

# HERBERT & CONWAY, INC. TERMS AND CONDITIONS

**1. AGREEMENT.** These terms and conditions of sale apply to all goods, services, or combination of goods and services, sold, furnished or provided by Herbert & Conway, Inc. (the "Seller"). They are the exclusive terms applicable to the goods and services provided by the Seller and any conflicting or additional terms are expressly rejected and of no force or effect.

**2. PRICE; PAYMENT.** The price is stated in Seller's quotation and is firm for thirty (30) days. Prices do not include taxes, freight or insurance. Payment terms are as indicated in Seller's proposal, or if not shown in the proposal, thirty (30) days net from date of invoice unless otherwise agreed in writing. All payments shall be made without deduction, deferment, set-off, lien or counterclaim of any nature. All amounts due not paid within thirty (30) days after the date such amounts are due and payable shall bear interest at the lesser of 1.5 percent (1.5%) per month or the maximum rate of interest allowed by law.

**3. DELIVERY.** Delivery is F.O.B. the place of shipment. The customer assumes all risk of loss following delivery of the goods to the first carrier. Dates for the delivery or shipment of goods or performance of the services are approximate only and are subject to change. The Seller is not liable for delays in performance or delivery due to causes beyond its reasonable control, including any labor difficulties, shortages, strikes or stoppages of any sort, failure or delay in obtaining materials from ordinary sources, fires, floods, storms, accidents or other acts of God or any similar or dissimilar events. If such a delay occurs, the Seller may, at its option, extend the performance or delivery date for a period of time equal to the delay or terminate acceptance of the purchase order.

**4. WARRANTIES.** The Seller hereby assigns to the customer any rights it may have under any warranty extended by a third party covering the goods or any part thereof. Goods manufactured by others and resold by the Seller carry the original warranty but do not carry any additional warranty by the Seller unless stated specifically in writing or as set forth below.

(a). **LIMITED WARRANTY.** The Seller warrants that all services furnished shall be performed in a good and workmanlike manner. The duration of this warranty is ninety (90) days from the performance of the services. Except in cases where a manufacturer's warranty is available, the Seller further warrants that any goods provided by the Seller will be free from defects in material and workmanship for a period of one (1) year from the date of shipment.

(b). **WARRANTY NOTICE AND REMEDY.** For limited warranty claims only, the customer must make a claim for any breach of warranty by written notice to the Seller's home office within thirty (30) days of the discovery of the defect or non-conformance. The Seller will, at its option and expense, repair or replace, F.O.B. Seller's plant, any goods that it determines are defective, or will re-perform any services which do not meet this warranty. No expenses incurred by the buyer in replacing, repairing or returning defective goods, services, or replacement parts will be reimbursed by the Seller. If the Seller is unable to repair the goods or re-perform the services so that they conform to the warranty after a reasonable number of attempts, the Seller will refund the portion of the purchase price paid that is attributable to the goods or services that were defective. These remedies are the exclusive remedies for breach of warranty.

(c). **EXCLUSIONS FROM WARRANTY.** These warranties are inapplicable to and exclude: (i) damage caused by accident or negligence, normal wear and tear, erosion, corrosion or by disasters such as fire, flood, wind and lightning; (ii) damage caused by the failure to follow all installation and operating instructions or manuals or to provide normal maintenance; (iii) damage caused by improper water treatment; (iv) damage caused by unauthorized or improper installation of attachments, repairs or modifications; or (v) any other abuse or misuse. **THE SELLER EXPRESSLY DISCLAIMS ALL OTHER WARRANTIES EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY IMPLIED WARRANTY OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.**

**5. SECURITY INTEREST.** Until payment in full of the price, the Seller retains a purchase money security interest in the goods and any proceeds thereof to secure full payment of the price. The customer authorizes the Seller to record its security interest, to file a mechanic's lien, or both to secure payment. Upon request, the customer will promptly sign any documents reasonably related thereto. The customer will not encumber the goods with any mortgage, lien, pledge or other attachment prior to payment in full of the price therefor.

**6. HAZARDOUS MATERIALS.** Any hazardous materials encountered by the Seller at the site will be the responsibility of the customer and may cause delays in performance. Where such services involve boilers or boiler equipment, the customer shall be responsible for having the stack, chimneys and/or breeching cared for, inspected, and cleaned by a qualified provider. The Seller does not clean or inspect chimneys or breeching.

**7. SELLER'S REMEDIES:** The Seller has the right to recover all amounts owed or incurred as a result of the goods and services it has provided. Customer specifically agrees that in the event customer's creditworthiness becomes unsatisfactory to the Seller or upon customer's default prior to receipt of payment in full, the Seller shall have the following rights, in addition to any and all other rights that Seller may possess under federal, state or local law:

(a) At any reasonable time, to withhold shipment or suspend providing services in whole or in part;

(b) To require cash payments or satisfactory security for future deliveries of goods or the provision of services;

(c) To recall goods in transit and retake the same;

(d) To peaceably enter upon customer's premises to repossess the goods, without the necessity of any legal notices or process; and

(e) To terminate this agreement.

Customer acknowledges and agrees that all goods withheld, recalled, retaken or repossessed shall become the absolute and sole property of the Seller subject to the equitable right of set-off for any partial payment made to the Seller for such goods.

**8. LIMITATION OF LIABILITY. THE SELLER WILL NOT BE LIABLE FOR AND THE CUSTOMER HEREBY WAIVES AND RELEASES ANY CLAIMS AGAINST THE SELLER FOR ANY DIRECT, SPECIAL, INCIDENTAL, EXEMPLARY, INDIRECT OR CONSEQUENTIAL DAMAGES, INCLUDING LOST SALES, REVENUES OR PROFIT, LOSS OR RETURN OF OR DAMAGE TO PRODUCT, LOSS OF PROSPECTIVE ECONOMIC ADVANTAGE AND LOSS OF FACILITIES, INVENTORY, WORK-IN-PROCESS OR TIME AND MATERIALS, ARISING FROM ANY PERFORMANCE OR FAILURE OF PERFORMANCE BY THE SELLER OR ITS EMPLOYEES OR SUBCONTRACTORS UNDER THIS AGREEMENT OR A PURCHASE ORDER OR FROM THE BREACH OF WARRANTY HEREUNDER. THE TOTAL CUMULATIVE LIABILITY OF SELLER, IF ANY, FOR DAMAGES OF ANY KIND RELATING TO THE GOODS SUPPLIED OR SERVICES PERFORMED HEREUNDER OR OTHER BREACH OF THIS AGREEMENT SHALL NOT EXCEED THE PURCHASE PRICE PAID TO SELLER FOR SUCH GOODS OR SERVICES.**

**9. INDEMNITY.** The Customer shall defend, indemnify and hold harmless the Seller, its agents, directors, officers and employees, from and against any and all claims, demands, causes of action, losses, costs, damages, liabilities and expenses (including reasonable attorney's fees and litigation expenses) arising out of or resulting from customer's breach of any provision of this agreement or any negligent acts or omissions of customer, or its agents, employees, subcontractors, vendors or invitees in connection with this agreement.

**10. GOVERNING LAW AND DISPUTE RESOLUTION.** This agreement and any dispute arising under or with respect thereto shall be governed and decided in accordance with the laws of the State of Ohio. Except for Seller's right to institute legal action for collection of amounts past due, any dispute, controversy or claim arising out of, or in connection with the provision of goods, services, this agreement, or any combination thereof, including its breach, termination or invalidity, shall be finally settled without recourse to the courts in accordance with the rules of the American Arbitration Association. The number of arbitrators shall be one, the location of the arbitration shall be in Columbus, Ohio, and the proceedings shall be conducted in English. The parties agree to discuss any point of disagreement in good faith and to escalate issues within their respective companies before taking the dispute to arbitration in accordance with this section.

**11. NOTICES.** Unless specifically directed otherwise, whenever written notice is required under this Agreement, it may be provided by e-mail or other recognized electronic means and the parties further agree that communications and other business dealings between the parties may where appropriate also be conducted by such means.

**12. GENERAL.** The rights and remedies contained herein are the exclusive remedies available for breach. No course of prior dealings and no usage of the trade shall be relevant to supplement or explain any terms used herein. Neither party shall assign this Agreement or a purchase order without the prior written consent of the other party, which consent shall not be unreasonably withheld or delayed. If any provision of this Agreement is held to be invalid or unenforceable, such holding shall not affect the validity or enforceability of any other provision herein. No waiver by either party of any default or breach by the other party will operate as or be deemed a waiver of any subsequent default or breach.