon breach of warranty, negligence, strict liability, tort, breach of contract or any other theory, shall in no event exceed the aggregate purchase price of the particular Goods or the price of the Services with respect to which losses, damages, expenses or costs are claimed. Seller shall have no liability to any person other than Buyer by virtue of the sale of the Goods, provision

of Services, or any other matters contemplated by this agreement and Buyer shall add Seller as a party protected by Buyer's warranty and limit of liability provisions in Buyer's terms of sale. The limitation of liability set forth in this paragraph shall survive termination or cancellation of this agreement.

- c) THE FOREGOING IS THE ENTIRE OBLIGATION OF SELLER. IN NO EVENT SHALL SELLER BE LIABLE FOR ANY CONSEQUENTIAL, SPECIAL, INCIDENTAL, INDIRECT OR PUNITIVE DAMAGES TO ANY PERSON, WHETHER BASED UPON BREACH OF WARRANTY, NEGLIGENCE, STRICT LIABILITY, TORT, BREACH OF CONTRACT OR ANY OTHER THEORY, REGARDLESS OF WHETHER THE REPLACEMENT OR REFUND REMEDY SET FORTH ABOVE FAILS OF ITS ESSENTIAL PURPOSE OR FOR ANY OTHER REASON WHATSOEVER.

No statement or recommendation made or assistance given by Seller, or its representatives, either oral or in any literature or other documentation, to Buyer, its customers or any other persons in connection with the purchase, use or installation by Buyer, its customers or any other persons, of any Product sold hereunder, shall constitute a waiver by Seller of any provision hereof or affect Seller's liability as herein defined; and no such statement, recommendation or assistance that is not expressly required by the provisions of this agreement shall subject Seller to any liability of any nature whatsoever.

## **10. SAFETY AND HEALTH INFORMATION**

Seller has supplied or made available to Buyer information (including but not limited to Material Safety Data Sheets) and warnings concerning the safety and health aspects of the Goods. Buyer agrees to communicate such information and warnings to Buyer's employees, agents, contractors and customers, and to require such persons to further communicate such information and warnings to all persons that they may reasonably foresee will be exposed to or handle such goods.

## **11. TRADEMARKS**

The purchase of Goods or Services from Seller shall not entitle Buyer to use, register, or otherwise identify Buyer or its business with the name, trademark, service mark or other identity of Seller. Should Buyer violate this provision, Seller may avail itself of all remedies provided for by law or in equity, including, without limitation, injunctive relief.

## **12. EXPORT SALES**

Buyer represents and warrants that it has complied and/or will comply with all applicable laws, rules and regulations pertaining to the export, import and movement of Goods sold hereunder.

## **13. TERMS OF PAYMENT**

Terms of payment shall be governed by Seller's credit policy and, unless otherwise agreed, shall be net 45 days from the date of Seller's invoice, unless other specific terms of payment are stated in the Purchase Order and accepted, in writing, by an authorized employee or agent of Seller. If at any time Seller, in its sole discretion, deems Buyer's credit unsatisfactory or in any way impaired, Seller reserves the right, among other remedies, to terminate the Purchase Order, and suspend further deliveries; or, to require payment either by: (a) Cash with the order; (b) Cash payment by sight draft against bill of lading; or, (c) Cash on delivery (C.O.D.). (Under (b) and (c) above, Buyer will be responsible for all of Seller's Costs.)

Cash discounts as set forth on individual Purchase Orders duly accepted, in writing, by Seller are allowed only on the sales value of the goods. Transportation costs and other "add-on" charges are excluded. Seller will compute and show on Buyer's invoice the exact amount of any cash discount allowed. Buyer will not be allowed a cash discount on any Purchase Order not accepted, in writing, by Seller, or while any past due invoice remains unpaid. No future datings may be given on invoices. Buyer shall indemnify and hold Seller harmless from and against any and all costs or expenses, including attorney's fees (collectively, "Seller's Costs") incurred by Seller as a result of any breach of the terms of these Standard Terms of Sale. Any Buyer who makes payment by check or draft which is returned due to non-sufficient funds will be assessed a fee of \$50.00 for each returned check. Notwithstanding any provision contained herein to the contrary, each shipment of Goods by Seller shall be deemed a separate and independent transaction and payment therefore shall be made accordingly.

## **14. RETURN OF GOODS**

Goods may only be returned for credit with the written permission of Seller within six (6) months from the date of delivery of the Goods. Only standard Goods regularly maintained in stock by Seller and in resalable condition will be considered for return by Buyer for credit. Goods must be returned to Seller in good, resalable condition, freight prepaid. Credit for returned Goods will be allowed in Seller's sole discretion based on the condition of the returned Goods. Special packaging by Buyer may be necessary to protect goods returned in less than full truckload quantities. In no event shall Buyer's credit exceed 80% of the original or then current purchase price for the Goods delivered to Buyer, whichever is the lower, less freight paid by Seller on the original shipment to Buyer, if any.

## **15. BUYER INSOLVENCY**

If Buyer (i) becomes insolvent, or institutes or has instituted against it insolvency proceedings, or admits in writing its inability to pay its debts generally, or any proceeding is instituted by or against Buyer seeking adjustment, protection or composition of it or its debts under any law relating to bankruptcy, insolvency or reorganization or relief of debtors, or seeking the entry of an order for relief or the appointment of a receiver, trustee or other similar official for it or for any substantial part of its property, or (ii) fails to comply with any of the Standard Terms of Sale hereof or any other contract or Purchase Order with Seller, then the same shall constitute a breach hereof and a default hereunder. In the event of such breach or default, Seller shall be entitled to cancel any unfilled part of this Purchase Order without any liability whatsoever, and shall have such other rights and remedies afforded to Seller for breach of contract under the Uniform Commercial Code as enacted in the State of Georgia or under any applicable law, including, but not limited to, the remedies of incidental and consequential damages, and in such an event, Buyer shall also be responsible to Seller for all cancellation charges as described in Section 5 of this Standard Terms of Sale.

## **16. ENTIRE AGREEMENT**

- a) These Standard Terms of Sale, together with the terms and conditions contained in a Purchase Order duly accepted by Seller in writing constitute the entire agreement between Seller and Buyer with respect to the matters contained therein, and supersede all prior oral or written representations, proposals, correspondence, discussions, negotiations and agreements. No course of prior dealings and no usage of the trade shall be relevant to supplement, explain or modify any terms contained herein.
- b) By acceptance of a Purchase Order, Seller agrees to comply to the best of its ability with the provisions of any applicable law, and all valid regulations and orders thereunder to the extent required thereby. Any such provisions which are required to be included herein shall be deemed incorporated herein by reference. If Buyer specifies in its Purchase Order that the Purchase Order and these Standard Terms of Sale will create a sub-contract under a contract with any governmental entity, Buyer must note the government contract number on the face of the Purchase Order, and list any provisions which must under applicable law be included in such subcontract. Seller shall review and advise Buyer, within thirty (30) days whether Seller will accept Buyer's Purchase Order.

## **17. PRIORITY**

In the event of any inconsistency among the provisions in these Standard Terms of Sale or the Purchase Order, precedence shall be given first to the special terms and conditions contained on the face of the Purchase Order and accepted, in writing, by Seller; and second, to these Standard Terms of Sale.

## **18. RELATIONSHIP OF PARTIES**

Seller and Buyer are independent contracting parties and nothing in these Standard Terms of Sale or the Purchase Order shall be construed as constituting or making Buyer or Seller as franchiser, franchisee, partner, broker or agent of the other. Each party is an independent contractor and neither shall have any power, right or authorization to bind the other or to assume or create any obligations or responsibilities, express or implied, on behalf of the other or in the other's name.

## **19. GOVERNING LAW**

The Purchase Order and these Standard Terms of Sales are to be construed according to the laws of the State of Georgia without regard to its conflict of laws provisions, and each party hereto submits to the non-exclusive jurisdiction of any state or federal court sitting in Georgia in any action or proceeding relating to or arising out of the Purchase Order or these Standard Terms of Sale.

## **20. SEVERABILITY**

If any provision of these Standard Terms of Sale or the Purchase Order is deemed invalid or unenforceable by any court of competent jurisdiction or under any statute, regulation, ordinance, executive agreement or other rule of law, such provision shall be deleted or modified, at the election of the parties, but only to the extent necessary to comply with such ruling, statute, regulation, ordinance, agreement or rule, and the remaining provisions of these Standard Terms of Sale and the Purchase Order shall remain in full force and effect.

## **21. NON-WAIVER**

No change, modification or waiver of any provision of these Standard Terms of Sale shall be valid or binding unless it is accepted by Seller. A waiver by either party of any breach or failure to enforce any term or condition of these Standard Terms of Sale shall not in any way affect, limit or waive such party's right at any time to enforce strict compliance with that or any other term or condition of these Standard Terms of Sale.

## **22. NON-ASSIGNMENT**

Buyer may not assign its rights or delegate its obligations hereunder or under the Purchase Order without Seller's prior written consent.