

TRESPA NORTH AMERICA, LTD. (“TNA”) GENERAL TERMS AND CONDITIONS

1. Agreement to General Terms and Conditions. TNA and the Buyer identified on the TNA Order Confirmation Form (“Order”) hereby agree that the following General Terms and Conditions govern the transaction arising out of the Order. TNA and Buyer acknowledge and agree that in certain circumstances, the Order is executed pursuant to a separate written agreement – a National Fabricator, Fabricating Installer, Distribution Agreement or other controlling Agreement signed by both parties (the “Controlling Agreement” or “Agreement Documents”) –executed by TNA and Buyer regarding Buyer’s purchase of panels, products, services or deliverables, including without limitation Trespa sheet panels (collectively, the “Goods”) from TNA. TNA and Buyer intend that such Controlling Agreement, if it exists, and its respective exhibits mentioned therein, govern all purchases of the Goods by Buyer, and that any different or additional terms purported to be made or conditioned by Buyer, whether through the use of Buyer’s purchase order form or otherwise, shall be of no force or effect unless expressly approved in the Controlling Agreement executed by an authorized officer of TNA. The parties expressly intend that this Section 1 govern the interpretation of their legal rights and responsibilities, and that it supersede any different interpretation that would result from the application of UCC Code Sections regarding conflicting documents, or any other legal authority of similar effect.
2. Authority of TNA’s Agents. No agent, employee or representative of TNA has any authority to bind TNA to any representation or warranty, whether made orally or in writing, concerning the Goods, other than as specifically set forth in writing in Agreement Documents. Buyer hereby affirms that neither TNA, nor any of its agents, employees or representatives, have made representations other than those specifically set forth in writing in the Agreement Documents concerning the Goods, and Buyer affirms that its purchase of the Goods is based solely upon the representations set forth in the Agreement Documents.
3. Transportation and Claims. All Goods shall be deemed to be received in good condition unless Buyer adheres to the warranty claim procedure set forth in the applicable TNA Warranty for the Goods (the “Trespa Warranty”) or to the following procedure: claims (other than claims under the Trespa Warranty) by Buyer for shortages or for improper, defective or damaged Goods must be made in writing specifying in detail the nature and extent of the shortage, defect or damage within ten (10) business days of delivery, accompanied, in the case of claim for shortage or damage, by the original freight bill (or a legible copy thereof) with a notation on the face thereof by the local agent of the carrier listing the items or quantity short or damaged.
4. Title to Goods; Risk of Loss; Taxes. Title to the Goods, including risk of loss thereof, shall transfer from TNA to Buyer F.C.A. Shipping Point, unless indicated otherwise on an Order or Agreement Documents. Buyer is responsible for all applicable taxes and duties, except U.S. import duties on the Goods shipped from the Trespa International B.V. factory directly to a U.S. destination.
5. Time for Bringing Action. Except for claims under the Trespa Warranty, any legal action (including any arbitration proceeding) brought by Buyer pertaining to the Order must be commenced (or, in the case of arbitration, demanded) within one (1) year after the date of delivery of the Goods to Buyer.
6. Force Majeure. Neither Party to this Order shall be liable to the other Party for any failure to perform any obligations hereunder to the extent that such failure is the direct or indirect result of conditions beyond either Party’s control, 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. Quantities so affected may be eliminated from the amount ordered at the discretion of the party affected without liability and TNA may allocate its available supply among its purchasers, including its own internal customer divisions, in an equitable manner as determined by TNA in its sole discretion, but the Order shall remain otherwise unaffected. Notwithstanding the foregoing, this Section 6 shall not excuse any late payment by Buyer pursuant to this Order.
7. Limitation of Liability. IN NO EVENT SHALL TNA HAVE ANY OBLIGATION OR LIABILITY TO BUYER OR ANY OTHER PERSON OR ENTITY (INCLUDING BUYER’S CUSTOMERS OR CONTRACTORS) FOR ANY LOSS OF USE, DELAY, LOSS OR INJURY TO EARNINGS, PROFITS OR GOODWILL, OR INCIDENTAL PUNITIVE, SPECIAL OR CONSEQUENTIAL DAMAGES (EVEN IF TNA HAS BEEN ADVISED OF THE POSSIBILITY THEREOF) ARISING OUT OF OR IN CONNECTION WITH THE SALE, DELIVERY, USE, REPAIR OR PERFORMANCE OF ANY OF TNA’S GOODS SUBJECT TO THE ORDER.
8. Warranty. TNA’S SOLE AND EXCLUSIVE WARRANTY WITH RESPECT TO THE GOODS IS SET FORTH IN THE APPLICABLE TRESPA WARRANTY. NO OTHER WARRANTY, EXPRESS OR IMPLIED, IS EITHER MADE OR SHALL BE DEEMED MADE BY TNA WITH RESPECT TO THE GOODS. TNA EXPRESSLY DISCLAIMS ANY AND ALL OTHER WARRANTIES, WHETHER EXPRESS, IMPLIED OR STATUTORY, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND ANY WARRANTIES ARISING FROM COURSE OF DEALING OR TRADE OR USAGE. IF TNA DOES NOT OFFER A WRITTEN TRESPA WARRANTY FOR THE GOODS SUBJECT TO AN ORDER, THEN IN NO EVENT SHALL TNA HAVE ANY OBLIGATION OR LIABILITY TO BUYER OR ANY OTHER PERSON OR ENTITY (INCLUDING BUYER’S CUSTOMERS OR CONTRACTORS) FOR ANY LOSS OF USE, DELAY, LOSS OR INJURY TO EARNINGS, PROFITS OR GOODWILL, OR INCIDENTAL, SPECIAL OR CONSEQUENTIAL DAMAGES (EVEN IF TNA HAS BEEN ADVISED OF THE POSSIBILITY THEREOF) ARISING OUT OF OR IN CONNECTION WITH THE SALE, DELIVERY, USE, REPAIR OR PERFORMANCE OF ANY OF TNA’S GOODS SUBJECT TO THE ORDER. BUYER’S REMEDY FOR DEFECTIVE OR NONCONFORMING GOODS SHALL BE LIMITED TO, AT THE OPTION OF TNA, EITHER (1) RETURN OF THE NONCONFORMING OR DEFECTIVE GOODS AND REPAYMENT OF THE PURCHASE PRICE, OR (2) REPLACEMENT OF THE NONCONFORMING GOODS.
9. Maximum Liability. TNA’S LIABILITY ARISING OUT OF THE ORDER WILL NOT EXCEED THE ORDER PRICE. EXCEPT AS SET FORTH IN THE TRESPA WARRANTY, IN NO EVENT WILL TNA BE LIABLE TO BUYER, BUYER’S CONTRACTORS, CUSTOMERS OR ANY OTHER PERSON OR ENTITY FOR THE COST OF SUBSTITUTE GOODS. Buyer shall not be entitled to deduct from the price invoiced to it the amount of any claim asserted against TNA without TNA’s written consent.
10. Legality. In the event that any provision of these General Terms and Conditions or of the Order shall be construed to be invalid or unenforceable for any reason, such invalidity or unenforceability shall not be deemed to affect the remaining provisions thereof, and these General Terms and Conditions and the Order shall be construed and enforced as if such provision had never been included therein.
11. Waiver. The failure of either party to enforce, at any time or for any period of time, any provision of these General Terms and Conditions or Order will not be interpreted to be a waiver of such provision or of the right of such party thereafter to enforce each and every provision of the Order.
12. Disclaimer of Agency. The relationship between TNA and Buyer established under the Order is that of seller and purchaser, respectively. Buyer shall in no way be construed as acting as agent or representative of TNA in any dealings which Buyer may have with any other person, firm or corporation, and Buyer shall have no power to act for or to legally bind TNA in any such transaction. Buyer agrees that it will not in any way conduct its affairs to convey or suggest to third parties a status or identity inconsistent herewith.
13. Assignment; Third Party Beneficiaries. Buyer shall not assign this Order or any right thereunder or hereunder without TNA’s prior written consent, which shall not be unreasonably withheld. Any purported assignment without the prior written consent of TNA shall be null and void. For purposes of this Section 13, a change in control of Buyer (defined as the transfer of a controlling stock or other equity interest in Buyer) without TNA’s prior written consent shall constitute a prohibited assignment. TNA may assign the Order and rights thereunder to any person, firm, corporation or other entity without Buyer’s consent, prior, written or otherwise. Nothing expressed or implied in the Order is intended or shall be construed to give any person other than the parties hereto and their respective successors and permitted assigns any rights or remedies under or by reason of the Order.
14. Notice. Any notice, request, demand or other communication required or permitted hereunder shall be deemed to be properly given provided such notice, request, demand or other communication is transmitted to the address or facsimile number of recipient last known to sender by first class U.S. mail, postage prepaid, or by facsimile with electronic confirmation of receipt.
15. Past Due Sums. Any sums not paid when due shall bear interest at the rate of one and one-half percent (1.5%) per month (compounding) until paid, provided that if such rate of late charge is not permitted by law, the highest legal rate shall be charged. In the event payment is not made as provided herein, TNA shall have the right to withhold further Goods until payment is made or all outstanding balance owed immediately or to terminate the Order and receive damages until paid. TNA reserves the right to change credit terms on any outstanding portion of an Order if any sums not paid when due.
16. Bankruptcy. In the event Buyer is adjudicated bankrupt or files a voluntary petition in bankruptcy, makes an assignment for the benefit of creditors or applies for or consents to the appointment of a trustee or receiver over a substantial part of Buyer’s property, TNA shall have the right to terminate the Order and collect for all work performed through the date of termination and, to the extent reasonably related to such termination, following the date of termination.
17. Credit Acceptance. TNA reserves the right to secure full or partial payment in advance if, in TNA’s sole discretion, the financial condition of Buyer does not justify credit extension. TNA reserves the right to require collateral from Buyer to secure repayment for Buyer’s credit account or individual Purchase Orders.
18. Governing Law; Arbitration. This Order and the transactions contemplated hereby shall be governed by and construed in accordance with the laws of the State of New York without regard to any conflict of law principles. The Parties agree that in the event of any dispute, controversy, or claim arising out of or relating to this Order and/or its validity, interpretation, enforcement, or breach, and the Parties are unable to resolve the dispute, controversy, or claim through direct negotiation, the Parties will then attempt to resolve the dispute by mediation, using a mediator mutually agreed upon by the Parties. The cost of the mediator shall be borne equally by the parties, and each party shall bear its own attorney fees and costs in preparing and presenting its position at the mediation. The parties further agree that if the Parties are unable to resolve the dispute, controversy, or claim through mediation, any such dispute, controversy, or claim arising out of or relating to this Order or the transactions described therein shall be resolved by arbitration in accordance with the Expedited Procedures of the Commercial Arbitration Rules of the American Arbitration Association by one or more arbitrators appointed in accordance with such rules. Any judgment upon the award rendered by such arbitrator(s) may be entered in any court of competent jurisdiction. The arbitration shall take place in New York, New York. Jurisdiction of such arbitrator(s) shall be exclusive as to disputes relating to this Order or the transactions described therein and the parties hereto agree that in any such dispute the arbitrator(s) shall apply New York law. The parties hereto further agree that this agreement to arbitrate shall be specifically enforceable under the laws of the State of New York. No party shall have the right to appeal any final determination by the arbitrator(s) with respect to the matters before the arbitrator(s) or otherwise to submit a dispute relating to this Order or the transactions described therein to a court of law other than to enforce such final determination by the arbitrator(s). With respect to matters submitted to arbitration, each of the parties hereto shall bear its own respective costs, fees and expenses (including reasonable fees, expenses and disbursements of attorneys) in connection with such arbitration. Buyer and TNA shall each pay one-half of the total costs, fees and expenses of the arbitrator. Notwithstanding the foregoing, TNA shall have the right to join Buyer in any legal action or proceeding involving TNA and any third party, and the foregoing requirement to arbitrate shall not apply to any such legal action or proceeding.
19. Failure to Comply with Applicable Codes and Standards. In no event shall TNA be liable to Buyer or any third party for any claims, costs or damages arising out of or relating to lack of compliance with any applicable code(s) or industry standard(s). Buyer agrees to defend, indemnify and hold TNA harmless from any and all liability, claims, costs or damages of whatsoever kind, nature or description, arising out of or relating to lack of compliance with any applicable code(s) or industry standard(s).
20. Right to Inspect. TNA has the right but not the obligation to conduct limited building site inspections for purposes of assessing compliance with Trespa Product Warranty requirements.
21. Right to Rescind. If the Buyer fails to comply with any applicable code and/or standard, as reasonably determined by TNA, TNA has the right to rescind the contract and/or delay, halt or otherwise suspend delivery of the Goods and void any warranty.