



## EXCLUSIVE TERMS AND CONDITIONS OF SALE

### SECTION A – DEFINITIONS AND EXCLUSIVE TERMS AND CONDITIONS

**1. Definitions.** For purposes of this Agreement, the following terms shall have the following meanings:

**1.1** "Products" shall mean those certain equipment mats **sold** by TMS to Customer from time-to-time.

**2. Exclusive Terms and Conditions.** All sales of Products, shall be governed solely and exclusively by the terms and conditions contained herein (except as hereafter supplemented and/or modified in a written instrument signed by a duly authorized officer of TMS), which terms and conditions shall supersede and prevail over all terms and conditions submitted by Customer in any written order or other communication.

### SECTION B - SALE OF PRODUCTS

**3. Orders.** Customer shall initiate all purchases of Products by submitting orders, either verbally or in writing, to TMS. All orders placed by Customer shall be subject to acceptance or rejection by TMS. No order shall be binding on TMS until the earlier of TMS's acceptance in writing or shipment and, in the case of acceptance by shipment, only as to the portion of the order shipped.

**4. Acceptance of Customer Order Conditioned on Customer's Assent to Terms Herein.** TMS's acceptance of a Customer order is expressly conditioned on Customer's acceptance of the terms and conditions of sale set forth herein in their entirety without any additions, deletions, modifications or exceptions. Any terms or conditions submitted by Customer (in any order or other communication) that are different from or in addition to the terms and conditions contained herein are hereby objected to and rejected by TMS; shall not be effective or binding on TMS; and shall not become a part of the contract of purchase and sale between Customer and TMS. TMS's silence or failure to respond to any terms or conditions submitted by Customer shall not be deemed to be an acceptance or approval thereof.

**5. Price.** TMS's prices vary depending on the size, type, weight, quantity and quality of the Products ordered. The purchase price of all Products purchased from TMS shall be as determined by TMS, and mutually agreed to by Customer, on an order-by-order basis. TMS reserves the right to change its prices, and any price quotation made to Customer, at any time prior to TMS accepting a Customer order. All prices charged Customer are exclusive of freight, shipping and insurance charges, and any and all sales, use, excise or similar taxes, all of which shall be paid by Customer.

**6. Payment.** All sales are cash in advance unless credit terms have been approved by TMS in writing in advance. If TMS elects to extend credit terms to Customer, payment shall be made by Customer in lawful money of the United States within 15 days of the date of TMS's invoice. TMS shall have the right to revoke any credit terms extended to Customer at any time and reinstate cash in advance on further sales to Customer. If Customer fails to pay any sum owing to TMS when due, or otherwise fails to perform any other obligation owing to TMS, TMS shall have the right, at its option and in its sole discretion, in addition to any and all other rights or remedies, to cancel any pending orders, or to stop shipment in transit, or defer shipment, of any pending orders until Customer has paid all sums owing in full and otherwise fully complied with all obligations owing to TMS. All payments shall be applied, in TMS's sole discretion, among charges, interest, current and past-due invoices (with payments being applied to the oldest invoices first), non-lien or unbonded jobs, and other amounts otherwise due to TMS hereunder. Customer shall pay a late payment charge on any invoice not paid in full within 15 days of the date thereof equal to 1.5% per month of the unpaid balance, or if said 1.5% is deemed to be unenforceable under applicable law, the highest late payment charge permissible under applicable law.

**7. LIMITATION OF LIABILITY WITH RESPECT TO SALE OF PRODUCTS.** CUSTOMER'S SOLE AND EXCLUSIVE REMEDY WITH RESPECT TO ANY CLAIM OR DAMAGE ARISING OUT OF, OR IN CONNECTION WITH, THE SALE OF ANY PRODUCT, OR ANY BREACH BY TMS OF ITS OBLIGATIONS WITH RESPECT THERETO, SHALL BE LIMITED TO REPAIR OR REPLACEMENT OF THE PRODUCT, OR REFUND OF THE PURCHASE PRICE PAID BY CUSTOMER FOR THE PRODUCT, AT TMS'S SOLE DISCRETION; PROVIDED, HOWEVER, TMS SHALL HAVE NO LIABILITY WHATSOEVER TO CUSTOMER UNLESS (i) CUSTOMER HAS GIVEN TMS WRITTEN NOTICE OF THE DEFECTIVE OR NON-CONFORMING PRODUCT WITHIN 24 HOURS OF DELIVERY; (ii) CUSTOMER HAS OBTAINED TMS'S PRE-APPROVAL TO RETURN THE DEFECTIVE OR NON-CONFORMING PRODUCT AND HAS RETURNED THE SAME TO TMS'S WAREHOUSE, AT CUSTOMER'S SOLE COST AND EXPENSE; (iii) TMS HAS INSPECTED THE PRODUCT AT TMS'S WAREHOUSE AND DETERMINED THAT SUCH PRODUCT IS, IN FACT, DEFECTIVE OR NON-CONFORMING; AND (iv) CUSTOMER HAS PAID FOR THE PRODUCT IN FULL WHEN DUE.

**8. Security Interest.** As security for the payment and performance of all obligations of Customer hereunder, including payment of the purchase price of all Products purchased from TMS, TMS reserves, and Customer grants to TMS, a security interest in all Products purchased from TMS, now existing or hereinafter acquired, and in Customer's proceeds therefrom, including accounts receivable. This Agreement shall operate as a Security Agreement, and TMS may file such UCC-1 Financing Statements as it deems necessary to reflect said security interest.

### SECTION C - GENERAL PROVISIONS

#### 9. Delivery

**a. Method of Delivery.** TMS and Customer shall mutually select, on an order-by-order basis, one of the following methods of delivery: If Products shall be delivered by common carrier, or by Customer pick-up at TMS's warehouse, then the Products shall be sold to Customer F.O.B. seller's warehouse (the "F.O.B. Point"), at which time title to the Products and risk of loss shall pass to Customer. TMS shall, in such event, put the Products into the possession of the common carrier, or into Customer's possession, at the F.O.B. Point. If TMS uses its own vehicles and personnel to deliver Products to Customer, then title to Products and risk of loss shall not pass to Customer until TMS has delivered Products to Customer.

**b. Cost of Delivery.** Customer shall pay upon invoice, in the case of shipment by common carrier, all freight, shipping, transportation and insurance charges and any and all charges incurred after delivery of Products or Rental Products to the common carrier, or in the case of delivery by TMS, using its own vehicles and personnel, TMS's standard shipping rates in effect at the time of shipment.

**10. Duty to Inspect.** Customer shall carefully and prudently inspect all Products immediately upon delivery and shall give TMS written notice within 24 hours of delivery as to any discrepancies between the shipping papers and the actual shipment of goods, or any claim that the Products are damaged or non-conforming. If Customer fails to give such notice within 24 hours of delivery, the Products shall be deemed satisfactory and accepted "AS-IS," and Customer shall be bound to pay for the same in accordance with the terms set forth herein, and shall have no right to thereafter assert any claim against TMS with respect to shortages, damages or non-conforming Products. Customer expressly waives the right to revoke acceptance after expiration of the 24-hour inspection period.

**11. Taxes.** Customer shall be responsible for, and pay, all value-added, sale, use, license fees, assessments, charges, gross receipts or similar taxes relating to or arising out of its purchase of Products, or the use thereof.



**12. Indemnification.** Customer shall fully and forever defend (with legal counsel satisfactory to TMS) and indemnify and hold TMS, and its officers, directors, shareholders, employees, agents, successors and assigns, harmless from and against any and all claims, actions, suits, proceedings, costs, expenses, damages and liabilities, including attorneys' fees, (including any of the foregoing arising or imposed under the doctrine of strict liability in tort or product liability), arising out of, connected with, or resulting from the Products, including without limitation the selection, purchase, lease, delivery, possession, use, operation, condition or return of the Products.

**13. DISCLAIMER OF WARRANTIES.** TMS MAKES NO REPRESENTATIONS OR WARRANTIES WHATSOEVER TO CUSTOMER WITH RESPECT TO THE PRODUCTS OR THE ADEQUACY OF THE PRODUCTS FOR CUSTOMER'S INTENDED USE. TMS SPECIFICALLY DISCLAIMS ALL WARRANTIES, WHETHER WRITTEN OR ORAL, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION, ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, OR ANY WARRANTIES ARISING FROM COURSE OF DEALING OR USAGE OF TRADE.

**14. LIMITATION OF DAMAGES.** UNDER NO CIRCUMSTANCES SHALL TMS BE LIABLE TO CUSTOMER FOR ANY PUNITIVE OR EXEMPLARY DAMAGES OR ANY CONSEQUENTIAL, INCIDENTAL, INDIRECT, OR SPECIAL DAMAGES (INCLUDING WITHOUT LIMITATION DAMAGES FOR LOSS OF USE, PROFITS, REVENUE OR BUSINESS) ARISING FROM, OR IN ANY WAY RELATED TO, THE SALE, USE OF, OR INABILITY TO USE THE PRODUCTS, NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY HEREIN. THIS EXCLUSION SHALL APPLY REGARDLESS OF WHETHER SUCH DAMAGES ARE SOUGHT BASED ON BREACH OF CONTRACT, BREACH OF WARRANTY, NEGLIGENCE, STRICT LIABILITY IN TORT, OR ANY OTHER LEGAL OR EQUITABLE THEORY. NO ACTION, REGARDLESS OF FORM, ARISING OUT OF THE SALE OF PRODUCTS MAY BE BROUGHT BY CUSTOMER AGAINST TMS MORE THAN ONE YEAR AFTER THE DATE OF DELIVERY OF THE PRODUCTS TO CUSTOMER.

**15. WAIVER AND RELEASE.** OTHER THAN FOR THE LIMITED REMEDIES SET FORTH IN SECTIONS 7 AND 26 ABOVE, CUSTOMER FULLY, FINALLY, IRREVOCABLY AND UNCONDITIONALLY WAIVES ANY AND ALL OTHER RIGHTS AND REMEDIES THAT CUSTOMER MAY HAVE WITH RESPECT TO THIS AGREEMENT, SPECIFICALLY INCLUDING WITHOUT LIMITATION ANY AND ALL CLAIMS FOR DAMAGE OF EVERY KIND AND NATURE WHATSOEVER (WHETHER CONTRACTUAL OR EXTRA-CONTRACTUAL, IN LAW OR IN EQUITY) ARISING OUT OF, OR RELATED TO THE SALE OF THE PRODUCTS. OTHER THAN FOR THE LIMITED REMEDIES SET FORTH IN SECTIONS 7 AND 26 ABOVE, CUSTOMER FULLY RELEASES AND FOREVER DISCHARGES TMS, AND ITS OFFICERS, DIRECTORS, SHAREHOLDERS, EMPLOYEES, AGENTS, SUCCESSORS AND ASSIGNS, FROM ANY AND ALL CLAIMS, LOSSES, DAMAGES, LIABILITIES, COSTS, EXPENSES, ACTIONS AND CAUSES OF ACTION, OF EVERY KIND AND NATURE WHATSOEVER, THAT CUSTOMER MAY NOW OR HEREAFTER HAVE AGAINST THEM ARISING OUT OF, OR RELATING TO, THIS AGREEMENT.

**16. Delivery and Pick-Up Dates.** TMS does not agree to any specific delivery or pick-up dates, and TMS shall not be obligated to deliver or pick-up any Products by any specified date. Although TMS will, if possible, attempt to accommodate Customer's requests, TMS shall, in its sole discretion, determine all shipping dates and delivery and pick-up dates and times. If TMS provides Customer with any delivery and/or pick-up dates and times, such dates and times are "estimates" only and TMS shall have no liability to Customer for not delivering any Products to Customer by such estimated dates and times.

**17. Lien Rights.** TMS expressly reserves all lien, bond and public works rights related to the Products, and may file such documents as it deems necessary to reflect same, and nothing contained herein shall be deemed a waiver, release or discharge of any such rights. Customer agrees that TMS may demand and receive payment due hereunder directly from the owner of any project in which the Products are used.

**18. No Agency.** Neither the making of this Agreement, nor the performance of any of the provisions hereof, shall be construed (i) to constitute Customer as an agent or legal representative of TMS for any purpose whatsoever, (ii) to constitute the parties as partners, joint venturers, co-owners or otherwise as participants in a joint or common undertaking, or (iii) to allow Customer to create or assume any obligation on behalf of TMS for any purpose whatsoever.

**19. Independent Business.** Customer maintains its own independent business separate and apart from TMS and shall have sole fiscal and other responsibility for its own acts and omissions, the acts, omissions and compensation of its own employees and agents, and the expenses of the conduct of its own business. Customer acknowledges and agrees that TMS shall have no liability under any laws applicable to Customer's employees or agents, specifically including without limitation any liability under any safe employment acts, whether such liability arises from TMS's ownership of the Product or otherwise. In the event of any finding, judgment or other determination that TMS is liable under any laws applicable to Customer's employees or agents, Customer shall indemnify, defend and hold TMS harmless from all such liability.

**20. Attorney's Fees.** In the event Customer fails to pay any sums owing to TMS under this Agreement, Customer shall reimburse TMS for all collection costs and expenses, including without limitation reasonable attorney's fees, incurred by TMS in collecting such sums. In addition, in the event of any legal action to enforce or interpret this Agreement, or filed by or on behalf of a party, the prevailing party, in addition to all other amounts that the other party may be required to pay, shall be entitled to recover such additional sum for the prevailing party's reasonable attorney fees otherwise related to this Agreement, or in the event a petition in bankruptcy is and costs, as the applicable court determines to be reasonable in the action, including any proceeding at trial, on appeal, or on petition for review, and in any bankruptcy proceeding.

**21. Entire Agreement; Amendment.** The terms and conditions set forth herein (as modified and supplemented by any written instrument, including any sales acknowledgment or rental agreement, hereafter signed by a duly authorized officer of TMS) constitute the entire, final and complete agreement and understanding of the parties with respect to TMS's sale of Products to Customer. None of the terms and conditions contained herein may be added to, modified, superseded or otherwise amended, unless such addition, modification or amendment is set forth in writing and signed by a duly authorized officer of TMS by specific reference to these Exclusive Terms and Conditions. The foregoing notwithstanding, nothing contained in any purchase order or other documentation submitted by Customer shall control, supersede, amend or constitute a waiver of these Exclusive Terms and Conditions except by written amendment to said Exclusive Terms and Conditions as provided in this Section 21.

**22. Binding Effect.** All rights, remedies and liabilities herein given to or imposed upon the parties shall extend to, inure to the benefit of and bind, as the circumstances may require, the parties and their respective heirs, personal representatives, successors and, insofar as this Agreement is assignable by the terms hereof, assigns.

**23. Waiver.** No waiver of any provision of this Agreement shall be deemed, or shall constitute, a waiver of any other provision, whether or not similar, nor shall any waiver constitute a continuing waiver. No waiver shall be binding unless executed in writing by the party making the waiver.

**24. No Third-Party Beneficiaries.** Nothing in this Agreement, express or implied, is intended to confer on any person, other than the parties to this Agreement or the permitted assignees, any right or remedy of any nature whatsoever.



**25. Force Majeure.** TMS shall have no obligation or liability whatsoever arising out of or in connection with any delay or failure to perform any of its covenants or obligations under this Agreement, or any loss or damage incurred by Customer as a result thereof, if such delay or failure is caused, in whole or in part, either directly or indirectly, by act of God, fire, war, riot, civil insurrection, accident, embargo, transportation delays, governmental priority, strikes or other labor trouble, discontinuance of any Product, decree or order of any court or government, acts of domestic and/or international terrorism, or any other occurrence, act, cause or thing beyond the control of TMS, whether related or unrelated or similar or dissimilar to any of the foregoing, any of which shall, without liability, excuse TMS from performance.

**26. Severability.** If any portion of this Agreement or its application is construed to be invalid, illegal or unenforceable, then the other portions of the Agreement or its application thereof shall not be affected thereby and shall be given full force and effect without regard to the invalid or unenforceable portions.

**27. Choice of Law; Forum Selection; Consent to Jurisdiction.** This Agreement shall be governed by, construed and interpreted in accordance with the laws of the State of Mississippi (excluding the choice of law rules thereof). Customer hereby (a) agrees that all disputes and matters whatsoever arising under, in connection with, or incident to this Agreement shall be litigated, if at all, in and before a court located in Madison County, Mississippi, to the exclusion of all the courts of any other state or country; and (b) irrevocably submits to the nonexclusive jurisdiction of any state or federal court located in Madison County, Mississippi in any action or proceeding arising out of or relating to this Agreement, and hereby irrevocably waives any objection to the laying of venue of any such action or proceeding in any such court and any claim that any such action or proceeding has been brought in an inconvenient forum. A final judgment in any such action or proceeding shall be conclusive and may be enforced in any other jurisdiction by suit on the judgment or in any other manner provided by law.

**28. Survival of Covenants.** The indemnification provisions of Section 11, and any other obligations and duties which by their nature extend beyond the termination of this Agreement shall survive any termination of this Agreement and remain in effect.

**29. Facsimile Signatures.** Transmission of any signed original document by facsimile or scanning and e-mailing, shall be the same as delivery of an original. Customer will, at the request of TMS, confirm such transmitted signatures by signing an original document.

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