

# AVIVA METALS, INC.

## TERMS AND CONDITIONS OF SALE

- 1. Agreement, Integration and Conflict of Terms.** These terms and conditions, together with any special conditions expressly incorporated thereto in the quotation or sales form, are to govern any sale by Aviva Metals, Inc. or its affiliates ("Seller"). This writing is an offer or counteroffer by Seller to sell the material and/or services set forth on the quotation or sales form subject to these terms and conditions and is expressly made conditional on Buyer's assent to these terms and conditions. Acceptance by Buyer is expressly limited to these terms and conditions. Any additional or different terms and conditions contained in Buyer's purchase order or other communication shall not be effective or binding upon Seller unless specifically agreed to in writing by Seller; Seller hereby objects to any such conditions, and the failure of Seller to object to specific provisions contained in any purchase order or other communication from Buyer shall not be construed as a waiver of these terms and conditions nor an acceptance of any such provisions. Neither Seller's commencement of performance nor delivery shall be deemed or construed as acceptance of Buyer's additional or different terms and conditions. Buyer agrees that these terms and conditions, together with any accompanying quotation and any special conditions or limited process guarantees or documents referred to or included within the quotation and expressly made a part of this agreement, (e.g., drawings, illustrations, specifications, or diagrams), is the complete and final agreement between the parties ("Agreement"). This Agreement supersedes all prior negotiations, representations, or agreements, either written or oral, between the parties and, further, can only be altered, modified or amended with the express written consent of Seller.
- 2. Quotation, Withdrawal, Expiration.** Quotes are valid for thirty (30) calendar days from the date of issuance unless otherwise provided therein. Seller reserves the right to cancel or withdraw the quotation at any time with or without notice or cause prior to acceptance by Buyer. There is no Agreement if any conditions specified within the quotation or sales form are not completed by Buyer to Seller's satisfaction within thirty (30) calendar days of Seller's acknowledgment in writing of an order unless otherwise provided therein. Seller nevertheless reserves its right to accept any contractual documents received from Buyer after this 30-day period.
- 3. Prices.** Prices apply to the specific quantities stated on the quotation or sales form. Unless otherwise agreed to in writing by Seller, all prices are Ex Works Seller's shipping location (as defined in accordance with the latest version of Incoterms), and do not include transportation costs or charges relating to transportation, which costs and charges shall be solely the responsibility of Buyer unless otherwise agreed in writing by Seller. Prices include standard packing according to Seller's specifications for delivery. All costs and taxes for special packing requested by Buyer, including packing for exports, shall be paid by Buyer as an additional charge. Prices are subject to change without notice.
- 4. Taxes.** The price for the material or services does not include any applicable sales, use, excise, GST, VAT, or similar tax, duties or levies. Buyer shall have the responsibility for the payment of such taxes if applicable.
- 5. Payment Terms.** Seller reserves the right to require payment in advance or C.O.D. and otherwise modify credit terms should Buyer's credit standing not meet Seller's approval. Unless different payment terms are expressly set forth in the quotation or sales form or order acknowledgment, invoicing will occur upon shipment of material or completion of services. Payment shall be made in U.S. Dollars. Payment in full is due within thirty (30) days from the invoice date. In the event payment is not made when due, Buyer agrees to pay Seller a service or finance charge of the lesser of (i) one and one-half percent (1.5%) per month (18% per annum), or (ii) the highest rate permitted by applicable law, on the unpaid balance of the invoice from and after the invoice due date. Buyer is responsible for all costs and expenses associated with any checks returned due to insufficient funds. All credit sales are subject to prior approval of Seller's credit department. Export shipments will require payment prior to shipment or an appropriate Letter of Credit. Upon default by Buyer in payment when due, Buyer shall immediately pay to Seller the entire unpaid amounts for any and all shipments made to Buyer irrespective of the terms of said shipment and whether said shipments are made pursuant to this Agreement or any other contract of sale between Seller



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and Buyer, and Seller may withhold all subsequent shipments until the full amount is settled. Acceptance by Seller of less than full payment shall not be a waiver of any of its rights hereunder. Buyer shall not assign or transfer this Agreement or any interest in it, or monies payable under it, without the written consent of Seller and any assignment made without such consent shall be null and void.

6. **Delivery, Risk of Loss.** Delivery dates are estimates, and time is not of the essence. All shipments will be made Ex Works Seller's shipping location unless otherwise specified. Seller shall not be responsible to Buyer for any loss, whether direct or indirect, arising out of or relating to any failure of the material to be delivered by the specified delivery date. In the absence of specific instructions, Seller will select the carrier. Risk of loss for services shall pass to Buyer at completion of services. Upon completion of the agreed Incoterm, title and the risk of loss for material shall pass to Buyer. Buyer shall reimburse Seller for the additional cost of its performance resulting from inaccurate or lack of delivery instructions, or by any act or omission on Buyer's part. Any such additional cost may include, but is not limited to, storage, insurance, protection, re-inspection and delivery expenses. Buyer further agrees that any payment due on delivery shall be made on delivery into storage as though material had been delivered in accordance with the order.
7. **Warranty and Disclaimer** Seller warrants that, for a period of thirty (30) days from the date of shipment, Products supplied hereunder will conform to the Industry Standards identified in writing by Seller's suppliers and any specifications jointly agreed to by Seller and Purchaser in writing for this Agreement. Purchaser shall promptly report any failure to conform to this warranty in writing to Seller within such thirty (30) day period, whereupon Seller shall, at Seller's sole option: (a) instruct Purchaser to return such Product to Seller and correct such nonconformity by suitable repair or replacement at Seller's premises during Seller's normal business hours, (b) replace such Product, F.O.B. point of shipment, and/or (c) refund the purchase price of such Product. Purchaser shall, at its expense, store and maintain Products in accordance with good industry practices and comply with all specific recommendations by Seller (if any) regarding such Products. Seller shall have no obligation with respect to a Product that has been subject to abuse, misuse, negligence or accident, or if Purchaser fails to perform any duties stated in this agreement with respect to such Product. Seller shall have the right to test, inspect, or take samples of Products claimed by Purchaser to be defective and if, upon such test or inspection, a Product is found not to be defective, or otherwise not to fall within the scope of the warranty, all costs expended by Seller in connection with such inspection, testing, and sampling shall be charged to and be borne by the Purchaser at Seller's standard rates then in effect. Seller makes no other warranty or representation whatsoever as to the Products, expressed or implied, and all implied warranties or merchantability and fitness for a particular purpose are specifically excluded.
8. **THE FOREGOING WARRANTY IS EXCLUSIVE AND IN LIEU OF ANY AND ALL OTHER EXPRESS, ORAL, OR IMPLIED WARRANTIES, GUARANTEES, CONDITIONS OR TERMS OF WHATEVER NATURE RELATING TO THE MATERIAL AND SERVICES PROVIDED HEREUNDER, INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, WHICH ARE HEREBY EXPRESSLY DISCLAIMED AND EXCLUDED. BUYER'S EXCLUSIVE REMEDY AND SELLER'S AGGREGATE LIABILITY FOR BREACH OF ANY OF THE FOREGOING WARRANTIES ARE LIMITED TO THE REPAIR, REPLACEMENT, RE-PERFORMANCE, OR REFUND.**
9. **Inspection.** Buyer shall have the right to inspect the material upon their receipt. Buyer shall notify Seller in writing of any nonconformity of the material with this Agreement within five (5) days from receipt by Buyer. Failure to give such applicable notice shall constitute a waiver of Buyer's right to inspect and/or reject the material for nonconformity and shall be equivalent to an irrevocable acceptance of the material by Buyer. Claims for loss of or damage to material in transit must be made to the carrier, and not to Seller.
10. **Seller's Limitation of Liability. IN NO EVENT SHALL SELLER'S LIABILITY ARISING UNDER OR RELATED TO THIS AGREEMENT EXCEED THE AMOUNT PAID BY BUYER UNDER THIS AGREEMENT. SELLER SHALL HAVE NO LIABILITY FOR LOSS OF PROFIT, LOSS OF ANTICIPATED SAVINGS OR REVENUE, LOSS OF INCOME, LOSS OF BUSINESS, LOSS OF PRODUCTION, LOSS OF OPPORTUNITY, LOSS OF USE, LOSS OF REPUTATION,**



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**INDIRECT, CONSEQUENTIAL, INCIDENTAL, PUNITIVE OR EXEMPLARY DAMAGES, HOWSOEVER ARISING, WHETHER IN CONTRACT, TORT, OR OTHERWISE, REGARDLESS OF WHETHER SELLER HAS BEEN APPRISED OF SUCH LOSSES IN ADVANCE.**

- 11. Force Majeure.** Seller may cancel or suspend this Agreement and Seller shall have no liability for any failure to deliver or perform, or for any delay in delivering or performing any obligations, due to acts or omissions of Buyer and/or its contractors, or due to circumstances beyond Seller's reasonable control, including but not limited to acts of God, fire, flood or other natural disasters, war and civil disturbance, riot, acts of governments, terrorism, disease, currency restrictions, labor shortages or disputes, unavailability of materials, fuel, power, energy or transportation facilities, failures of suppliers or subcontractors to effect deliveries, in which case the time for performance shall be extended in an amount equal to the excused period, provided that Seller shall have, as soon as reasonably practicable after it has actual knowledge of the beginning of any excusable delay, notified Buyer of such delay, of the reason therefor and of the probable duration and consequence thereof. Seller shall use its commercially reasonable efforts to eliminate the cause of the delay, interruption or cessation and to resume performance of its obligations hereunder without undue delay.
- 12. Cancellation.** Except as otherwise provided in this Agreement, no order may be canceled unless requested in writing by either party and accepted in writing by the other. In the event of a cancellation by Buyer, Buyer shall, within thirty (30) days of such cancellation, pay Seller a cancellation fee, which shall include all costs and expenses incurred by Seller up to the receipt of the request for cancellation including, but not limited to, all commitments to its suppliers, subcontractors and others, all fully burdened labor and overhead expended by Seller, plus a reasonable charge for profit. Return of material shall be in accordance with Seller's most current Return Materials Authorization and subject to a minimum fifteen percent (15%) restocking fee.
- 13.** Notwithstanding anything to the contrary herein, should the financial responsibility or condition of Buyer is such that Seller in good faith deems itself insecure, if Buyer becomes insolvent, if a material change in the ownership of Buyer occurs, if Buyer fails to make any payments in accordance with the terms of its contract with Seller, in the event of the commencement by or against Buyer of any voluntary or involuntary proceedings in bankruptcy or insolvency, or in the event Buyer shall be adjusted bankrupt, make a general assignment for the benefit of its creditors, or if a receiver shall be appointed on account of Buyer's insolvency, or in the event Buyer does not correct or, if immediate correction is not possible, commence and diligently pursue the cure of any default of Buyer to comply with any of the provisions or requirements of this Agreement within ten (10) calendar days after being notified in writing of such default by Seller, Seller may, by written notice to Buyer, without prejudice to any other rights or remedies which Seller may have, terminate its further performance of this Agreement. In the event of such termination, Seller shall be entitled to receive payment as if Buyer had canceled the Agreement as per the preceding paragraph. Seller may also stop material in transit and defer or decline to make delivery of material, except upon receipt of satisfactory security or cash payments in advance. Seller may nevertheless elect to complete its performance of this Agreement by any means it chooses. Buyer agrees to be responsible for any additional costs incurred by Seller in so doing. Upon termination of this Agreement, clause 9 herein and the other rights, obligations and liabilities of the parties which shall have arisen or been incurred under this Agreement prior to its termination shall survive such termination.
- 14. Proprietary Information, Injunction.** Seller's designs, illustrations, drawings, specifications, technical data, catalogs, "know-how", economic or other business or manufacturing information (collectively "Proprietary Information") disclosed to Buyer shall be deemed proprietary and confidential to Seller. Buyer agrees not to disclose, use, or reproduce any Proprietary Information without first having obtained Seller's express written consent. Buyer's agreement to refrain from disclosing, using or reproducing Proprietary Information shall survive completion of the work under this Agreement. Buyer acknowledges that its improper disclosure of Proprietary Information to any third party will result in Seller's suffering irreparable harm. Seller may seek injunctive or equitable relief to prevent Buyer's unauthorized disclosure. Information disclosed by Buyer hereunder shall not be considered confidential or proprietary to Buyer unless otherwise agreed to in writing by Seller prior to Buyer's disclosure.



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15. **Specifications.** Changes in specifications requested by Buyer are subject to approval in writing by Seller. In the event such changes are approved, the price for the material and the delivery schedule shall be changed to reflect such changes.
16. **Buyer Warranty.** Buyer warrants the accuracy of any and all information relating to the details of its operating conditions, including temperatures, pressures, and where applicable, the nature of all hazardous materials. Seller can justifiably rely upon the accuracy of Buyer's information in its performance. Should Buyer's information prove inaccurate, Buyer agrees to reimburse Seller for any losses, liabilities, damages and expenses that Seller may have incurred as a result of any inaccurate information provided by Buyer to Seller.
17. **Minimum Order.** Seller reserves the right to refuse to process any order that does not meet Seller's stated quantity requirements for any given product or group of products.
18. **Quality Levels.** Prices are based on quality levels commensurate with normal processing. If a different quality level is required, Buyer must specify its requirements, as approved in writing by Seller, and pay any additional costs that may be applicable.
19. **Product Recalls.** Buyer shall take all reasonable steps (including, without limitation, those measures prescribed by the Seller) to: (a) ensure that all customers of the Buyer and authorized service personnel who own or use affected products are advised of every applicable recall campaign of which the Buyer is notified by the Seller; and (b) ensure that modifications of which the Buyer is notified by the Seller, by means of service campaigns, recall campaigns, service programs or otherwise, are made with respect to any products sold or serviced by Buyer to its customers or authorized service personnel. The reimbursement of Buyer for material and labor used in making those modifications shall be as set forth in the campaign or program instructions. Without the prior consent of the Seller, the Buyer shall not disclose to any other third party the information contained in service campaign, recall campaign or service program literature. Should Buyer fail to perform any of the actions required under this section, Buyer shall be liable to Seller for any costs, liabilities, damages resulting therefrom.
20. **GOVERNING LAW. THE TERMS OF THIS AGREEMENT AND ALL RIGHTS AND OBLIGATIONS HEREUNDER SHALL BE GOVERNED BY THE LAWS OF THE STATE OF SELLER'S OFFICE TO WHICH THIS ORDER HAS BEEN SUBMITTED (WITHOUT REFERENCE TO PRINCIPLES OF CONFLICTS OF LAWS). THE RIGHTS AND OBLIGATIONS OF THE PARTIES HEREUNDER SHALL NOT BE GOVERNED BY THE 1980 U.N. CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF MATERIAL.**
21. **Titles.** The section titles are for reference only, and shall not limit or restrict the interpretation or construction of this Agreement.
22. **Waiver.** Seller's failure to insist, in any one or more instances, upon Buyer's performance of this Agreement, or to exercise any rights conferred, shall not constitute a waiver or relinquishment of any such right or right to insist upon Buyer's performance in any other regard.
23. **Severability.** If any term herein should prove invalid or otherwise unenforceable, such term shall be excluded to the extent of such invalidity or unenforceability, but shall not affect the validity or continuing force and effect of any other provision of this Agreement. Such term shall be deemed modified and replaced by a valid and enforceable term that most closely expresses the intent of the parties.



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