

## **Dayton Brick Company d/b/a D&M Welding**

### **Terms and Conditions**

**1. Parties:** Dayton Brick Company, an Ohio corporation DBA D&M Welding (hereinafter referred to as "DMW"), and the person or company purchasing referred to as "Buyer." All materials, products, goods, or work described regardless of type, will be collectively referred to as "Products."

**2. Documents Incorporated:** These Terms and Conditions hereby incorporate any and all estimates, proposals, purchase orders, quotations and confirmations and/or acceptances of any purchase order submitted and exchanged by and between DMW and Buyer.

**3. Credit Approval:** All of DMW's credit requirements must be met and current in order to receive credit terms. If those terms requirements are not met, advance payment may be required before acceptance of any purchase order.

**4. Price Adjustments; Payments:** The prices stated herein do not include any sales, use, or other taxes unless so stated specifically. Such taxes will be added to invoice prices in those instances in which DMW is required to collect them from Buyer; provided, however, that if DMW does not collect any such taxes and is later asked by or required to pay the same to any taxing authority, Buyer will make such payment to DMW or, if requested by DMW, directly to the taxing authority. At DMW's option, prices may be adjusted to reflect any increase in the costs of v resulting from state, federal or local legislation, or any change in the rate, charge, or classification of any carrier.

Unless otherwise specified by DMW, all prices are F.O.B. DMW's yard/facilities unless otherwise agreed by BMW and Buyer in writing. Buyer's payment to DWM will be net/cash 30 days from date of invoice. Invoices unpaid and past due will be subject to a service charge on the unpaid balance at an interest rate equal to the lesser of eighteen percent (18%) per annum or the maximum allowable interest rate under applicable law, and Buyer shall be responsible and liable for all expenses incurred by DMW in collection of outstanding amounts due, including reasonable attorneys' fees and expenses incurred by DMW in collection.

**5. Scheduling:** All scheduling changes are contingent on the prior written acceptance by DMW. Additional charges resulting from scheduling changes shall be the sole responsibility of the Buyer.

**6. Dates, Title/Risk and Shipment:** All work and/or delivery dates are approximate, and DMW shall not be responsible for any damages of any kind resulting from any delay. Regardless of the manner of shipment, title to any Products and risk of loss or damage thereto shall pass to Buyer upon tender to the carrier at Buyer's or DWM's facility/yard as agreed in writing by the Parties, except in those

instances in which delivery is made by DMW vehicles. Unless otherwise stated herein, Buyer may exercise its judgment in choosing the carrier and means of delivery. No deferment of shipment at Buyer's request beyond the respective dates indicated will be made except on terms that will indemnify DMW against all loss and additional expense, including, but not limited to demurrage, handling, storage and insurance charges.

**7. Warranty:** DMW warrants only its workmanship, to be free from defects for a period of twelve (12) months from the date of delivery or completion to Buyer, under normal and proper use in accordance with instructions of DMW. DMW's liability under such warranty or in connection with any other claim shall be limited to the replacement of parts at DMW's expense.

**EXCEPT AS EXPRESSLY STATED ABOVE, DMW MAKES NO WARRANTY, EXPRESS OR IMPLIED, WHETHER OF MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE OR USE OR OTHERWISE, ON THE PRODUCTS, OR ON ANY PARTS OR LABOR FURNISHED.**

**8. Excess Materials:** Any unique excess inventory caused due to the following will be the responsibility of the Buyer:

1) Minimum purchase quantities beyond the actual order,

2) Non-returnable/non-cancelable materials, or

3) Design changes. In addition, any materials purchased for an order that is delayed at the request of the Buyer will be billed to the Buyer after 6 months if the order has still not been filled.

**9. Cancellations:** After acceptance by DMW, orders shall not be subject to cancellation by Buyer, except with DMW's prior written consent and upon terms that will indemnify DMW against all direct, incidental, and consequential losses or damages. In the event of an approved cancellation, cancellation charges may apply. All cancellation charges shall be the responsibility of the Buyer. Cancellation charges will be calculated based on the status of product in process (value will be determined on raw materials costs associated with work order in process and labor charged to the job), raw materials in stock or on order/purchased that cannot be returned due to minimum buy requirements, NCNR, changes and do not include additional services, product or raw materials relating to the order. Cancellation charges may exceed the value of the order in the event excess materials apply. DMW's approval and consent to a Buyer's cancellation of an accepted order shall be at DMW's, sole discretion.

**10. Claims; Commencement of Actions:** Buyer shall promptly inspect all Products and/or work upon delivery or the completion of work. No claims by Buyer will be allowed unless such claims are reported in writing within sixty (60) calendar days after delivery or the completion of work. In the case of an alleged breach of warranty, written notice to DMW shall be given not more than sixty (60)

calendar days after the date within the warranty period on which the defect is or should have been discovered by Buyer. All notices required under this Paragraph, shall be given in writing to DMW's President.

Any action based upon breach of contract or upon any other claim arising out of this sale (other than an action by DMW for any amount due from Buyer) must be commenced within one (1) year from the date of the tender of delivery or work completion or, in the case of a cause of action based upon an alleged breach of warranty, within one (1) year from the date within the warranty period on which the defect is or should have been discovered by Buyer.

Notwithstanding any other provision of these Terms and Conditions, DMW may bring a court action for collection of amounts due and owing by a customer, solely in the Montgomery County Court of Common Pleas, Dayton, Ohio. Buyer shall reimburse DMW all of its costs and expenses in collection of amounts due herein, including but not limited to attorney fees and related costs and expenses. Ohio law shall govern any court action filed by DMW for collection of amounts due and owing by Buyer.

**11. Dispute Resolution-Compulsory Arbitration:** Except for the right of DMW to bring a court lawsuit to collect amounts due and owing by Buyer, any dispute arising between the Parties shall be decided by dispute resolution procedures as follows:

a. The Parties will attempt in good faith to resolve any controversy or dispute arising out of or relating to their transaction, promptly by negotiation between authorized persons for each party who have authority to settle the controversy; and

b. In the event that informal negotiations do not resolve an ongoing controversy or dispute, the Parties agree to resolve the same by compulsory arbitration to take place in Dayton, Ohio and which will proceed in accordance with the Commercial Arbitration Rules of the American Arbitration Association and in accordance with the laws of the State of Ohio without regard to the provisions thereof concerning conflicts of law. Within seven (7) days or longer if the parties mutually agree after either party elects arbitration, DMW and Buyer shall each select one (1) arbitrator with a third arbitrator selected by the two (2) arbitrators chosen by the parties. The party electing arbitration shall bear the costs of the same including paying all arbitrator's fees. Further, the non-prevailing party in an arbitration shall reimburse the other for their attorneys' fees and related costs and expenses incurred in arbitration.

**12. Parts Allocation:** Buyer shall reimburse DMW for all premium or other payments for procuring materials outside the initial proposal terms and/or qualified material providers.

**13. Change Notification:** Notification of proposed Buyer's change(s) shall be only submitted in writing, and are subject to DMW's prior, written approval. Buyer is responsible for all costs associated with all change notification. Permanent changes resulting in additional material and or labor costs shall require an additional quote.

**14. Deviations:** Any purchase order must reflect and accept these Terms and Conditions state. Any deviation from this quotation will have to be negotiated and accepted in writing by DMW. Failure of Buyer to not reflect these Terms and Conditions on any purchase order does not invalidate these Terms and Conditions which are binding on the Parties.

**15. Quote Validity:** Quotations, proposals and/or estimates ("quotation") furnished by DMW are not intended as and shall not be construed as constituting an offer to Buyer. Any quotation or confirmation of DMW is subject to, and shall not become binding upon DMW until (i) actual receipt by DMW of Buyer's written order based on all the Terms and Conditions stated herein, without qualification, received by DMW within 60 days after the date of quotation (unless otherwise noted in quote or confirmation), and (ii) DMW's written acceptance of such order at its main office in Dayton, Ohio. A quotation is subject to change if the actual information or documentation is significantly different from the information supplied at the time of request for quotation. Quotations are also subject to change based on materials pricing. Pricing at the time of quotation may differ from actual pricing upon order placement.

**Documentation requirements include but are not limited to:** Bill of Materials with approved manufacturers and assembly drawings, including drawings for fabricated items and shipping requirements

**16. Lead Times:** Delivery dates and lead times indicated in the proposal are best estimates based on previous experience, process flow at time of quotation, and component manufacturer lead times for raw materials from quoted sources. Actual material availability, and/or delay of Buyer's furnished materials may impact original estimated delivery dates.

**17. Limitations of Liability:** IN NO EVENT SHALL DMW BE LIABLE TO BUYER FOR ANY SPECIAL, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES ARISING OUT OF, OR AS THE RESULT OF, THE SALE, DELIVERY, NON-DELIVERY, SERVICING, USE OR LOSS OF USE OF THE PRODUCTS OR ANY PART THEREOF, OR FOR ANY CHARGES OR EXPENSES OF ANY NATURE INCURRED BY BUYER WITHOUT DMW'S PRIOR WRITTEN CONSENT, EVEN THOUGH DMW HAS BEEN NEGLIGENT. IN NO EVENT SHALL DMW'S LIABILITY UNDER ANY CLAIM MADE BY BUYER EXCEED THE PURCHASE PRICE OF THE PRODUCTS IN RESPECT OF WHICH DAMAGES ARE CLAIMED.

**18. Contingencies:** DMW shall not be liable for any default or delay in performance if caused, directly or indirectly, by acts of God; war; force of arms; fire; the elements; riot; labor disputes; picketing or other labor controversies; sabotage; civil commotion; accidents; any governmental action, prohibition or regulation; delay in transportation facilities; shortage or breakdown of or inability to obtain or non-arrival of any labor, material or equipment used in the manufacture of the Products; failure of any party to perform any contract with DMW relative to the production of the Products; or from any cause whatsoever beyond DMW's control, whether or not such cause be similar or dissimilar to those enumerated. DMW shall promptly notify Buyer of the happening of any such event and of the contemplated effect thereof on the manufacture and delivery of the Products.

**19. Loss to Buyer's Property; Patent, Trademark, or Copyright Infringement, Etc:** DMW shall not be liable for, and shall have no duty to provide insurance against, any damage or loss to any goods or materials of Buyer which are used by DMW in connection with this order. Where any Product is manufactured from patterns, plans, drawings, or specifications furnished by Buyer, Buyer shall indemnify DMW against and save DMW harmless from all loss, damage, and expense arising out of any suit or claim against DMW for infringement of any patent, trademark, or copyright because of DMW's manufacture of such Product or because of the use or sale of such Product by any person. Upon DMW's request, Buyer shall appear in and assume the defense of the litigation, at no cost to DMW.

**20. Specifications, Technical Data, Etc:** Any specifications, drawings, plans, notes, instructions, engineering notices, or technical data of DMW furnished to Buyer shall be deemed to be incorporated herein by reference the same as if fully set forth. DMW shall at all times retain title to all such documents, and Buyer shall not disclose any of the same to any party other than DMW or a party duly authorized by DMW. Upon DMW's request, Buyer shall promptly return to DMW all such documents and all copies thereof.

**21. Buyer's Obligation:** If DMW shall at any time doubt Buyer's financial responsibility, DMW may demand adequate assurance of due performance or decline to make any further shipments except upon receipt of cash payment in advance or security. If DMW demands adequate assurance of due performance and the same is not forthcoming within 10 calendar days after the date of DMW's demand, DMW may, at its option, (i) continue to defer further shipments under this order and/or any other order from Buyer which has been accepted by DMW until adequate assurance is received, or (ii) cancel this order and/or any other orders from Buyer which have been accepted by DMW and recover damages. If Buyer fails in any way to fulfill the Terms and Conditions on the front or the back hereof, DMW may defer further shipments until such default is corrected or cancel this order and recover damages. DMW shall have a security interest in, and lien upon, any property of Buyer in DMW's possession as security for the payment of any amounts owing to DMW by Buyer.

**22. Limitation on Assignment:** Neither party may assign any of its rights or obligations hereunder without the prior written consent of the other except that DMW shall have the right to assign to any company with which it is affiliated or to any corporation into which it shall be merged, with which it shall be consolidated, or by which it, or all or substantially all of its assets, shall be acquired.

**23. Export:** If the Products herein are to be exported, this order is subject to DMW's ability to obtain export licenses and other necessary papers within a reasonable period. Buyer will furnish all Consular and Custom declarations and will accept and bear all responsibility for penalties resulting from errors or omissions thereon. Buyer shall not re-export the Products or any goods or items which incorporate the Products if the re-export would violate United States export laws.

**24. Equal Opportunity Clause:** This clause applies only in the event that the Products are to be used in whole or in part for the performance of government contracts and where the dollar value of said Products exceeds, or may in any one year exceed \$10,000,00:

"In connection with the performance of work under this contract, the contractor (subcontractor) agrees not to discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The aforesaid provision shall include, but not be limited to, the following: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising, layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor (subcontractor) agrees to post hereafter in conspicuous places, available for employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause."

"The provisions of the Equal Opportunity Clause, as promulgated by Executive Order 111246 dated September 24, 1965, as amended, are incorporated herein by reference."

**25. Other Rights or Remedies:** Except as otherwise provided herein, any rights or remedies granted hereunder to either party shall be in addition to, and not in lieu of, any other rights or remedies of such party at law or in equity.

**26. Entire Agreement:** These Terms and Conditions and all purchase orders, estimates, proposals, quotes, quotations, and/or confirmations incorporated herein, contain the entire agreement between DMW and Buyer and constitutes the final, complete and exclusive expression of the terms of the agreement, all prior or contemporaneous written or oral agreements or negotiations with respect to the subject matter hereof being merged herein. By way of illustration and not limitation, Buyer's order shall be deemed to incorporate, without exception, all the Terms and Conditions hereof notwithstanding any order form of Buyer containing additional or contrary terms or conditions, unless Buyer shall have expressly advised DMW to the contrary in a writing apart from such order form, and no acknowledgement by DMW of, or reference by DMW to, or performance by DMW under, an order of Buyer shall be deemed to be an acceptance by DMW of any such additional or contrary terms or conditions. In the event of a written request by Buyer for additional or contrary terms or conditions,

then such modifications may be made in these Terms and Conditions only by a written instrument signed by one of DMW's officers.

**27. Severability:** In the event that any provision hereof shall violate any applicable statute, ordinance, or rule of law, such provision shall be ineffective to the extent of such violation without invalidating any other provision herein.

**28. Governing Law:** This document and the sale of all Products shall be governed by and construed in accordance with the laws of the State of Ohio, as applicable to contracts executed and wholly performed therein.

We are pleased to submit the foregoing quote, proposal and or estimate (or their equivalent). Buyer's acceptance of the same will be subject to and incorporate these Terms and Conditions found at <http://www.dmweldingusa.com/termsandconditions>. It will be expressly made conditional on assent by Buyer to all these Terms and Conditions, which also supersede and supplement any of Buyer's Terms and Conditions or their equivalent. Buyer's acceptance of any DMW quotations, proposals, estimates, or their equivalent constitutes Buyer's acceptance of and binds Buyer to these Terms and Conditions. Means of your acceptance includes but is not limited to your issue of an order, purchase order or other accepting act of document agreeing to all of DMW's terms, including these Terms and Conditions, as offered by DMW.

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