

# BLU54, LLC CUSTOM MATERIAL TERMS AND CONDITIONS

**1. ACCEPTANCE.** Buyer is purchasing from Seller the goods, supplies or materials described in the Purchase Order ("Goods") upon the terms and conditions stated herein and in the Purchase Order (these "Terms and Conditions"), and will become a binding contract upon acceptance either by Seller's acknowledgement or performance in whole or in part. In the event of a conflict between the terms of this Agreement and a Purchase Order, the terms included on the face of the Purchase Order shall govern. No additional or different terms contained in any Seller invoice, quote, proposal, sales order or other document required or provided by Seller will be binding on Buyer and Buyer rejects such additional or different terms.

**2. DELIVERY.** Time is of the essence. Seller shall ship all Goods in order to meet the required delivery schedule stated or referred to in the Purchase Order. Seller shall send no deliveries COD or by Shipper's Order. Seller shall provide 48 hours' notice prior to delivery of the Material. Seller shall notify Buyer promptly of any delays or threatened delays in delivery. Regardless of such notice, Seller is responsible for all Buyer costs and damages resulting from any delay of delivery of any Goods, provided Buyer makes reasonable efforts to mitigate such costs. If delivery is not made on or before the specified date, Buyer may, without liability and in addition to its other rights: (a) terminate or reschedule this Purchase Order by notice to Seller effective upon receipt as to Goods not yet shipped and/or services not yet rendered; (b) accept a revised delivery schedule with any late shipments provided via the fastest means available, shipped prepaid at Seller's sole expense and/or (c) purchase substitute Goods elsewhere and charge Seller for costs incurred for all or part of the price for substitute Goods (including any costs to expedite manufacture or deliver).

Supplier shall fabricate and deliver the Material and perform its obligations under the Purchase Order in a diligent, efficient and skillful manner, and in conformance with the Contract Documents using personnel competent to perform the work, to allow Buyer to promote the general progress of the entire construction and so that Supplier's performance or failure to perform shall not interfere with, hinder or delay other work.

**3. RISK OF LOSS.** Unless otherwise provided on the Purchase Order, all sales are DDP to the site identified on the Purchase Order (Incoterms 2010). Title and risk of loss will transfer to Buyer from Seller upon receipt by Buyer at the location identified in the Purchase Order. Seller will not retain any security interest in goods shipped to Buyer. However, if Seller is performing any repair or replacement of the Goods or removes any Goods from the site for any reason, risk of loss shall transfer back to Seller for such nonconforming or removed Goods.

**4. WARRANTY.** Supplier warrants and guarantees that the Goods will be new, fit for the purpose intended, free from defects and in compliance with all requirements of the Purchase Order and any specifications drawings, samples, or other Seller-provided descriptions of the Goods or, if no Seller description or specification was referenced, to standard commercial specifications for such Goods; and free from any liens and encumbrances. Supplier shall, without cost to BLU54, promptly remove and replace defective Goods and any other work affected by such correction which may be discovered within (a) 12 months from the date of first use or (b) 18 months from delivery, whichever is later and not to exceed 24 months from the date of delivery. The establishment of the warranty period herein relates only to Seller's obligation to repair and replace Goods and does not limit any other of Buyer's legal rights or remedies.

Nothing contained in this Article shall be construed to establish a period of limitation with respect to other obligations which Seller has under the Purchase Order. Establishment of the Warranty Period herein (or in the Purchase Order) relates only to Seller's specific obligations to remove and replace defective Goods and has no relationship to the time within which the obligation to comply with the Purchase Order may be sought to be enforced. EXCEPT AS OTHERWISE PROVIDED HEREIN, SELLER MAKES NO OTHER WARRANTY, IMPLIED OR EXPRESS, WHATSOEVER WITH RESPECT TO THE GOODS, INCLUDING BUT NOT LIMITED TO ANY WARRANTY OF MERCHANTABILITY;

WHETHER EXPRESS OR IMPLIED BY LAW, COURSE OF DEALING, COURSE OF PERFORMANCE, USAGE OF TRADE OR OTHERWISE.

**5. INSPECTION / ACCEPTANCE.** Buyer may inspect and test finished Goods, as well as components and materials, at the place of manufacture, storage and/or destination. Such inspections will be permitted with or without prior notice during normal business hours. If any goods are found at any time before, during, or after delivery to be defective in material or workmanship or damaged due to unsatisfactory packaging, or otherwise in breach of warranty, Buyer may (a) reject and/or return such goods at Seller's expense and receive full credit for same, (b) require replacement or repair of the goods without additional cost to Buyer, (c) retain and use the goods with an equitable adjustment in purchase price, (d) repair the goods at Seller's expense, and (e) recover all loss, damage and expense resulting from the rejection and/or replacement of any Goods. Such rights are in addition to any rights Buyer might otherwise have. Buyer's inspection (if any), acceptance, or rejection of Goods will not relieve Seller of any obligations herein. Buyer retains all rights and remedies available at law and in equity. Such remedies are cumulative and may be exercised concurrently or separately by Buyer. Seller will be responsible for all costs and expenses in connection with any product recalls.

**6. PRICE / PAYMENTS.** Buyer shall pay Seller the price stated in the Purchase Order. Seller shall send invoices for the Goods referenced in the Purchase Order to the address listed on the front of the Purchase Order. Seller shall include with such invoices all documentation necessary to support the amount requested, as reasonably determined by Buyer. Seller will, at Buyer's request, break-out from the price all individual charges, in its invoices. Payment will be in U.S. Dollars. Buyer may, at any time, setoff any amounts Buyer asserts Seller owes Buyer against any amounts Buyer owes to Seller or any of its affiliated companies. Payments do not constitute acceptance of improper, faulty, defective or non-conforming Goods, do not release Seller of any of its obligations under the Purchase Order or these Terms and Conditions and do not constitute a waiver of any rights or provisions hereof by Buyer. Buyer shall pay Seller within 60 days of (i) receipt of the Goods at the delivery location identified on the Purchase Order, and (ii) receipt of a complete and accurate invoice for such delivered Goods, whichever is later. Buyer shall be entitled to a 2% discount on the invoiced amount for such Goods if Buyer pays Seller the full amount of such invoice within 10 days of the applicable date in the preceding sentence. Buyer shall be entitled to a 1% discount on the invoiced amount for such Goods if Buyer pays Seller the full amount of such invoice within 20 days of the applicable date in the preceding sentence.

As a precondition to payment and/or after Seller has been paid, Seller shall furnish lien waivers as reasonably requested by Buyer.

**7. TAXES AND CONTRIBUTIONS.** As a reseller, BLU54 has reseller tax exemption. Supplier shall not include or add taxes to the Purchase Price. The Purchase Price excludes all sales, use, personal property and other taxes (including interest and penalties), whether stated separately, imposed by reason of furnishing the Material, or the acquiring, furnishing, ownership or use of any materials, equipment, labor, services or other items in connection with furnishing the Material.

However, Supplier shall pay and include in Purchase Price all federal, state, county, municipal and other taxes imposed by law or contract, and based upon labor, services, materials, equipment or other items acquired, performed, furnished or used in connection with the Material, including but not limited to (a) contributions, taxes or premiums (including interest and penalties) measured upon payroll or required to be withheld from employees; (b) pension, welfare, vacation, annuity and other benefit contributions payable in connection with labor agreements or applicable law; (c) taxes, tariffs, duties or fees payable in connection with goods imported as part of this scope of work.

**8. SELLER BREACH.** In the event of a Seller breach including, without limitation, no delivery, late delivery, delivery of nonconforming or defective goods, lapse of insurance or breach of warranty, as well as Seller's failure to provide Buyer, upon request, with reasonable assurances of future performance, then, in addition to Buyer's other rights and remedies available under this Purchase Order or at law, upon notice

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to Seller, Buyer (i) may cancel this Purchase Order, or any part hereof, (ii) require repair or replacement of the Goods, (iii) recover all loss, damage and expense resulting from the breach or other failure, and/or (iv) reject further deliveries of Goods and/or return excess or early deliveries to Seller at Seller's expense. Seller will also be in breach if the Goods fail quality requirements, including, but not limited to, audits and inspections by Buyer, a third party or the government or any governmental agency. Buyer may immediately terminate or cancel a Purchase Order if Seller becomes insolvent, is adjudicated bankrupt, files a voluntary petition in bankruptcy, makes an assignment for the benefit of creditors, or seeks protection from creditors under any applicable laws.

**9. CHANGES.** Buyer reserves the right at any time to make changes in requirements, specifications, materials, packaging, time and place of delivery, or delivery method related to the Goods. If a change by Buyer, which did not result from a breach by Seller of its obligations, causes an increase or decrease in the cost or time required for performance of the requirements of the Purchase Order, an equitable negotiated adjustment may be made to the price, quantity or delivery terms as agreed upon by Seller and Buyer.

**10. CANCELLATION.** Buyer reserves the right to cancel this Purchase Order in whole or in part at any time upon notice to Seller. Unless such change or cancellation is due to Seller's breach of its obligations, Seller shall be entitled to reasonable charges that cannot be recovered through Seller's repurposing or re-sale of the Goods or other Seller mitigation, not to exceed the Purchase Order price. Buyer has no obligation to pay Seller for work performed after Seller's receipt of the notice of a cancellation, nor for any costs that Seller could have reasonably avoided. Seller agrees that it will not be entitled to any damages for lost profits or lost opportunity related to the portion of the Purchase Order is cancelled or terminated by Buyer. Upon receipt of such termination notice, Seller shall, unless the notice directs otherwise: (a) immediately discontinue fabrication, procurement and delivery of the Goods on the date and to the extent specified in the notice; (b) place no further orders for materials, equipment or services, except as may be necessary for completion of such portion of the Goods that are not terminated; (c) promptly make every reasonable effort to procure cancellations, upon terms satisfactory to Buyer, of all material orders to the extent they relate to the terminated portion of the Purchase Order; and (d) take action to mitigate the damages or losses incurred by Seller as a result of the termination. These Terms and Conditions will survive such cancellation or termination. Notwithstanding the foregoing, if a cancellation schedule with cancellation costs is specified in the Purchase Order, Buyer shall only be responsible for the cancellation charges identified in the cancellation schedule.

**11. DOCUMENTS.** Seller shall provide to Buyer all shipping papers, including, without limitation, the original bill of lading and packing slip. Such documents will not amend in any manner the terms of the Purchase Order or these Terms and Conditions. Seller shall furnish Buyer with all Material Safety Data Sheets, test results and as-builts for qualifying material upon delivery of such material to Buyer. Supplier shall promptly prepare and submit to Buyer such shop drawings, details, design calculations, product data, submittals, samples and mockups as required by the Contract Documents and as necessary to describe completely the details of the Material and to ensure timely fabrication and delivery of the Material. Shop drawings, details, design calculations, product data and other submittals shall be provided in the form, format and quantity requested by Buyer. Approval of such items by Buyer shall mean only that the submission conforms to the general concept of the Project, and shall not relieve Supplier of its obligation to furnish the Material in compliance with the Contract Documents.

**12. DISPUTE RESOLUTION.** The Purchase Order and Terms and Conditions will be governed by, and construed and enforced in accordance with the laws of the State of Minnesota without regard to its conflicts of law principles. Any dispute arising between Buyer and Seller under this Agreement or a Purchase Order, including breach thereof, that involves the general contractor and/or owner of the Project, shall be decided in the manner provided for in Buyer's contract with the general contractor and/or owner of the Project. Any dispute arising between Buyer and Seller under the Agreement, including breach thereof that does not involve the general contractor and/or owner of the Project will, at Buyer's sole discretion, be resolved by arbitration in accordance with

the then current Construction Industry Arbitration Rules of the American Arbitration Association. The arbitration hearing will be conducted in Minneapolis, Minnesota. Buyer may enforce its rights to arbitration under this article pursuant to the Federal Arbitration Act and shall be entitled to recover its costs and attorneys' fees incurred in enforcing its right to arbitrate or any other rights in this article. If Buyer demands arbitration against Seller as agreed herein, Seller agrees not to institute or assert any lawsuits against Buyer arising out of or relating to the Project, a Purchase Order, or this Agreement. The award rendered by the arbitrator(s) pursuant to this article shall be final, and judgment may be entered upon it in accordance with the Federal Arbitration Act or other applicable law in any court having jurisdiction thereof. If Buyer is required to comply with administrative procedures for resolution of disputes by the general contractor, and Seller is notified of such procedures, Seller agrees (a) to comply with such procedures and submit any claims or disputes to Buyer in such time and in such manner as will allow Buyer to comply with such procedures, and (b) to not institute (and to stay) legal or other proceedings against Buyer until such administrative procedures have been exhausted, and agrees to fully reimburse Buyer for costs and expenses, including reasonable attorneys' fees incurred by Buyer in enforcing this requirement. Pending final resolution of any dispute or claim, and at all times, Seller shall proceed diligently with furnishing the Goods.

**13. INSURANCE** - Prior to delivering the Goods, Supplier shall procure and maintain the following minimum insurance coverages and limits of liability:

Workers' Compensation	Statutory Limits
Employer's Liability	\$1,000,000 each accident \$1,000,000 disease policy limit \$1,000,000 disease each employee
Commercial General Liability	\$2,000,000 each occurrence \$2,000,000 general aggregate applicable on a per project basis \$2,000,000 products/completed operations aggregate
Automobile Liability	\$2,000,000 each accident
Professional Liability (if required)	\$2,000,000 each claim/aggregate

Such insurance shall not be less any coverages or limits of liability specified in the Purchase Order, or coverages and limits required by law. Workers' Compensation and Employer's Liability - For any employee, owner or principal of the Supplier who shall be at the site of the project to which delivery of the Goods is made, workers' compensation coverage shall be provided whether or not required by statute. If delivery is made to a project located, and/or Supplier's principal place of business is, in the state of Illinois, coverage must be amended such that the Supplier and its insurer agree to waive any protection afforded under statute, law, ordinance or common law rights that cap the employer's liability to the amount of workers' compensation benefits it has paid or will pay on behalf of its employee. For deliveries to projects in those states where Workers' Compensation insurance is provided through a state fund and Employer's Liability coverage is not available, "stop gap" coverage shall be provided through either the Commercial General Liability policy or another state's Workers' Compensation policy.

Commercial General Liability - Insurance required under this Paragraph shall provide coverage on an occurrence form no less broad than the ISO Form CG 00 01 or equivalent and shall include coverage for Products/Completed Operations, renewed and maintained for four (4) years after delivery of the Goods or such longer period as Buyer may require in a Purchase Order. The general aggregate limit shall be per project.

Automobile Liability - Insurance required under this Paragraph shall include coverage for all owned, hired and non-owned automobiles.

Professional Liability - If Seller's Goods require any design or engineering services, including that required to meet a performance specification, Seller shall procure and pay for, or shall cause to be procured and paid for, Professional Liability/Errors & Omissions insurance with limits as indicated above. Such coverage shall be continuously maintained for four (4) years after delivery of the Goods or such longer period as Buyer may require in a Purchase Order.

Employer's Liability, Commercial General Liability and Automobile Liability insurance required herein may be arranged under single policies, or by a combination of underlying policies with the balance provided by an Excess or Umbrella Liability policy that is as materially broad as the underlying policy. To the greatest extent allowed by law, Supplier shall endorse all policies, except (if required) Professional Liability, to add BLU54, LLC, the owner of the project, and such other parties as Buyer is required to name as additional insureds on Buyer's insurance, as "additional insureds", with respect to but not limited to liability arising out of operations performed for Buyer or the owner of the project by or for Supplier. This insurance shall be primary and noncontributory to any insurance maintained by Buyer, the owner of the project, or others required to be included as additional insureds. Supplier shall maintain insurance with carriers authorized to do business in the state in which the Project is located and having a current A.M. Best rating of not less than A minus (A-), unless a different A.M. Best rating is accepted by Buyer in writing. Evidence of this insurance shall be filed with Buyer prior to commencing any work hereunder. Certificates shall be provided not less than ten (10) days prior to the expiration date of any of the required policies. Buyer shall not be obligated to review, nor shall receipt of the same, relieve supplier of complying with the insurance requirements listed herein, nor shall it be deemed a waiver of Buyer's right to enforce the terms of Supplier's obligations hereunder. Supplier shall provide written notice of cancellation or non-renewal to Buyer, within (30) days of notification of the same.

**14. INDEMNIFICATION.** To the fullest extent permitted by law, Seller shall indemnify, hold harmless and defend Buyer and the owner of the project where the Goods are installed and used and their affiliates and their respective officers, directors, employees, representatives and agents (and the owner of the project at which any Goods are used or employed) (collectively the "indemnified parties") from and against any and all suits or claims alleging damages, losses and expenses, including attorneys' fees, attributable to a) injuries to persons or damage to property (including loss of use), caused by the Goods, b) claims that any part of the Goods infringe any intellectual property rights of others (including patents, copyrights, trademarks), c) claims that the Goods were not manufactured or supplied in accordance with applicable laws, and d) claims that Seller failed to pay a supplier, subcontractor, employee or other third party; but in no case shall Seller be required to indemnify Buyer to the extent of Buyer's negligent acts or omissions.

**15. CONFIDENTIALITY/PROPRIETARY RIGHTS.** Seller shall not release any advertising or any other form of publicity mentioning Buyer or its employees or the project owner where the Goods are delivered unless Buyer approves such advertising or other form of publicity in writing. Seller acknowledges that it may have access to confidential and proprietary information and trade secrets such as, but not limited to, designs, drawings, specifications, and data of Buyer or others and agrees not to disclose any such information to any person or entity except as necessary in connection to its performance of the Purchase Order (and in such instance shall require that such person comply with the obligations of this paragraph), and Seller shall not use such information for any purpose other than to perform the execution of the Purchase Order. If Seller has executed a separate confidentiality agreement with Buyer, Seller agrees that its use and disclosure of Buyer's confidential

and proprietary information and trade secrets will be governed by the terms and conditions of such Confidentiality Agreement. All information, equipment, materials and data of every kind and description that Seller receives, directly or indirectly, from Buyer or from a third party on behalf of Buyer is and will remain the property of Buyer.

**16. INTELLECTUAL PROPERTY INFRINGEMENT.** Seller warrants that the Goods will not infringe on any existing patents, copyrights or trademark rights, and agrees to indemnify, hold harmless, and pay Buyer all judgments, decrees, costs, and expenses, including attorneys' fees, resulting from any such infringements. If any Goods furnished under the Purchase Order are held to so infringe, Seller shall, at its expense: (i) procure for Buyer the right to continue using such Goods; (ii) replace the Goods with substantially equivalent non-infringing Goods; or (iii) modify such Goods to become non-infringing with substantially similar performance.

**17. COMPLIANCE.** The Purchase Price includes, and Supplier shall obtain and pay for all permits, licenses, and fees necessary to furnish the Material in accordance with the Contract Documents. Seller warrants that the items delivered in accordance with the Purchase Order have been produced in compliance with the current requirements of local, municipal, state and federal law. Seller agrees to execute any equal opportunity documents or other federal documents required of suppliers of federal or state funded projects. Buyer shall provide such forms with the Purchase Order. If Buyer requires the Goods to perform under a contract or subcontract with the federal government, Seller will be subject to certain federal acquisition regulations, and Buyer will provide Seller with notice thereof. Seller will comply with the requirements of 41 CFR Part 60-1.4, 60-300.5(a) and 60-741.5(a). These regulations prohibit discrimination against qualified individuals based on their status as protected veterans or individuals with disabilities, and prohibit discrimination against qualified individuals based on their race, color, religion, sex, or national origin. Moreover, these regulations require that covered prime contractors and subcontractors take affirmative action to employ and advance in employment individuals without regard to race, color, religion, sex, national origin, protected veteran status or disability.

**18. MISCELLANEOUS.**

Assignment of Agreement - Seller may not assign this Purchase Order, in whole or in part, or delegate any of its obligations under this Purchase Order to any other party or entity without the prior written consent of Buyer. Any assignment or attempted assignment made without such approval will be void as to Buyer and the Purchase Order and Terms and Conditions will remain enforceable against Seller.

Safety - While on Buyer's premises or project sites, Seller and its employees, agents and representatives shall comply with all safety and security regulations of Buyer or owner of the site, and take all necessary precautions to prevent injury or damage to persons or property.

Substitutions - No substitutions of similar supplies, materials, equipment or any other portion of the Material for items called for by the Contract Documents shall be made unless approved in writing by Buyer and Owner or Architect, which approval shall not relieve Supplier from satisfactory and timely completion and delivery of the Material, or from conformance of all of the Material to the Contract Documents.