



MillerClapperton

Southeast | Mid-Atlantic | Midwest | Mountain West | West

GENERAL TERMS AND CONDITIONS

Revised September 2018

1. GENERAL

- a. All offers and sales of products and services ("Products") manufactured, provided, or otherwise supplied by The Miller-Clapperton Partnership, Inc. ("Seller") to Customer ("Buyer"), are expressly conditioned on Buyer's acceptance of these Terms and Conditions. Seller and Buyer may be collectively referred to as the "Parties."
- b. Buyer agrees that any of the following definitively constitute Buyer's acceptance of these Terms and Conditions: Buyer issues a written purchase order or other similar instructions to Seller for the delivery of any Products covered by any sales document to which these Terms and Conditions are either attached, included, or incorporated by reference, and made available to Buyer by any communications medium including, but not limited to, quotations and proposals ("Proposal"), email, faxes, references to website, brochures, color charts, samples, or Buyer either accepts delivery of any such Products, installs any such Products, or pays for any such Products.
- c. Any purchase order or other communication from Buyer that contains terms or conditions in addition to or inconsistent with these Terms and Conditions will not apply to the purchase of any Products by Buyer or be used to waive, modify, vary, explain or supplement all or any part of these Terms and Conditions and are hereby objected to and rejected by Seller, unless expressly agreed upon in writing by Seller.
- d. Seller's Terms and Conditions of sale and delivery also apply if Seller carries out delivery of any such Products to the Buyer without express agreement in a signed writing to any general terms and conditions of the Buyer conflicting with or deviating from Seller's Terms and Conditions. Seller's employees are not authorized to make additional or different oral agreements or provide oral promises that extend beyond the content of the written agreements.

2. PRICING

- a. The Proposal is good for acceptance within 30 days ONLY, unless a specific expiration date is given, and is subject to change after 30 days without notice until a signed purchase order is received and acknowledged. Any delays in award due to changes or other causes beyond the control of Seller may require updated pricing.
- b. The prices contained in any proposal by Seller are based on the conditions contained herein. In the event of a conflict between these Terms and Conditions and the contract documents, the terms of herein shall govern. Any conflicts between the contract documents and these Terms and Conditions should be reviewed by Buyer and brought to the attention of the Seller for evaluation of potential cost impact before acceptance.
- c. The purchase price may not include such taxes, fees, and charges, and Seller reserves the right to separately invoice Buyer for all applicable taxes, fees, and charges and Buyer agrees that these amounts shall be immediately due and payable. Buyer will not have the right of offset against the purchase price of any Products nor the right to back charge any agreement or sales document unless Seller has given its prior written consent.
- d. Seller and Buyer agree that prices are based on market conditions on the date of any tendered proposal and acknowledge certain costs may experience unforeseen price escalations due to circumstances beyond the control of the Seller, including, but not limited to, fire, explosion, accidents, flood, or other act of God, labor trouble or shortage, act of or authorized by any government, inability to obtain suitable material, equipment, fuel, power, or transportation, or arising from contingencies, happenings, or causes beyond the control of the party affected that reasonably prevent timely performance or pricing under this Agreement. For shipments beyond ninety (90) days prices may be adjusted due to fluctuations in the price of raw materials or published price increases by other material suppliers. The recognized materials price increases shall be calculated by comparing prices in the month of the applicable Proposal to the month that precedes the month of shipment.

3. PRODUCT QUALITY AND CHARACTERISTICS

- a. Buyer agrees and understands that due to inherent variations in manufacturing processes, production conditions, raw materials composition, and variability in engineered as well as natural materials, optically perceived variations in color, texture, tonality, and reflectivity may occur between production lots, widths, and product configurations. There may exist tolerances customary in each Products' industry trade with regard to size, thickness, and color. None of these constitute a reason for a claim by the Buyer against Seller. Buyer agrees to follow purchasing and installation guidelines to minimize the potential for optical differences as mentioned above.
- b. Buyer agrees and understands that Product surface appearance may change during fabrication and installation typical of each product. Anodized metal and glazed tile products may craze before, during, or after installation. This natural occurrence does not diminish the performance or value of the Products. Any such perceived optical variations within manufacturer's stated tolerances do not constitute a reason for a claim.
- c. Buyer agrees and understands that under no circumstance does or will Seller take responsibility for the adequacy of installation, even if it provides information or direction to Buyer.

4. INVOICING

- a. Monthly invoices will be submitted from the Seller to the Buyer and will include charges for pre-paid raw materials ordered by Seller, and both fabricated and stored materials held by Seller. Charges for Engineering may be invoiced at any time after the submittal of shop drawings or calculations.
- b. If Seller is authorized to order Products or other material and subsequent delays occur, not the fault of Seller, any stored materials will be billed and are due upon the agreed Terms of Payments established between the Seller and Buyer.
- c. All Change Orders must be priced by Seller and approved in writing by the Buyer before Seller will proceed with the Change Order. The Buyer agrees that any dimensional changes deviating from the architectural and/or shop drawings may result in a Change Order.

5. PAYMENT

- a. Credit and Payment Terms
 - i. Payment terms are net 30 days of the invoice date, which is the earlier of (a) 30 days after Product delivery; (b) Buyer's receipt of Product; or (c) 30 days after Product leaving Seller's premises.
 - ii. Credit terms are subject to Seller approval. For first time Buyers, on orders less than \$25,000, a 50% payment is due upon receipt of shop drawings.
 - iii. Contingent payment terms are not acceptable and will be excluded from any agreement except when funds are withheld by the owner due to the direct fault of Seller.
 - iv. Export shipments must be paid by irrevocable letter of credit before shipment.
- b. If Buyer fails to make any payment when due, then (i) interest accrues at the higher of 1.5% per month or the maximum amount allowed by applicable law from the date the payment was due until Seller receives payment in full, (ii) Buyer shall pay Seller's attorneys' fees and other costs of collection of any past due amounts, and (iii) Seller may, in its sole discretion, take any of the following actions: suspend performance with respect to Buyer or any Buyer-affiliate; terminate for default any outstanding sales or accepted proposals; require Buyer to pay the full price on any outstanding payment; and take any other actions or pursue any other remedies under applicable law. Seller's failing to charge interest on late payments or to exercise Seller's right to suspend performance is not a waiver of any legal or equitable remedies.
- c. Buyer agrees that Seller will not accept any offsets to the project price including back charges, hold backs, set offs, unilateral price adjustments, liquidated damages, consequential damages, overtime charges, or any other penalties imposed by the Buyer or any other party unless specifically agreed to in writing by the President or Vice President of Seller.
- d. Buyer agrees to make final payment before Seller will release warranties and unconditional lien waivers.
- e. Buyer accepts that Seller will not accept Retention.
- f. Either Seller or Buyer may terminate this Agreement upon seven (7) days written notice to the other party. In such event, the Buyer agrees to pay for the portion of work performed to date by Seller and all ordered materials. In the event the Buyer terminates this Agreement, the Buyer shall additionally pay Seller a 10% cancellation fee.
- g. If Buyer fails to pay any amount due to Seller when due, fails to observe or perform any of its other obligations under these Terms and Conditions, takes any action that in Seller's opinion adversely affects the name, reputation, or goodwill of Seller or its Products, or becomes insolvent, is adjudicated as bankrupt, voluntarily files or permits the filing of a petition in bankruptcy, makes an assignment for the benefit of creditors, seeks any similar relief under any bankruptcy laws or related statutes, or a receiver is appointed for its assets, then, at Seller's sole option, all sums due or to become due from Buyer to Seller will become immediately due and payable, and concurrently, Seller may terminate any existing order between the Parties in whole or in part, defer shipment or delivery of any Products, sell any part of any undelivered Products, and exercise any other remedies available to Seller under applicable law.

6. SCHEDULE AND DELIVERY

- a. No delivery commitments will be made until a mutually agreeable schedule is developed. Shop drawings will not be scheduled until either a letter of commitment agreeing to pay for shop drawings is received, or a formal purchase order is received. Shop drawings will not be released until the Seller's credit application has been received and credit terms agreed upon.
- b. Prices are based on the shipment of all ordered material within six (6) months of the date of signed acceptance of the Proposal. Any delays in shipment, not the fault of Seller, which delay shipments partially or in full past said date are subject to escalation charges being applied to the unshipped portion.
- c. Buyer Change Orders may affect delivery times and project completion dates, especially when added during Seller's stated lead time for acquisition and production or fabrication of a Product. Seller may make delivery installments, separately invoiced and payable without regard to subsequent deliveries. Delay in delivery of any installments will not relieve Buyer of its obligations to accept the initial or any remaining installments. If shipments are delayed by Buyer, invoices may be rendered on the dates Seller is prepared to make shipments.
- d. Seller is authorized by its Buyer to order materials upon the receipt of approved color samples and shop drawings unless the Buyer directs Seller in writing not to proceed. The Buyer is responsible to pay for all costs associated with the materials once purchase commitments are made.

- e. Seller cannot control and will not be responsible for material availability or lead times from its suppliers and consequential impact upon the project schedule. Prompt submittal approvals by Buyer is encouraged to help expedite the material procurement process.

7. DRAFTING

- a. Seller is not responsible for the design of the framing and structure required to support its panel systems. The structure shall be adequately designed by others to accommodate the attachment of our panel systems using our standard fastening methods.
- b. All shop drawings will be submitted in electronic PDF format. One printed set of such drawings can be provided at no charge upon written request. Additional printed sets can be provided for an additional charge. All other submittals with exception of color samples will only be submitted in electronic PDF format.
- c. Proposal includes one original shop drawing submittal and one round of revisions. Additional submittals or revisions may be provided for an additional charge.
- d. Unless otherwise stated, the Buyer is required to provide field measurements to Seller which must be complete and conclusive in a clear and readable format. Errors, delays, rework, and/or overtime associated with incomplete or inconclusive field measurements may result in a Change Order and will be the responsibility of the Buyer.
- e. If applicable, after incorporation of field measurements, fabrication part drawings will be submitted to the Buyer for review and approval. The Buyer will promptly review and approve such drawings. Failure of the Buyer to review and approve the part drawings within three (3) days shall constitute acceptance of the part drawings, and the Buyer shall be solely responsible for dimensional errors in those part drawings.

8. FREIGHT AND TRANSFER OF TITLE

- a. The standard freight terms for material shipments from Seller to the delivery location are F.O.B. (Freight on Board), location of shipment. Title to the Products sold and assumption of all risk of loss from theft, casualty, or other causes transfers to Buyer once Products have shipped from Seller.
- b. If freight shipments to the delivery location are included in this Proposal, then any shipments above the quantity stated shall be additionally paid by the Buyer.
- c. Some Products may be shipped and delivered DDP (Delivered Duty Paid) to Buyer's facility or job site at which time all risk of loss for Products passes to Buyer upon delivery. All Products held by Seller as a result of Buyer's inability or refusal to accept delivery will be held at Buyer's risk, cost, and expense. Buyer assumes all obligations and risks of an absolute owner and agrees to indemnify and hold harmless Seller from any loss or damage or claim for loss or damage to persons or properties caused by reasons of the use or possession of the Products. Title to the Products will pass to Buyer upon Seller's receipt of payment of invoices for the Products.
- d. Buyer hereby grants a priority lien on the Products (including all accessions, accessories, parts, supplies, and replacements thereof) and the proceeds until all obligations of Buyer to Seller are paid in full. Upon the failure of Buyer to pay the purchase price for any Products when due, or to perform any of Buyer's obligations under these Terms and Conditions, Seller will have all rights and remedies under the Uniform Commercial Code of the State of Georgia and any other applicable law.

9. INSPECTION

- a. The Buyer is responsible for inspecting Products immediately upon delivery and notifying Seller in writing of any damaged or defective Products within 72 hours.
- b. Defective Products: If Seller determines that the Products are defective, Buyer's sole remedy is that Seller will, in its sole discretion, repair or replace the Products or credit Buyer for the purchase price of the Products. Buyer agrees that installation of any such Products or failure to notify constitutes acceptance.
- c. Damaged Products: The Buyer is responsible to file and process all freight claims for materials damaged during shipment from Seller to the delivery location. It is recommended that all deliveries should be inspected and documented with photographs by the Buyer for damaged materials before accepting shipment.

10. WARRANTIES

- a. Seller warrants all Products delivered under a Proposal against defects and workmanship for one (1) year from the completion of installation of work. This warranty does not cover damage to Products, which is caused by others, or any abnormal use or abuse, whether intentional or accidental.
- b. This warranty will have no force or effect until Seller receives payment in full for the delivered Products.
- c. Except as expressly warranted by Seller in its written warranty applicable to the Products, Seller makes NO WARRANTY OF ANY KIND, EXPRESSED OR IMPLIED, AND SPECIFICALLY MAKES NO WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. Buyer agrees to assume all risks and liability for the Products, whether used individually or in combination with other materials or goods.
- d. Seller does not provide finish warranties for Metal Composite Material (MCM), Anodized MCM, High-Pressure Laminate (HPL), Solid Plate Aluminum, or Fiber Cement panels. Any applicable finish warranties are provided directly by the third-party manufacturers of those products. Details of applicable warranties should be procured via direct consultation with the product manufacturer or their corresponding website.

- e. Seller is not liable for any third-party design, engineering or installation services or products, including, without limitation, any building wall system into which the Products are incorporated. SELLER SHALL HAVE NO LIABILITY TO BUYER (OR ANY PERSON OR ENTITY CLAIMING THROUGH BUYER) FOR LOST PROFITS, FOR LOSS OF REVENUE, OR FOR INCIDENTAL, SPECIAL, EXEMPLARY, OR CONSEQUENTIAL DAMAGES. CLAIMS FOR LOST PROFITS, FOR LOSS OF REVENUE, OR FOR INCIDENTAL, SPECIAL, EXEMPLARY, OR CONSEQUENTIAL DAMAGES ARE HEREBY WAIVED BY BUYER. Notwithstanding anything to the contrary contained herein, any written warranty separately issued by Seller for the Products shall be incorporated herein as if a part of the terms hereof.
 - f. SELLER MAKES NO WARRANTIES, EITHER EXPRESS OR IMPLIED AS TO THE ABILITY OF ITS RAINSCREEN PRODUCTS TO PREVENT, IN WHOLE OR IN PART, THE PRESENCE OF MOLD OR FUNGUS IN THE WALLS OF BUILDINGS UTILIZING PRODUCTS SOLD BY SELLER, AND SPECIFICALLY DISCLAIMS ANY AND ALL LIABILITY, OF WHATEVER NATURE, RELATING TO THE PRESENCE OF ANY MOLD OR FUNGUS WHICH MAY OCCUR.
 - g. MAXIMUM LIABILITY OF SELLER WILL NOT EXCEED THE VALUE OF PHYSICAL PRODUCT MATERIALS EXCEPT AS OUTLINED IN PRODUCT SPECIFIC PRODUCT WARRANTY. IN NO EVENT WILL SELLER BE LIABLE TO BUYER, BUYER'S CONTRACTORS, BUYERS OR ANY OTHER PERSON OR ENTITY FOR THE COST OF SUBSTITUTE GOODS OR SERVICES.
11. INDEMNITY. Except if a claim arises from the sole negligence of Seller, Buyer shall indemnify, defend and hold harmless Seller, its owners, officers, directors, employees and agents from any and all claims, actions, suits, damages, liabilities, costs, obligations, and expenses (including, for example, attorneys' fees, consultants' fees, and expert witnesses' fees) arising from or relating to (i) selection, application, use or incorporation of Products, (ii) processing or modifying Products (iii) violation, misappropriation, or infringement of any patent, trademark, copyright or other intellectual property rights of any person or entity related to compliance with Buyer's design, specifications or instructions, (iv) Product use exceeding Seller's specifications, (v) any breach of warranty or misrepresentation (express or implied) made by Buyer, its employees or agents, and (vi) any violation of law or regulation by, intentional or negligent act of, or unauthorized representation by Buyer, its employees or agents, in their marketing activities, sales, distribution or handling of Products. At Seller's request, Buyer shall defend Seller, at Buyer's expense, against any claim made against Seller, except if such claim arises from the sole negligence of Seller.
12. FORCE MAJEURE. Seller will not be liable for any delay or failure in performance of any order, in the delivery or shipment of any Products or for any damages or losses suffered by Buyer or any third party which are caused by, or in any manner arises from, directly or indirectly, in whole or in part, including, but not limited to, an act of God, a governmental act, order or regulation, a domestic or international problem such as a riot, war, act of terrorism or insurrection, strike, fire, flood, earthquake, explosion, lockout or embargo, or any criminal activities of third parties, delays or interruptions in transportation, or any other causes beyond Seller's control. Upon any such delay or failure Seller may, in its sole discretion and without any liability to Buyer, delay the performance of, partially perform, or cancel any affected order in whole or in part.
13. GOVERNING LAW, DISPUTE RESOLUTION
- a. At Seller's sole election, any claim or dispute arising out of or in connection with the Products shall be subject first to mediation and then, at Seller's sole election either to 1) arbitration under the Construction Industry Rules of the American Arbitration Association or 2) litigation as provided below. In the instance of such election, Buyer agrees that its arbitration may consolidated with any other arbitration in which Seller is or could be involved arising from the Products or sale thereof, at Seller's sole election. Unless decided otherwise by Seller, the venue for any arbitration shall be in the Atlanta, Georgia offices of the American Arbitration Association and Buyer consents to venue in that forum.
 - b. In the event Seller does not elect to arbitrate, Buyer agrees (i) to submit irrevocably and unconditionally to the exclusive jurisdiction of the state and federal courts located in Cobb County, Georgia to resolve any disputes relating to this Agreement and (ii) to waive any right to move or to dismiss or to transfer any such action brought in such court on the basis of any objection to personal jurisdiction, venue, or forum *non conveniens*.
 - c. The prevailing party in either dispute resolution forum shall be entitled to recovery from the other of its reasonable attorneys' fees and costs (including all cost of the arbitration, if arbitrated).
 - d. If Seller becomes involved in dispute resolution processes with other parties related to the sale of the Products that involve Buyer's work or knowledge, Buyer agrees, at no charge other than reasonable copying costs and travel costs, to provide all documentation and truthful testimony requested by Seller to be provided.
 - e. This agreement shall be construed under and any claims thereto shall be decided under the laws of the State of Georgia.
14. SUCCESSORS AND ASSIGNS; SEVERABILITY: These Terms and Conditions will be binding upon the Parties and their respective successors and assigns; provided, however, that Buyer may not assign or otherwise transfer (whether by operation of law or otherwise) any of Buyer's rights or obligations hereunder without Seller's prior written consent, which consent may be withheld in Seller's sole discretion. If any provision of these Terms and Conditions is held by a court of competent jurisdiction to be unenforceable, the remaining provisions of these Terms and Conditions will remain in full force and effect.
15. COSTS AND EXPENSES: Buyer will be responsible for all costs and expenses, including reasonable attorneys' fees and disbursements, incurred by Seller in enforcing any term or condition herein and Buyer will indemnify and promptly reimburse Seller for such costs and expenses.