



## FOUNDATION BUILDING MATERIALS, LLC TERMS AND CONDITIONS

1. Definitions. Foundation Building Materials, LLC, along with all of its subsidiaries, divisions, affiliates, associates or trade names listed in Section 14 of these Terms and Conditions, are collectively referred to hereinafter as "FBM". "Terms" mean these terms and conditions, along with the terms and conditions of the commercial credit agreement that govern the sale by FBM of those products ("Products") identified on a "Delivery" or "Pick Ticket", or on a "Quotation", "Order Acknowledgement" or "Invoice" (all collectively hereinafter "Ticket") issued by FBM to its customer ("Customer") in connection with the sale of Products, and includes any related services, such as delivery.

2. Customer signatures. Signatures are not required on delivery documents in order for FBM to enforce the Terms. All persons signing Tickets on behalf of Customer represent and warrant to FBM that they are authorized to do so and that these Terms shall be binding upon Customer, and Customer affirms and ratifies that all persons signing Ticket are authorized to place such orders. Terms and the additional terms specified on the Ticket, if applicable, represent the final and complete agreement of FBM and Customer as to the purchase and sale of Products. No other terms or conditions adding to or modifying the same shall be binding upon FBM unless set forth in writing and signed by an authorized representative of FBM.

3. Price Conditions and Obligations of Payment. Customer shall pay in full for all Products on the due date specified in each respective FBM invoice issued to Customer. No Customer payments shall be subject to any setoffs, deductions or claims, unless agreed to in writing by FBM. FBM's acceptance of a Customer payment in an amount less than that due shall in no way be an accord and satisfaction between FBM and Customer or prejudice to FBM's rights and remedies to collect the full amount due. Time is of the essence regarding Customer's obligation to make on-time payments to FBM. Prices do not include any sales taxes or other charges levied by any governmental authority upon the sale, use or transportation of the Products, all of which shall be paid by Customer.

4. Shipping Responsibilities, Transfer of Title and Risk of Loss. FBM will tender all Products either to (a) Customer or (b) Customer's carrier: (i) at FBM's or manufacturer's warehouse designated on the Ticket or (ii) by delivery to the "SHIP TO" location specified on the Ticket. Both title and risk of loss of Products that are tendered at FBM's or manufacturer's warehouse shall transfer from FBM to Customer when the Products are loaded onto Customer's vehicle(s) or Customer's carrier's vehicle(s). Title and risk of loss of Products delivered to the "SHIP TO" location specified on the Ticket shall transfer either (a) at the time the Products arrive curbside at the "SHIP TO"



address and even before unloading, spreading or stocking or, (b) if the Ticket specifies that FBM shall supply the unloading, spreading and/or stocking services, then at the time the Products are so unloaded, spread and/or stocked. Any damages related to any handling of the Products after such transfer of title and risk of loss occurs shall be at Customer's sole and exclusive risk. In the event of delivery to a "SHIP TO" address, Customer represents and warrants to FBM that Customer has the ability and right to permit the access necessary for FBM to make complete delivery of the Products, specifically for ingress, egress, unloading and deposit of Products, and all related and necessary activities. FBM shall retain a Uniform Commercial Code purchase money security interest in the Products until final payment is received, and Customer grants FBM a right of repossession of all materials for which credit terms are in default, or, at FBM's discretion, until the materials are paid for. For delivery and repossession purposes, Customer hereby grants to FBM and to FBM's carrier(s) a license for entry to the construction property. Dates of shipments are estimated and not guaranteed.

5. Product Inspection and Claims of Non-conformity. Customer must inspect the Products and notify FBM in writing (email to suffice), with confirmed delivery required, of any claims of damage or non-conformity within 48 hours after delivery, with delivery defined as FBM's tender of Products to the destination at which title to Products transfers to Customer. Customer's failure to make inspection and deliver written notice of claims of damage or non-conformity within such 48 hour period shall constitute irrevocable acceptance of the delivered Products and Customer's waiver of any claims of damage or non-conformity. Following timely notice of damaged, defective or non-conforming Products which FBM delivered to Customer, Customer's sole remedy for any damaged or non-conforming Products shall be that FBM, at FBM's election, shall either: (a) replace the damaged or non-conforming Products, or (b) refund the price paid by Customer to FBM for such damaged or non-conforming Products.

6. Cancellations and Returns by Customer. If Customer fails to make payment as required by the Terms, or otherwise fails to comply with these Terms or fails to act in accordance with any other agreement between Customer and FBM, then FBM may, at its option, and in addition to other remedies, cancel any unshipped portion of Customer's order, without liability to FBM, in which case Customer remains liable for all unpaid amounts for Products already delivered. Subject only to Section 5 above, Products cannot be returned, and orders, once accepted by FBM, cannot be cancelled without FBM's prior written consent, which may be granted or withheld in FBM's sole and exclusive discretion. All Products accepted by FBM for return and refund are subject to a restocking fee of 20% of the price of cancelled or returned Products, plus all shipping costs, to be paid by Customer.

7. Warranty and Damages Disclaimer. In most instances, FBM does not manufacture the Products.<sup>[1]</sup> In those limited circumstances where FBM is the



manufacturer, FBM will honor any warranties expressly stated in writing on the product label. FBM otherwise entirely disclaims, and Customer agrees to entirely waive, all other manufacturer and seller warranties and representations, whether based in common law, statute, Uniform Commercial Code or otherwise. In the event that some or all of the Products are warranted by the manufacturer, FBM, to the extent reasonably possible and permitted by applicable law, will pass through any such warranty to Customer, but FBM is not responsible for manufacturer's warranties under any circumstances. Products are sold "AS IS" and FBM does not make and expressly disclaims any and all representations, warranties and guaranties of any kind, whether expressed or implied, as to the Products, including but not limited to implied warranties of fitness for a particular purpose or merchantability. FBM, as a good customer practice, will act as a liaison for Customer with respect to manufacturer, but makes no representations as to dispute outcome and retains the right to terminate such efforts in its sole and exclusive discretion.

Recommendations, advice, representations, warranties, commitments or agreements given or made by any person, including employees, agents or representatives of FBM, and regardless of whether in response to Customer's inquiry, or following tests for a particular purpose, or analysis or comparison to project specifications that are inconsistent with the foregoing disclaimer shall not be binding upon FBM, unless independently expressed in a writing that is signed by an authorized representative of FBM. FBM's only obligation is to provide the Products ordered by Customer (if such order is accepted by FBM) without regard to the Products' appropriateness to Customer's intended application, whether expressed, implied by circumstances or otherwise.

Customer represents and warrants that (a) it will use all Products for business and commercial purposes and not for personal, household or family uses, and (b) Customer is not a "consumer" as defined by any applicable federal or state usury or consumer protection laws, including but not limited to the Fair Credit Reporting Act, 15 U.S.C. 1681. In no event shall FBM be liable for any indirect, exemplary, punitive, incidental, consequential, lost profits, special or similar damages of any kind. Customer's damages against FBM for any claim by Customer of breach by FBM of any aspect of Terms are limited to the purchase value of the materials claimed to be damaged or non-conforming.

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<sup>[1]</sup> Prowall Building Products, Inc., of Arizona is presently the only FBM subsidiary that manufactures products.

8. Release and Indemnification. Customer: (a) on behalf of itself and its insurers and its and their respective successors and assigns, as against FBM and its agents, officers, employees, representatives and contractors and all of their respective successors and assigns ("FBM Parties"), hereby waives all rights, liabilities, losses,



claims, damages, penalties, actions, lawsuits, judgments, costs and expenses of any kind (including attorneys' fees) arising out of or related to: (i) the transport, unloading, spreading, stocking or storage of the Products (except when FBM is providing such services), (ii) the possession, use or installation of any Products, or (iii) any re-sales of Products by Customer to a third party (points i, ii and iii collectively referred to herein as "Section 8 Claims"), and (b) shall indemnify, defend and hold FBM Parties harmless against and from (i) all Section 8 Claims, and (ii) all third party claims against FBM for any mechanic's liens or payment bond claims filed by FBM to recover for delinquent amounts owed to FBM by Customer.

9. **Notice of Damage.** Any claims for damage to property claimed to have been caused by Products must be reported to FBM in writing (email to suffice) with confirmed delivery required within 48 hours after delivery is complete. Claims against FBM for damages shall be deemed waived unless an authorized FBM representative has a 48 hour period, and longer if agreed to either in writing or orally, in which to inspect the claimed damaged property before Customer or any other party undertakes repairs.

10. **Force Majeure.** Delay in delivery or else in the event of non-delivery, in whole or in part, by FBM shall not be a breach or default by FBM if performance is delayed or made impracticable by the occurrence of any one or more of the following: (a) fires, floods, or other casualties, (b) wars, riots, embargoes, governmental regulations or martial law, (c) inability to obtain necessary materials from usual sources of supply, (d) shortage of transportation or delays in transit, (e) strikes or other labor troubles, and (f) other conditions not reasonably within FBM's control, whether or not of a kind mentioned herein.

11. **Assignment.** Customer may not at any time assign any portion of its rights or obligations under Terms and pursuant to the Agreement. FBM retains the right to assign its rights and obligations so long as FBM's assignment does not materially alter the rights of Customer.

12. **Choice of Law and Jurisdiction.** Without regard to its choice of law provisions, any controversy or claim arising out of or relating to these Terms and the Agreement, which includes all sales or delivery of products regardless of credit terms granted, shall be conducted only in an appealable trial court having competent jurisdiction, and that is located in the state of the FBM office which supplied the materials. "Competent jurisdiction" is defined as any court having jurisdiction and which is capable of entering judgment, whether municipal, state or federal. This includes, at FBM's sole discretion, removal to federal court from state court or from state court to federal court, if concurrent jurisdiction exists and removal is allowed by law. Venue of county or parish shall be selected by FBM in its sole discretion. If a controversy or claim relates to or is the subject of a mechanic's lien, also known as a construction lien, FBM



may proceed in accordance with applicable law in a court of competent jurisdiction to preserve and enforce its lien rights.

13. Miscellaneous Provisions. If it becomes necessary for FBM to undertake collections of delinquent balances owed to FBM by Customer, Customer agrees to pay any cost of collection, regardless of whether suit is instituted, including reasonable attorney fees in the event of a lawsuit or appeal, along with any post-judgment collection actions necessary to enforce any judgment rendered. Customer acknowledges and agrees that in the event FBM files a lawsuit to collect any sums due, such action shall be initiated in the state in which the FBM office supplying the materials is located and in the county or parish of FBM's choosing. Customer hereby waives any statutes relating to venue and further waives any rights to trial by jury. The unenforceability or invalidity of any one or more portions of these Terms shall not render any other otherwise enforceable portions unenforceable or invalid, which remaining portions shall continue in full force and effect. No waiver by FBM of any term or any obligation of Customer shall constitute a waiver of any other term or obligation. All of Customer's representations, warranties and indemnities under Terms shall survive the consummation of or termination or cancellation of any purchase and sale of Products by FBM to Customer. Which party prepared these Terms shall have no bearing on their construction in favor of any party.

14. FBM entities. The following FBM entities are authorized to transact business pursuant to FBM's credit application. With limited exceptions, the entities listed below are registered in their respective states as the owner of the tradename "Foundation Building Materials" and are doing business under that tradename. For the remaining entities, the tradename registration is in progress.

- Arizona:** FBM Southwest, LLC, Great Western Building Materials, Inc., and Prowall Building Products, Inc.
- California:** Foundation Building Materials, LLC, and Oxnard Building Materials, Inc.
- Colorado:** FBM Wagner Distribution, LLC
- Florida:** Kobrin Builders Supply, LLC, dba Foundation Building Materials.
- Illinois:** FBM Gypsum Supply of Illinois, LLC
- Indiana:** Home Acres Building Supply Co., LLC, and V-Line Logistics, LLC
- Iowa:** FBM Gypsum Supply of Illinois, LLC



- Kansas:** FBM Wagner Distribution, LLC
- Missouri:** FBM Wagner Distribution, LLC
- Nebraska:** FBM Wagner Distribution, LLC
- Michigan:** Home Acres Building Supply, Co., Home Acres Building Supply, Co., LLC, FBM Michigan, LLC, and FBM Gypsum Supply of Illinois, LLC
- Ohio:** FBM Wholesale Builders Supply, LLC
- Pennsylvania:** FBM Wholesale Builders Supply, LLC
- Tennessee:** FBM/W&S, LLC
- Texas:** FBM Gypsum Supply, LLC, and FBM BAV, LLC
- Wisconsin:** Home Acres Building Supply, Co. and Home Acres Building Supply, Co., LLC