

TERMS AND CONDITIONS OF SALE

1. GENERAL

- 1.1 Unless specifically agreed by us in writing, these Terms and Conditions of Sale ("Terms") apply to all materials and goods ("goods") and services ("services") provided by us to the person, firm or body corporate ("you") and form part of all quotations, agreements, orders or sales. They will prevail over any contrary terms and conditions, including any terms and conditions contained in your order forms or contracts.
- 1.2 References to "we" and "us" and "our" in these Terms are references to MS Engineering Limited and/or its franchisees, operators, authorised agents and representatives.

2. CREDIT

- 2.1 We will only give quotations, accept your orders, agree to provide goods and services to you or accept part payment where we have first approved your credit, or where you have given us satisfactory security for payment.

3. PRICE AND ORDERS

Quoted Price

- 3.1 You will unless otherwise agreed, pay in addition to the price of the goods and/or services all government duties, levies or taxes, insurance charges, installation and maintenance costs in respect of the goods and/or services.
- 3.2 Unless otherwise specifically stated by us in writing, the quoted price for the goods or services:
- Is in New Zealand currency.
 - The price of goods excludes GST.
 - In the case of the goods, is ex-works or store, New Zealand.
 - Is based on our current rates for labour, materials, goods and subcontractor charges.

- 3.3 In the case of imported goods, is calculated on current rates of exchange as follows:
- If we pay the overseas supplier for the imported goods prior to invoicing you or if your remittance is received after the due date for payment provided for in clause 9, the rate of exchange will be that paid by us to the overseas supplier.
 - Otherwise, the rate of exchange payable by you will be the rate quoted by the Bank of New Zealand (International Branch) ("BNZ"), on the morning your remittance is received. If your remittance is received after midday, it will be deemed to be received on the next day on which the BNZ is open for business. If there is a rate of exchange set out on our invoice this will be the rate available at the date of invoice, and it may be subject to alteration at the time of your remittance.
 - Adjustments for exchange rate fluctuations will be made by the issue of a credit note or further invoice to you, once the final exchange rate is established, price may be increased.

- 3.4 Subject to any applicable statutory provisions, the quoted price for the goods and services (including labour and materials) may be increased in accordance with any increase in the cost to us of labour, materials, goods and transport costs (if applicable), market fluctuations and exchange rates. The increased price will be the price payable by you even if the increase occurs after you accept our quotation.

Orders

- 3.5 Each accepted order will constitute a separate contract for the supply of the particular goods and/or services on these Terms. We reserve the right to deliver the goods and/or services in instalments, in which case, each instalment will comprise a separate contract and you will pay for each instalment as if it were a separate order.
- 3.6 Orders of goods ex-stock are subject to the goods being available at the time acceptance is received. Orders are subject to the availability of import licences, if applicable.

4. QUOTATIONS

Acceptance of Quotations

- 4.1 Our quotation is open for acceptance by you for the time stated in the quotation. If no such time is stated, then our quotation will be open for acceptance by you for a period of 30 days from the date of quotation.
- 4.2 We reserve the right to withdraw the quotation prior to any acceptance by you either on account of lack of stock or for any other reason. Withdrawal of the quotation will be made or confirmed in writing.

DELIVERY, RISK AND PERFORMANCE

- 5.1 Unless otherwise specifically agreed by us in writing, delivery occurs when the goods are delivered to the transport medium for delivery to you or if no delivery medium is involved, at the time you collect the goods. Risk passes to you on delivery.
- 5.2 Unless otherwise instructed by you, or by agreement between us, we will arrange for a transport medium to deliver goods to your specified delivery address. Where we make such arrangements on your behalf, we will make payment to the transport company and charge you freight under our schedule of freight charges. Payment for the freight charges is due by the 20th of the month following delivery of the goods, unless we notify you of other payment terms.
- 5.3 If you refuse to accept delivery of the goods through no fault of ours, then delivery will be deemed to have been made and you will be responsible for payment for the goods.
- 5.4 We do not accept liability or responsibility for a failure to perform the services (either wholly or in part) where the failure is caused by you. In such a case, you will be responsible for payment for the services in accordance with the originally scheduled dates for completion of the services.
- 5.5 We do not accept liability or responsibility for any delays in the delivery of the goods or completion of the performance of the services caused (directly or indirectly) by war, strikes, lockouts, fire, flood, earthquake, tempest, accident, civil commotion, perils of the sea, failure on the part of the supplier to deliver any part of the required goods or services, or any other cause beyond our reasonable control.
- 5.6 You agree to insure any goods supplied by us to their full replacement value, until they have been paid for.
- 5.7 All claims for damage during delivery or non-receipt of goods and/or services must be made either to us or to the carrier within 3 days of receipt of the goods or service delivery.
- 5.8 We will not be liable to you for any loss or damage arising in any way from any delay in delivery of goods or services. Delay in delivery does not entitle you to cancel any order.
- 5.9 We shall be under no obligation to accept returns and if we do so, we may charge a handling fee of up to 20% of the invoiced price.

6. TESTING

- 6.1 The quoted price(s) for the goods or the services does not include the costs of testing, unless specifically agreed to by us in writing. If you direct that any goods or services are to be tested, we will comply with testing arrangements, but all costs involved will be charged to you.

7. REPAIRS AND SPARE PARTS

- 7.1 To the maximum extent permitted by law, we do not guarantee that repair facilities or spare parts will be available for imported goods, unless specifically agreed by us in writing.

8. DRAWINGS, WEIGHTS AND TOLERANCES

- 8.1 All illustrations, drawings and specifications accompanying our quotation or contained in our current price lists, catalogues or advertisements, are approximate only, and are not binding unless specifically agreed by us in writing.
- 8.2 Certified dimension drawings will be supplied by arrangement.
- 8.3 We will use all reasonable efforts to ensure all weights, measurements, process capacities and other particulars of the goods or services are correct. Small deviations from weight, measurement or process capacity, cannot invalidate the agreement formed by these Terms nor be the subject of any claim by you.
- 8.4 Errors and omissions are subject to correction at the expense of the party at fault.
- 8.5 You warrant that all drawings, specifications and other information provided to us by or on your behalf are correct and accurate.

9. PAYMENT

- 9.1 Unless we have agreed to extend credit to you, you must pay in cash before supply.
- 9.2 Where we have agreed in writing to extend credit to you, payment in full is due by the 20th of the month following delivery of the goods or completion of the performance of the services.
- 9.3 We are entitled to charge interest on overdue amounts at the rate of 2% per month from the due date up to the date of payment. This is in addition to any other rights and remedies given to us in these Terms. Our right to charge interest on any outstanding sum continues after judgment. The charging of interest will in no way imply the granting of or extension of credit from us to you.

- 9.4 You represent to us that you have the authority to bind not only yourself but also all your holding companies, subsidiary companies and associated legal entities, which do business with us. We may, at any time irrespective of liquidation, receivership or management, set off any amount which we may owe to you or such legal entities against any amount which you or any of them may owe to us. You may not deduct or withhold any amount (whether by way of set-off, counterclaim or otherwise) from any money owing to us.

- 9.5 If you fail to make payment by the due date or exceed the credit limit set by us, we may cancel any unfulfilled orders you have placed with us and/or may withhold delivery of further orders and close your credit account, at our discretion.

- 9.6 If you fail to make payment by the due date, we may appoint in writing any person to be a receiver of your business and other assets on the following terms:

- a. The receiver will be governed by the provisions of the Receivership Act 1993.
- b. We may remove the receiver and reappoint another receiver.

- 9.7 You agree to pay our costs and expenses (including actual legal costs and disbursements on a solicitor and own client basis, and debt collection costs and late payment fees) in relation to the enforcement of our rights under these Terms and/or the recovery of any amount that you owe to us.

- 9.8 Receipt by us of any cheque or other bill of exchange or any promissory note will not be deemed to be payment until it has been honoured or cleared through the banking system into our bank account. Until such time, our rights will not be prejudiced or affected.

- 9.9 We will not be taken to have waived any of our rights or remedies under these Terms (including our right to waive our rights to interest on overdue accounts) unless the waiver is in writing. Full or partial waiver of any right or remedy by us does not affect our ability to enforce that right or remedy at a later time, whether in full or in part.

- 9.10 Notwithstanding clause 9.2 above, all payments shall immediately become due to us if:

- You refuse to accept delivery of any goods and/or services;
- We reasonably believe that the information which you have given us in your application for credit is incorrect or no longer correct and you have failed to give us correct information satisfactory to us within 5 days of our request;
- You sell or otherwise dispose of any of our goods which have not been paid for without our consent or otherwise than in accordance with clause 10.3;
- You become insolvent or commit any act of bankruptcy;
- A receiver, liquidator or statutory manager is appointed over any of your assets or undertaking;
- You make or attempt to make an arrangement or composition with creditors; or
- If you fail to comply with any of the provisions of clause 10 or 11.

10. RETENTION OF TITLE

- 10.1 This clause 10 shall be applicable to supplies of goods made by us to which the Personal Property Securities Act 1999 ("PPSA") does not apply.

- 10.2 Notwithstanding any period of credit and that the goods have been delivered to you, property in all goods supplied by us to you remains with us and does not pass to you until you have fully paid for all goods supplied, and discharged any other outstanding debts you may owe to us, or until such time as you have sold the goods to any third parties by way of bonafide sale at full market value whether or not you have mixed the goods with others or altered their form or whether those goods relate to the services.

- 10.3 Until you have fully paid for all the goods and discharged any other debts owing to us, you may resell the goods but you agree to the following:

- The goods supplied to you are held by you as our agent or bailee but as between yourselves and the purchaser, you sell as principal.
- You shall be a fiduciary in respect of the goods which will include but not be limited to keeping the goods separate and readily identifiable and in good condition while in your possession or control.
- If you sell the goods, then:

- All monies received by you from the sale will be held by you in trust and must be kept in a separate bank account and should not be mixed with any other monies including any of your funds.
- We will have the right to trace the proceeds of the sale into any account into which the proceeds have been deposited or transferred. A like right shall apply in any situation where you use the goods in any way so as to be entitled to payment from a third party.

- 10.4 If you allow goods in which we retain a security interest to be transferred to a third party (including where you sell the goods, or transfer them to a new company owned by you or a family member or associate), you agree to notify us immediately of the transfer and provide us with the third party's details, including their name, address, type of entity, company registration number (for a registered company) or date of birth (for an individual).

- 10.5 You shall not allow the creation of liens against the goods by any third party.

- 10.6 In all cases, if you fail to make any payment by the due date, (without prejudice to any of our other rights) we may recover, dispose or sell the goods or any of them and credit any sale proceeds toward the moneys owed to us by you. You irrevocably authorise us, our agents and employees to enter your premises without notice or to enter any other land, building or premises which you are entitled to enter, as your agent, to search for, remove and take possession of the goods.

- 10.7 If we remove the goods from your or any other premises under clause 10.6 above, you agree we have no liability either to you or to any other person or entity claiming through you for any matters relating to the entry, the removal and taking possession of goods and you agree to indemnify us in respect of any liability that thus arises.

11. A SECURITY INTEREST CREATED

- 11.1 This clause 11 will apply, and clause 10 of these Terms will not apply, to all supplies of goods made or agreed to be made by us, to which the PPSA applies.

- 11.2 For the purposes of the PPSA, you grant a security interest to us in all plant, machinery parts, components, steel, hoses, pipes, fittings, consumables and other goods sold or supplied by us now or in the future ("Goods") together with the proceeds generated by such supply to secure the price payable for the Goods (and any interest or other charges payable in relation to the Goods) and to secure all monies payable by you to us at any time on any account. You acknowledge that the security interest will continue until we give you a final release. You acknowledge that you have received valuable consideration from us.

- 11.3 Until payment is made you will, where the Goods have been purchased for resale, store the Goods separately from goods not supplied by us. You will not move the Goods outside New Zealand and will not do or omit to do, or allow to be done or omitted to be done, anything which could adversely affect the goods or the security interest created by these.

- 11.4 You shall not agree to allow any person to register a financing statement over any of the goods supplied by us without the prior written consent of us and will immediately notify us if you become aware of any person taking steps to register a financing statement in relation to such goods.

- 11.5 You shall not allow the goods to become accessions or commingled with other goods unless we have first perfected any security interest that we have in relation to the goods.

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- 11.5 To the extent permitted by law, if you default under these Terms or fail to make any payment by the due date:

- Each security interest created by our favour will become immediately enforceable;
- We may at any time by notice to you declare all or any part of the moneys owing to us to be due and payable immediately, either upon demand or at a later date as we may in our sole discretion specify; and

- c. We may:

- Take possession of and either sell or retain the Goods;
- Pay any expenses incurred in the exercise of any such powers out of revenue from, or proceeds of realisation of, the Goods;
- Appoint a receiver in respect of any Goods (without your consent) and any receiver is authorised to do anything referred to in these Terms and otherwise to exercise all rights and powers conferred on a receiver by law.

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- d. You agree that you will pay or reimburse us for any costs, losses or other liabilities we incur or sustain, (including actual legal costs and disbursements on a solicitor and own client basis), in connection with the exercise, enforcement or preservation, or attempted exercise, enforcement or preservation of any right arising pursuant to the security interest granted under these Terms. We:
- Have the rights of a natural person in relation to the Goods;
 - Have all other rights conferred by law (including under Part 9 of the PPSA) in relation to the Goods; and
 - May, in your name or otherwise, at any time, do anything that you could do in relation to the Goods.
- e. You irrevocably grant us the right to enter upon your property or premises, without notice, and without being in any way liable to you or to any third party, if we have cause to exercise any of our rights under section 109 of the PPSA, and you shall indemnify us from any claims made by any third party as a result of such exercise.
- 11.6 Nothing expressed in the provisions of this Section shall limit or otherwise adversely affect the rights conferred upon us, by the PPSA.
- 11.7 Where we take possession of the Goods, we may sell the Goods by any means at any time and from any sale proceeds, deduct all costs incurred in connection with the sale and all monies owed (even if not due and payable) to us by you on any account (to the extent to which we have priority over any other interested parties). We may recover from you any shortfall on any sale or attempted sale.
- 11.8 You waive your rights:
- Under Section 114(1)(a) of the PPSA, to receive a Notice of Intention to Sell;
 - Under Section 116 of the PPSA, to receive a Statement of Account;
 - Under Section 120(2) of the PPSA, to receive notice of any of our proposals to retain collateral;
 - Under Section 121 of the PPSA, to object to any of our proposals to retain collateral;
 - Under Section 125 of the PPSA, to not have Goods damaged if we remove an accession;
 - Under Section 129 of the PPSA, to receive notice of the removal of an accession;
 - Under Section 131 of the PPSA, to apply to the Court for an order concerning the removal of an accession;
 - Under Section 132 of the PPSA, to redeem collateral, if we have sold the collateral, or if we are deemed to have taken any collateral in satisfaction or part-satisfaction of your obligations;
 - Under Sections 133 and 134 of the PPSA, to reinstate the Security Agreement; and
 - You waive your rights to receive a copy of the Verification Statement or a Financing Change Statement relating to our security interest.
- 11.9 Notwithstanding the provisions of sections 188 and 89 of the PPSA, any notice or other document to be served by you on us may not be served or given by facsimile or electronic mail.
- 11.10 You agree to give us not less than seven (7) working days prior notice of a proposed change of your personal or business name.
- 11.11 You agree that you will pay or reimburse us for any costs we incur, (including actual legal costs on a solicitor and own client basis) to register a change to or discharge of a financing statement on the Personal Property Securities Register whether or not the change was initiated by you.
- 11.12 We have the right to allocate as we wish any payments received from you, to any outstanding invoices/debts due in relation to goods and/or services supplied by us.
- 11.13 You agree that upon our request you shall promptly do all things (including signing any delivery docket, manual packing slip, invoice or other document) and provide all information necessary to enable us to perfect and maintain the perfection of any security interest granted by you to us (including the registration of a financing statement).
- 11.14 Within 2 working days of a written request from us, you will supply us with copies of all security interests registered over your personal property. You authorise our agent to request information from any secured party relating to any security interest which is held in any personal property that is or has been in your possession or control.
- 11.15 You acknowledge that you have read, understood and accept the provisions of this clause.
- 12 WARRANTY AND LIABILITY**
- Warranty**
- 12.1 Provided you comply promptly with the terms of payments, we warrant that the goods manufactured by us are free from original defects and the services provided by us are free from faulty workmanship, under proper and normal conditions of use, for a period of one month from the date of delivery.
- 12.2 If it appears to you that the goods are defective or the workmanship is faulty under proper and normal conditions of use within one month from the date of delivery, you must:
- Make a written complaint to us.
 - We must be satisfied the goods are defective or the workmanship is faulty.
 - We must be given the opportunity (as set out in clauses 12.3 and 12.4 below) to rectify the defect or fault.
- 12.3 In the case of defective goods, we agree to remedy such defects if you return the defective item to us with freight paid both ways. If you cannot return the defective item our warranty extends only to the supply of replacement parts. You are liable to pay any freight charges for these replacement parts.
- 12.4 In the case of services involving faulty workmanship, we agree to provide repairs, only where you have not attempted or authorised any repair work without our written permission.
- 12.5 In the case of materials, parts or components not manufactured by us, our liability is limited to making the benefit of any manufacturer warranties available to you (so far as those warranties can be transferred).
- No Liability**
- 12.6 To the maximum extent permitted by law, except as set out above in clause 12.1, all conditions or warranties in respect of the quality, merchantability fitness for purpose, condition, description, manufacture, design or performance (or otherwise) of the goods or services supplied by us to you, whether implied by statute, common law, law merchant, trade usage, or otherwise, are expressly excluded from the contract created by these Terms.
- 12.7 In the event that any limitation or provision contained in these Terms is invalid and we become liable to you for loss or damage (it being the intention that no such loss or damages may be recovered) which would otherwise have been excluded, our maximum liability for any claim made by you for any reason whatsoever, is limited to the value of the goods and or services supplied to you or the amount of \$10,000.00 whichever is the lesser.
- 12.8 In particular, we, our employees, contractors and agents, will not otherwise be liable to you for loss or damage of any kind however that loss or damage is caused or arises. This exclusion of liability includes (but is not limited to):
- Consequential or special loss of any kind.
 - Loss of profits, revenue or goodwill;
 - Loss or damage to anything caused by the goods or services, any defect or fault in them or any use made of them, and you agree to indemnify us against any such claim.
 - Injury, damage or loss arising from or related to the goods or services provided to you or caused by any of our agents, employees or subcontractors, whether in negligence, contract or otherwise (including a failure to do something which should have been done or to prevent something from happening), and you agree to indemnify us against any such claim.
- Directors Warranty**
- 12.9 You (or if you are a company, your directors) personally warrant that you are solvent at the time of purchase of all goods and this is a continuing representation.
- 13. WARNINGS AND INSTRUCTIONS**
- 13.1 You agree to read and comply with any warnings and instructions affixed to or accompanying the goods and services that we supply to you.
- 13.2 If you are reselling or transferring the goods to a third party, you agree to provide to, or make the third party aware of, such warnings and instructions.
- 13.3 We will not be liable for any failure to heed the warnings and/or instructions by you or any third party.
- 14. CONSUMER GUARANTEES ACT 1993**
- 14.1 Where the goods and service are acquired by you for the purposes of a business, then by accepting such goods and services you agree that the provisions of the Consumer Guarantees Act 1993 do not apply to the supply of our goods and services to you.
- 14.2 Where you purchase any goods from us for re-supply as, or for incorporation into, goods or services ordinarily acquired for personal household or domestic use or consumption ("Consumer Products") you warrant that:
- If you supply the Consumer Products directly to an end user/consumer you will do so using Terms which exclude liability for any claims under the Consumer Guarantees Act; and
 - If your customer acquires the goods for re-supply, you will ensure that your customer and each person in the distribution chain will exclude liability in this contract for supply for any claims under the Consumer Guarantees Act, but in each case only where the end user/consumer acquires the Consumer Products for business purposes, and you agree to indemnify us and our suppliers against any failure by you, your customers or any person in the distribution chain to properly contract out of liability to the business end users/consumers under the Consumers Guarantees Act.
- 15. INTELLECTUAL PROPERTY/COPYRIGHT**
- 15.1 Unless otherwise agreed in writing, we own the intellectual property in all goods supplied to you which have been designed by or on behalf of us and you will not copy or reproduce or permit any other person to copy or reproduce those designs without our written consent. You will on request sign any document considered necessary to convey, perfect, defend or enforce our ownership of such intellectual property.
- 16. INFORMATION AND PRIVACY ACT**
- 16.1 For the purposes of facilitating the efficient running of our business, you authorise us:
- To collect all information we will require from any third parties and authorise those third parties to release that information to us;
 - To hold all information given by you or any third parties to us;
 - To use that information including giving information to any other person to facilitate collection of debts from you;
- 16.2 The information will be collected, held and used on the condition that:
- It will be held at our office, or the office of our franchisee, operator, authorised agent or representative;
 - It will be accessible to any of our employees, franchisees and agents who need access to it for the efficient running of our business; and
 - You may request access to and correction of the information held at any time.
- 17. GENERAL**
- 17.1 If we fail to enforce any Terms or to exercise our rights under these Terms, at any time, we have not waived those rights.
- 17.2 If any provision of these Terms is held to be invalid or unenforceable for any reason, the remaining provisions shall remain in full force and effect and the parties shall adjust their respective rights and obligations in accordance with the spirit and intent of the parties as shown by these Terms.
- 17.3 With the exception of clause 10 (where the local law entitling enforcement of that provision will apply and where the parties agree to the non-exclusive jurisdiction of the courts of the relevant territory), the laws of New Zealand will apply to these Terms. In relation to any legal action or proceedings arising out of or in connection with these Terms ("Proceedings"), each party irrevocably submits to the exclusive jurisdiction of the Courts of New Zealand and waives any objections to the Proceedings in any such Court on the grounds of venue or on the grounds that the Proceedings have been brought in an inconvenient forum.

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