

**H & E SMITH, INC.  
SALES TERMS AND CONDITIONS**

**I. GENERAL**

The following Terms and Conditions (“Terms”) are applicable to all sales made by H & E Smith, Inc. (“Seller”), a Delaware corporation with a registered agent located at 70, W Madison St., Suite 5750, Chicago, Illinois 60602, and the acceptance of any order is expressly conditioned upon Buyer’s consent to these Terms. No interlineations, deletions, modifications or amendments to these Terms shall be binding on Seller unless agreed to and accepted in writing by Seller.

All sales are subject to written acceptance by Seller and Seller reserves the right to reject any order for any reason, or no reason at all, in its sole discretion. Buyer must respond to Seller’s written acceptance within twenty four (24) hours of receipt of such confirmation if it wishes to cancel the order or: (i) Buyer will waive its right to cancel the order and (ii) Buyer will be deemed to have accepted these Terms.

**II. PRODUCT INFORMATION; PRICE QUOTATIONS**

The quotations or tenders are noncommittal and non-binding in nature. Any quotation or offer made by the Seller to the Buyer shall be valid for 30 days from its date of issuance. No contract shall arise until a written acknowledgment from Seller accepting the Buyer’s order, is sent by Seller to the Buyer. Seller will be entitled to adjust agreed prices on the basis of the average change in the cost price of the goods or services to be delivered and/or activities to be performed by the Seller. The adjustment of agreed prices and rates will apply as of the beginning of the first month after the Buyer has been notified in writing of the adjustment.

The weights, dimensions, capacities, characteristics, colors and other data on Seller’s catalogs, prospectus, circulars, advertisements, price lists and instructions sheets are mentioned only as general information. They are only approximate and shall not bind Seller. Specifically, Seller shall not be liable for any crazing of ceramic products, or any glaze cracks therein, as may occur and depart from illustrations advertised by the Seller. The Seller shall not be responsible for any variations resulting from the natural shrinkage of materials as a result of their manufacturing process. Any purchase order, sale or other agreement entered into between the Seller and Buyer for the purchase of the goods shall allow for reasonable variations from the stated dimensions which result from such shrinkage of the materials.

**III. DELIVERY**

Unless otherwise specified by the parties in writing, the goods are to be delivered “ex works”, at Seller’s place of business (as “ex-works”/ EXW is defined by Incoterms 2010). The method and agency of transportation and routing will be designated by the Seller, at Buyer’s expense. In the event the Buyer requests alternative shipment or routing, the resulting alternative packing, shipping and transportation charges will for the Buyer’s account.

#### **IV. DELAYS IN DELIVERY**

Any specific shipping date designated in writing signed by the Seller shall be interpreted as estimated and in no event shall dates be construed as falling within the meaning of “time is of the essence”. The Seller shall not be responsible for any delays in filling orders, nor shall it be liable for any loss or damages resulting from such delays regardless of whether such delays are due to force majeure or otherwise.

Under no circumstances shall Buyer or Buyer's customer be entitled to any damages for Seller's failure to ship on time, and Buyer agrees to indemnify, defend and hold Seller harmless against any costs and expenses related to any claims for lost profits or other consequential damages based on Seller's failure to deliver timely.

If Buyer does not accept or pick up the goods at the date specified in the order or later agreed to by Seller, the delivery of the goods shall nevertheless be deemed accepted by Buyer who shall therefore pay for the goods delivered. The storage of the goods arranged by Seller will be at the risk and expense of the Buyer. Seller shall further be entitled, to the exclusion of any other remedy for the Buyer's failure to take the products, to recover any expenses properly incurred in performing the contract and not covered by payments received for the goods delivered.

#### **V. PAYMENT**

Unless otherwise agreed by the Parties in writing, payment for the goods shall be received by Seller in accordance with the schedule stated below. In the event Seller feels insecure concerning payment by Buyer, Seller reserves the right to require cash or letter of credit payment terms. The price does not include any present or future Federal, State or Local property, sales, use, excise, license, gross receipts or other taxes or assessments which may be applicable to, imposed upon or result from this transaction or any services performed in connection with these Terms and/or the goods. The Buyer agrees to pay any such taxes or reimburse payment of such taxes by Seller.

Unless otherwise agreed by the parties in writing, payment shall be received by Seller by wire transfer into Seller's account, as follows:

- Fifty percent of the agreed price shall be received by Seller upon Five (5) business days of the execution of the contract;
- Fifty percent of the agreed price shall be received by Seller upon Five (5) business days from the date notice is given by Seller that the goods are ready for dispatch.

In the event payment is not received when due, Seller shall be under no obligation to dispatch the goods for delivery, and interest shall be due at the rate of one and one half percent (1.1/2%), or the maximum permitted by law, on the unpaid portion of the invoice sum for each period of thirty (30) days or part thereof from the due date. Seller has the right to refuse to deliver goods or services if Buyer is past due on any of its debts to Seller. Furthermore, Seller shall have the right to retake all goods immediately unless other written arrangements have been made concerning payment only if Buyer is past due. Buyer agrees to make all goods available, shipping ready, for Seller, within

five (5) days of receiving notice from Seller of its intention to retake the goods.

Buyer shall pay all of Seller's costs of collection of any amounts past due, including, but not limited to attorneys' fees, court costs, witness fees, travel and lodging, etc.

Seller will be entitled to apply payments made by Buyer first to pay those claims it deems appropriate, including interest, late charges, costs of collection, etc.

Buyer, or its affiliates or assignees, will not be entitled to suspend its payment obligations to Seller, claim any right to compensation and/or to offset its payment obligations with any obligations of Seller to Buyer, with such obligations being those set forth in these Terms or other purchase contract between the Buyer and Seller. If Buyer does not fulfill its payment obligations to Seller completely or within the applicable payment period, Seller will be entitled to suspend its obligations to Buyer completely and/or not to perform them.

## **VI. SECURITY INTEREST**

In order to protect and secure payment of all debts due and owing from Buyer and until Seller has been paid in full, Buyer hereby grants to Seller a security interest in the Products, and all proceeds and all accounts receivables resulting from the sale of the Products. In connection therewith, Buyer hereby authorizes Seller to take all necessary steps to file such financing statements and exhibits with the proper authorities, including the filing of a UCC-1 financing statement.

Until the Buyer has paid for the Products in full, Buyer shall not pledge, mortgage, encumber, or create or suffer to exist a security interest in the Products in favor of any person other than Seller unless written approval of such other security interest is given by Seller. Additionally, Buyer agrees to keep the Products insured to their full value until payment is received by Seller. In the event Buyer sells the goods to a third party before payment in full is received by Seller, Buyer agrees to secure its security interest in the goods at the time of sale to its customer in order to protect Seller's interests to the greatest extent possible.

## **VII. INSPECTION; RETURNS**

Unless Seller receives a written complaint with full particulars from Buyer regarding any defective goods or services or other complaints within five (5) business days from the date the goods or services are delivered, the goods shall be deemed to have been delivered in good condition and that the delivery is accepted. All goods are subject to the Seller's Fixing Instructions as provided in their packaging and made available to Buyer on Seller's website: [hesmithtiles.com](http://hesmithtiles.com) The Buyer is responsible for inspecting the goods and their suitability with the Fixing Instructions. Failure to consult and appropriately follow the Fixing Instruction shall not, in any event, give the Buyer any right to return the goods. Acceptance of the returned goods does not imply acknowledgment by the Seller of the reason for the return. Goods returned by the Buyer to the Seller will remain at the Buyer's risk and the Buyer will owe the agreed amounts until the Seller has credited the Buyer for these goods. The goods accepted by the Buyer from the Seller, which the Buyer has put fully or partly into use, treated, processed or delivered to others will be considered to conform to the contract.

## **VIII. LIMITED WARRANTY OF GOODS AND SERVICES; DAMAGES**

Seller's warranty is as set forth in its Limited Warranty. Seller does not authorize Buyer to provide any other warranties to end users beyond that granted in Seller's limited warranty. Buyer shall indemnify, defend and hold Seller and any affiliated companies harmless against any claims made by third parties based on any representation or warranty made by Buyer that differs in any way from Seller's limited warranty.

## **IX. INDEMNIFICATION**

Except as otherwise provided for herein, Buyer and its parent, subsidiary, affiliated and related companies, and their respective predecessors, past and present officers, directors, shareholders, agents, employees, legal representatives, successors and assigns (the "indemnifying parties") assumes liability for, and shall pay when due, and shall indemnify, reimburse and hold Seller, and its parent, subsidiary, affiliated and related companies, and their respective predecessors, past and present officers, directors, shareholders, agents, employees, legal representatives, successors and assigns (the "indemnified parties") harmless from and against any and all Claims (defined below), directly or indirectly relating to or arising out of the acquisition, use, purchase, shipment, transportation, delivery, lease or sublease, ownership, operation, possession, control, storage, return or condition of the goods (regardless of whether the goods are at the time in the possession of the indemnifying parties), the falsity of any representation or warranty of Buyer, or Buyer's failure to comply with these Terms. The foregoing indemnity shall cover, without limitation, any claim for negligence, gross negligence, or liability in tort.

"Claims" means any and all liabilities, losses, damages, actions, suits, demands, claims of any kind and nature and all costs and expenses whatsoever to the extent they may be incurred or suffered by the indemnified parties in connection with the goods (including, without limitation, reasonable attorneys' fees and expenses), fines, penalties (and other charges of applicable governmental authorities), damage to or loss of use of property (including, without limitation, consequential or special damages to third parties or damages to Buyer's property), or bodily injury to or death of any person(s) (including, without limitation, any agent or employee of Buyer, user of the goods, or any other person).

## **X. INTELLECTUAL PROPERTY RIGHTS**

All intellectual property rights to, ownership of, and interest in all goods, trademarks, trade names, logos, distinctive marks, designs, and other materials created and/or made available by the Seller hereunder or within the framework of the relationship between Buyer and Seller (the "Intellectual Property") are vested exclusively in the Seller. The Buyer shall not reproduce, modify, transfer, grant, assign, license or use the Intellectual Property, except in accordance with these Terms.

The Buyer shall not remove or alter indications concerning intellectual property rights and concerning the confidential nature of information from goods, services, programs, works, distinctive marks, inventions, designs, models and other materials created and/or made available by the Seller and goods delivered.

In the event the goods are produced by the Seller in accordance with specifications submitted by

the Buyer, the Buyer shall indemnify the Seller against all loss, damages, costs and expenses awarded against or incurred by the Seller in connection with or paid or agreed to be paid by the Seller in settlement of any claim for infringement of any patent, copyright, design, trademark or other industrial or intellectual property rights of any other person which results from the Seller's use of the buyers specifications.

Seller makes no warranty concerning the appropriateness of the goods or services to the purposes for which Buyer or its customer are acquiring same. Moreover, Seller makes no warranty that the goods or services or other intellectual property of Seller does not infringe the rights of third parties.

## **XI. TERMINATION**

Seller may terminate or suspend any contract if Buyer is in default of the payment of any obligations pursuant to or any contract between the parties, or if in the sole judgment of Seller, Buyer's financial condition and responsibility has become materially impaired. In addition, Seller shall have the right to recover damages for nonperformance, and any unpaid installments due on account of this or any other contract between the parties shall become immediately due and payable.

In case of termination or suspension due to *force majeure*, Seller reserves the right to demand immediate payment for any raw materials, materials, parts and other goods it purchased, reserved, processed or produced for the performance of an order. Buyer is bound to accept delivery of such materials, parts, or goods. Failure to accept delivery will give Seller the right to store, sell, or scrap such materials, parts or goods at Buyer's expense and risk.

The Seller will be entitled to suspend or terminate the contract unilaterally with immediate effect, fully or in part if:

- a. the Buyer has failed to fulfill one or more of its obligations under this or any other contract or sales terms;
- b. Buyer has suspended payments or has sought the protection of the Bankruptcy Courts;
- c. a petition for the involuntary bankruptcy of the Buyer has been filed;
- d. the Buyer's property on Seller's premises has been attached in execution;
- e. a resolution for the dissolution and/or winding up of the Buyer has been adopted;
- f. the enterprise operated by the Buyer has been fully or partly transferred to a third party without consent of Seller.

The Seller shall not be liable with respect to the Buyer for any damages arising from suspension or termination of the contract for the aforementioned reasons.

If the contract is suspended or terminated, performance of the contract already received by the Buyer and the payment obligations of the Buyer in connection with it will remain. The amounts invoiced by the Seller for work actually performed prior to or upon termination of the contract will be immediately due and payable after termination. Buyer agrees to pay any of Seller's costs, damages, attorneys' fees and other expenses associated with Seller's termination of any contract with Buyer pursuant to the terms of this section.

## **XII. GOVERNING LAW; JURISDICTION**

These Terms and all transactions between Seller and Buyer are governed by the laws of the State of Delaware in the United States, without reference to conflict of laws principles. The application of the United Nations Convention on the International Sale of Goods is expressly excluded. In the event of a dispute arising from or relating to these Terms, which is not resolved by negotiation between the parties, the parties hereby agree to personal exclusive jurisdiction in the state and federal courts located in Chicago, Illinois.

## **XIII. ENTIRE AGREEMENT**

These Terms constitute the sole terms and conditions of the contract between the Buyer and Seller. No other terms, conditions, or understanding, whether oral or written, shall be binding upon the Seller, unless hereafter made in writing and signed by Seller's authorized representative and, in the case of printed matter, also initialed by such representative next to such printed term or condition.

## **XIV. SEVERABILITY**

Should any provision of this Agreement be judicially declared unenforceable, that provision shall be deemed stricken and the remainder shall continue in full force and effect insofar as it remains a workable instrument for effectuating the intents and purposes of the parties. The Parties further agree to renegotiate any so severed provision to bring the same within applicable legal requirements to the greatest extent possible.

## **XV. ASSIGNMENT**

The Buyer shall not assign or transfer these Terms or any related contract or purchase order without the prior written consent of the Seller. The Seller shall expressly be permitted to assign or transfer, without the prior written consent of the Buyer, the Seller's right to receive any or all of the payment due from the Buyer under these Terms.