

# TERMS AND CONDITIONS OF SALE

## ACCEPTANCE

The Terms and Conditions ("Terms") contained herein apply to all quotations and offers made by Emser Tile, LLC ("Emser") and to all purchase orders accepted by Emser. These Terms may in some instances conflict with some of the terms and conditions affixed to a Buyer's purchase order or to any other procurement document issued by the Buyer. In such cases, the Terms contained herein shall govern, and acceptance of Buyer's order is conditioned upon Buyer's acceptance of the Terms and Conditions herein, irrespective of whether the Buyer accepts these conditions by a written acknowledgement, by implication, by acceptance of products ordered, or by payment for products ordered. Emser's failure to object to provisions contained in any communication from Buyer shall not be deemed a waiver of the provisions herein. Any changes in the Terms contained herein must specifically be agreed to in writing, signed by an officer of Emser before becoming binding on either party.

Emser reserves the right at any time to amend these Terms and Conditions, and Buyer shall be deemed to accept such amended Terms and Conditions by ordering products offered after the date of such amendment.

## PRODUCT AND PRICES

Unless agreed to otherwise, in advance, in writing and signed by an Officer or Director of Emser, all catalog prices, and all offered prices are F.O.B. Emser's facility. All pricing quotes must be documented in writing and issued by Emser to be valid. Unless otherwise stated, prices quoted are firm for 30 days from the date quoted. Emser reserves the right to change its prices and the specifications of its products at any time without notice.

Prices do not include state, local, federal or other taxes and duties, and the same will be additionally charged unless a valid tax exemption or re-sale certificate is furnished to Emser prior to shipping. State and local taxes, when charged, are assessed based on those rates in effect at the Emser location selling or servicing the Buyer. All state, local, federal or other taxes and duties are the responsibility of the Buyer. Emser's failure to assess or collect adequate taxes at the time of sale does not relieve Buyer of the responsibility for actual tax liabilities.

All Emser tiles are nominal sizes. Sizes and prices include recommended joint allowances and joints shall not be deducted when estimating quantities.

Special order or Non-Stock Product (products not included in our current price list) orders require a 50% deposit. Buyer agrees that special order or Non-Stock Product orders are non-cancelable.

## CREDIT

All orders, shipments and deliveries by Emser are subject to credit approval by Emser's Credit Department. As part of this credit approval, Emser may at any time decline to make any shipments or deliveries, and/or impose other terms or conditions or security arrangements as Emser, in its sole discretion, deems appropriate. Emser reserves and Buyer hereby grants Emser a security interest in any products sold to the extent of the invoiced amount. If Buyer defaults under any obligation hereunder, Buyer agrees to make products available so that Emser can repossess them. A copy of the invoice may be filed with appropriate authorities at any time as a financing statement. Upon Emser's request, Buyer will execute any documents to perfect Emser's security interest in any products.

Emser reserves the right in its sole discretion to require prepayment from any Buyer at any time and may refuse to sell and/or withhold further shipment until all overdue balances are made current.

Buyer shall be liable for, and shall reimburse Emser for all costs and expenses it may incur in connection with collection of any amounts owed or in enforcement of its rights, including without limitation, reasonable attorneys' fees and expenses, court costs, and cost of collection agencies.

## PAYMENT

Buyer's obligation to pay outstanding invoices and all other amounts is not subject to reduction, set-off, counterclaim, or Buyer's receipt of payment from any third party. Buyer shall pay Emser on a timely basis pursuant to the credit terms provided and shown on Emser's invoice. Emser shall retain a purchase money security interest in all products sold until the entire purchase price has been paid in cash, in full. No check, money order, credit card, electronic payment or other form of payment shall constitute payment until it is paid by the bank on which it is drawn or by the institution of issue transmission.

Emser, in its sole discretion, reserves the right to specify the form of payment acceptable for settlement of invoices and other amounts (i.e. check, certified check, money order, credit card, wire transfer, ACH, or other electronic or non-electronic form of payment). Additionally, should the acceptance of any form of payment cause Emser to incur additional costs and fees, Buyer agrees to reimburse Emser for any such fees upon Emser's request.

Any disputed amounts should be reported immediately and remitted with the undisputed amount by the payment due date. All billing disputes must be made within thirty (30) days of the applicable invoice date, or will be deemed to be waived.

Balances remaining unpaid at the due date are subject, at the sole discretion of Emser, to the assessment of late fees applied at the rate of 1.5% per month, or the highest rate permitted by law, whichever is lower, until paid.

#### **TITLE AND DELIVERY**

All shipments by Emser are F.O.B. Emser's facility, or, if applicable, the facility of an Emser affiliate or agent. Title and risk of loss or damage to products passes to Buyer upon delivery to Buyer, or a common carrier, at Emser's facility, or, if applicable, the facility of an Emser affiliate or agent.

Buyer acknowledges and agrees that delivery dates, when quoted, are estimates only and may be changed. Emser will use reasonable efforts to deliver in accordance with quoted delivery dates. However, Emser shall not be liable for nonperformance or delays caused by a shortage of raw materials, manufacturing problems, delivery or labor problems, priorities, acts of regulatory agencies or judicial bodies, discontinuation of a product line, acts of God or third parties, infringement claims, or other causes beyond its reasonable control.

Emser reserves the right to make delivery in installments. All such installments shall be separately invoiced and paid for when due, without regard to subsequent deliveries. Delay of any shipment shall not relieve the buyer of its obligation to accept remaining installments. In the event that Emser's ability to supply products becomes constrained, for any reason whatsoever, Emser may reduce quantities, delay shipments, or allocate products among its customers at its discretion.

If part or all of the products are to be delivered from outside of the continental borders of the United States, and such products are not available for any reason, then Emser may in its reasonable discretion replace the same with like products, but shall be under no obligation to do so. If Emser does not replace same, then Emser shall notify Buyer within a reasonable period of time and as Buyer's sole and exclusive remedy Emser shall give Buyer credit based upon Buyer's prepayments, if any, for the products.

#### **INSPECTION AND ACCEPTANCE**

Any product sold or provided by Emser shall be deemed accepted by Buyer upon delivery. Claims for damage, shortage or errors in shipping must be recorded on the original receiving documents and reported within twenty-four (24) hours following delivery to Buyer.

**It is the Buyer's responsibility to inspect all merchandise prior to installation.** If for any reason the material is incorrect or unacceptable for installation, Buyer shall make such claim to Emser, in writing, before installation.

Emser's liability in respect to all claims shall be limited to accepting the return of incorrect or unacceptable product before installation, and then only after Emser has been notified in writing that the material is incorrect or unacceptable and has had the opportunity to inspect the product and conduct its own investigation. All original packaging materials must be kept until after inspection. Subsequent to any investigation, Emser shall have the right to supply substitute products. If substitute products are to be supplied, Emser shall have up to 90 days following the conclusion of Emser's investigation to so substitute.

All claims for incorrect or unacceptable product should be received in writing within 30 days from shipment date and prior to installation.

**Installation of product is deemed acceptance of product** and Emser shall not be liable for, and will not recognize, claims made after the start of the installation including claims of incorrect product; claims of incorrectly sized, colored, shaded, calibrated, or packaged product; claims of product not matching prior shipments; and/or any other product claims.

**Emser shall not be responsible for improper installation of products.**

#### **RETURNS**

Special order or Non-Stock Product are not returnable and deposits on such are non-refundable.

Returns of Emser Stock Product (product contained within Emser's current price list) is subject to the prior authorization of Emser, in its discretion.

All return requests must be made within 90 days of shipment date. All product accepted for return must be in its original, unopened packaging, in full case quantities, and in good condition – suitable for resale. All returns will be subject to a 25% handling fee, any third party restocking charges, and forfeiture of any deposit. Additionally, all costs of returning product to an Emser facility, or the facility of an affiliate, agent or original manufacturer, will be the responsibility of the Buyer. After the assessment of all costs of return, Buyer's account will either be credited for the excess of its deposit over such costs, or charged for the net of such costs in excess of its deposit.

#### **INDEMNIFICATION**

Buyer shall at its own expense apply for and obtain any permits and inspections required for the installation and/or use of Emser's products. Emser makes no promise or representation that the products will conform to any federal, state or local laws, ordinances, regulations, codes or standards.

Emser shall not be responsible for any losses or damages sustained by the Buyer, or any other person, as a result of improper installation or misapplication of Emser's products. Buyer shall indemnify and hold harmless Emser and its agents and employees against any loss, damage, claim, suit, liability, judgment or expense (including, without limitation, attorney's fees) arising out of, or in connection with, any injury, damage to or loss of any property, or violation of any applicable laws or regulations resulting from, or in connection with, the sale, transportation, installation, use, or repair of Emser's products by the Buyer.

#### **WARRANTY**

Emser warrants only to its immediate Buyer, and to no other person, that its products will, on the date of shipment, meet the terms of Emser's Bid Confirmation, Order Acknowledgement, or Sales Order pursuant to which such products were sold.

**Manufactured Products:** Emser warrants that manufactured products will be free from defect for a period of one-year from date of purchase. Defect is defined as a shortfall in the product to perform to specifications as disclosed in product or trade literature, within industry allowable tolerances as set forth in standard, national industry protocols. This one-year express warranty is the sole warranty extended and replaces any statutory warranties to the maximum extent allowable by law. Customer misuse including negligence, physical, or chemical abuse is not covered by this warranty. Installation defects or installations that violate building codes are not covered by this warranty. All warranty claims must be reported immediately. Failure to report any warranty claim within 30 days of defect discovery will void this warranty. All products must be inspected prior to installation. Visual defects or nonconformities apparent prior to installation voids this warranty.

Manufactured tile is subject to variation due to an inherent variability in raw materials and production processes. Ceramic tile with a rating of V3 or V4 may contain higher levels of variation. All products should be inspected prior to installation.

**Natural Stone Products:** Natural stone products, including, but not limited to, travertine, limestone, granite, marble, onyx, and slate, are products of nature mined and cut from natural formations which may inherently contain high levels of variation. Because these products are mined and cut from natural formations instead of manufactured, quality warranties are limited to the specified representations in Emser product literature, trade product literature, and guidelines established by the Marble Institute of America. Emser does not warrant natural stone products for shade, size, thickness, warping, cleft variations, surface finish variations, or other natural defects on stone products.

**EMSER DISCLAIMS ANY AND ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO, WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OR USE.**

No agent, employee or other representative of Emser has the authority to create any other affirmation, warranty or representation, either oral or written, regarding Emser's products.

**THE LIABILITY OF EMSER UNDER ANY THEORY OF LIABILITY (WHETHER CONTRACT, TORT, STRICT LIABILITY OR OTHERWISE) SHALL BE LIMITED AS FOLLOWS: THE SOLE AND EXCLUSIVE REMEDY FOR ANY BREACH OF WARRANTY, EXPRESS OR IMPLIED, SHALL BE THE REPLACEMENT OF DEFECTIVE GOODS F.O.B. EMSER'S FACILITY OR, AT EMSER'S OPTION, REFUND OF THE PURCHASE PRICE OF SUCH DEFECTIVE GOODS.**

**IN NO EVENT SHALL EMSER BE LIABLE FOR ANY SPECIAL, CONSEQUENTIAL, INDIRECT, OR OTHER DAMAGES BY REASON OF ANY BREACH OF WARRANTY, OR ANY DELAY OR FAILURE IN DELIVERY, WHETHER OR NOT EMSER HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.**

Buyer acknowledges and agrees that the foregoing disclaimer of warranties and limitations on Emser's liability are an essential basis for Buyer's agreement with Emser, that Emser would not have entered into this agreement but for such provisions, and that the exclusion of special, incidental, consequential, indirect or other damages shall apply and be enforced whether or not Emser is able to replace any defective goods or complete any delivery.

Any suit or other legal action that Buyer may bring against Emser arising out of the sale of goods or other transactions contemplated hereby (whether in contract, tort, strict liability or otherwise) must be filed within 12 months from the earlier of (i) delivery of goods hereunder, or (ii) the date of Emser's alleged breach. Buyer's failure to file within such period shall be deemed to act as a waiver and time bar for any and all claims against Emser Tile, LLC.

**NON-WAIVER**

Emser's waiver of any of these Terms in any instance is limited to that instance and does not imply that Emser will waive such Terms on any future occasion.

**NOTICES**

Any notice to Buyer hereunder shall be deemed to have been given if sent by prepaid first class mail to the party concerned at its last know address. Notice to Emser shall be to its Headquarter office at 8431 Santa Monica Boulevard, Los Angeles, California 90069.

**APPLICABLE LAW**

Emser and Buyer agree that this agreement shall be deemed made in Los Angeles, California; that the internal laws of California shall govern; and that the state or federal courts sitting in Los Angeles County, California shall have jurisdiction and are the proper venue for all actions hereunder. Any dispute or disagreement arising out of the sale of goods contemplated hereby shall be submitted to binding arbitration before the American Arbitration Association (AAA) in Los Angeles, California, in accordance with its commercial arbitration rules then in effect. The arbitrator(s) shall award reasonable attorney's fees and costs to the prevailing party, and the arbitrator's award may be entered and enforced by any court of competent jurisdiction.

All remedies of Emser hereunder shall be deemed cumulative and shall be in addition to any other remedies Emser may have under law. The exercise by Emser of any one or more remedies shall not be deemed an election of remedies by Emser Tile, LLC.