

Mesco Ltd - Terms and Conditions

Definitions, Interpretation, and Application

- 1.1 Unless inconsistent with the context the following definitions apply
 - “Customer” includes the customer’s successors and personal representatives;
 - “Delivery” or “delivery date” means the date determined under clause 4.1;
 - “MESCO” means Mesco Ltd and its successors and assigns;
 - “PPSA” means the Personal Properties Security Act 1999;
 - “Terms” means these terms of Trade as amended or substituted by MESCO from time to time;
 - “Product” or “Products” includes everything made, done or supplied by MESCO;
 - “Working day” has the meaning in Section 4 of the Property Law Act 2007
- 1.2 References to legislation refer to that legislation as amended or substituted
- 1.3 Words importing the singular number include the plural and vice versa.
- 1.4 Headings are inserted for convenience only and do not affect interpretation.
- 1.5 The Terms apply to all Products provided to or at the request of the Customer whether or not charged for.
- 1.6 By requesting Products from MESCO the Customer agrees that the Terms prevail over any other warranties, conditions, stipulations, instructions, or provisions.
- 1.7 The person by whose instrumentality any order is placed or any delivery is received warrants (where not the Customer) that he or she is authorised to act on behalf of the Customer, and agrees to be jointly and severally with the Customer bound by these Terms and liable for the performance of the Customer’s obligations.

2 Price, Payment, Charges, and Interest

- 2.1 The Customer shall pay each of MESCO’s invoices in full on receipt of invoice free from any deduction, counterclaim or set-off, legal or equitable. Payment must be made in full before delivery of Products can be arranged. The Customer will pay the invoice in full regardless as to whether part or all of the invoice is in dispute.
- 2.2 Machinery Products have additional terms and conditions specific to the type of machinery ordered. Where there is a conflict between these general terms and any specific terms the specific terms shall apply.
- 2.3 MESCO may in its sole discretion request payment of a non-refundable deposit.
- 2.4 Expenses incurred for carriage, freight, insurance, delivery, storage, travel, and other sundries plus a margin of 15% shall be added to the price and is also non-refundable.
- 2.5 The Customer shall have no right to object to any invoice unless the Customer gives MESCO in writing full details of all objections within 5 Working Days from the date the invoice was issued.
- 2.6 If the Customer owes MESCO any money, or becomes insolvent, commits an act of bankruptcy, has an application for liquidation started against the Customer, or has any receiver, liquidator, assignee, statutory manager or similar person appointed, or if the Customer may be or become unable to meet any of the Customer’s obligations under these terms in full, or if in the opinion of MESCO any of those events is likely to occur, then in any such case, MESCO from time to time (without being liable for any loss or damage) may:
 - a. cancel or suspend all or part of the work on or delivery of Products; and/or
 - b. retain possession of the whole or any part of the Products; and/or
 - c. sell, scrap, or otherwise dispose of Products or any part thereof, and apply the net amount received (or incurred) by such disposal against the amount payable by the Customer.
- 2.7 Notwithstanding any direction by the Customer MESCO may appropriate any payment towards any or all

Products or any other amount due to MESCO.

- 2.8 If any invoice remains unpaid at the end of the second month after the month of its issue there shall be added to the overdue amount:
- a. An administration fee being the greater of \$20.00 or 10% of the overdue amount; and
 - b. Interest on all overdue amounts (including costs, fees and interest) at a rate of 2.5% per month or part thereof compounding monthly (both before and after judgment); and
 - c. All expenses, disbursements, debt collection, and legal costs (on a solicitor client basis) incurred by MESCO in the enforcement or attempted enforcement of any rights or collection of any money due.

3 Quotations and estimates

- 3.1 Every statement or indication of price given by MESCO is deemed to be an estimate only, in respect of which MESCO has no liability or responsibility to the Customer or any other person except if it is a fixed price, in writing, specifically described as a quotation, dated, and signed by MESCO, and accepted by the Customer.
- 3.2 Unless otherwise specified, all prices exclude GST and expenses set out in clause 2.4. These charges are payable by the Customer in addition to the prices stated.
- 3.3 MESCO may at any time before Delivery is complete withdraw any quotation notwithstanding acceptance.
- 3.4 Any quotation (unless withdrawn) will expire after the specified period. If no period is specified the quotation expires 10 Working Days from its date.
- 3.5 If the Customer requests a variation to Products and MESCO agrees to comply with the variation, it will be charged on the basis set out in the quotation. If no basis is specified MESCO will charge in accordance with its usual rates plus a margin of 15%.
- 3.6 MESCO may adjust the quoted price if, before or during Delivery, MESCO's costs are affected by:
 - a. An increase in the cost of foreign currency, materials, services, or labour to MESCO; or
 - b. Any act or omission of the Customer or a third party; or
 - c. Amendments or substitutions to legislation, regulations, codes, or standards affecting the Products; or
 - d. Any increases in, or additional, or new, taxes, levies, royalties, surcharges, tariffs, duties, fees, tolls, or other such payments.

4 Delivery, Damage, and Returns

- 4.1 Delivery to the Customer of each of the Products occurs on the earliest of the dates when they are:
 - a. Available to be uplifted or received by or on behalf of the customer; or b. Given to a carrier; or
 - c. Taken to a location identified by the Customer, whether or not complete or commissioned.
- 4.2 MESCO has no responsibility or liability for any loss or damage arising direct indirectly or otherwise from any delay or failure in or cancellation of Delivery of all or part of the Products howsoever caused.
- 4.3 If the Customer requests that MESCO leave goods out MESCO's premises or at any other unattended location then the Products are left at the Customers sole risk.
- 4.4 The time agreed for Delivery (if any) is not of the essence. Any date or time given by MESCO is an estimate only.
- 4.5 MESCO will not be liable for any loss incurred by the Customer due to the time of delivery differing from the estimated time pursuant to clause 4.4.
- 4.6 Any carrier of the Products shall be deemed to be the Customer's agent.
- 4.7 The Customer shall be deemed to have accepted the Products as complete, compliant, and free from damage unless the Customer gives MESCO in writing within 2 Working Days from Delivery full details of any alleged shortage in quantity, damage, or non-compliance. No claim for shortage in quantity, damage, or non-compliance, or any loss or damage arising therefrom can be made after that period has expired.
- 4.8 If notice is given under clause 4.7 the Customer shall allow MESCO to fully inspect and test the Products.
- 4.9 MESCO need not accept return of or credit any Products which are worn or altered, or in any other way not in the same condition as when delivered, or which have not been used, maintained, and stored in accordance with best practice and manufacturer's recommendations.

4.10 MESCO may (in its discretion to be exercised only in writing as described in clause 12.6) accept Products for credit, but may charge a restocking fee of such amount as MESCO may determine together with inspection costs, and any expenses calculated in accordance with clause 2.4. In such cases clause 4.9 must still be complied with.

5 Warranty and liability exclusions

- 5.1 Subject to clause 5.5, 5.6, 5.7 and 12.3 to the fullest extent permitted by law, all conditions, warranties, guarantees, liabilities, representations, undertakings, descriptions, and conditions as to fitness, whether implied by statute, common law, or otherwise are expressly excluded.
- 5.2 MESCO has no liability in any circumstances for consequential damage however arising.
- 5.3 MESCO is not bound by representations, statements, conditions, agreements, or warranties, made by MESCO, or by its representatives, employees, agents, unless stipulated in writing as described in clause 12.6, and the Customer agrees that it has purchased the Products solely in reliance of the Customer's own judgment.
- 5.4 The exclusions and liabilities in this clause 5 shall extend to MESCO, its agents, employees, directors, and any person or entity who is associated with any of them under any of the definitions of "associated persons" in the Income Tax Act 2007, and their respective successors and personal representatives.
- 5.5 MESCO shall have no liability or responsibility for Products not manufactured or fabricated by MESCO provided however that if the Customer fully indemnifies MESCO against all costs and expenses incurred by MESCO in obtaining (or attempting to obtain) a remedy from the manufacturer of the Products MESCO will use reasonable endeavours to request such remedy for the Customer. For the avoidance of doubt the Customer acknowledges that MESCO does not manufacture trucks and any truck supplied as part of a Product does not come with any warranties from MESCO.
- 5.6 For Products manufactured or fabricated by MESCO to written specifications provided by the Customer, MESCO warrants on the conditions set out in clause 5.7 that for 10 Working Days from Delivery the Products will:
- a. Substantially comply with the specifications; and
 - b. Be free from faulty workmanship.
- 5.7 The conditions of MESCO's warranty are:
- a. Full details of the warranty claim must be given to MESCO in writing not later than 10 Working Days after delivery;
 - b. The price for the Products must have been paid in full;
 - c. The Products must not have been used other than in the way intended, or repaired, or altered without MESCO's approval, and must have been used, maintained, and stored in accordance with best practice including any instructions or guidelines supplied by MESCO;
 - d. The Products must have not been used after any defect became apparent or would have become apparent to a reasonably prudent operator or user;
 - e. The warranty covers only defects in the Products caused entirely by faulty workmanship;
 - f. MESCO's obligation under this warranty is (at its sole discretion) to either:
 - (i). Restore the Products to substantially comply with the Customer's written specification; or
 - (ii) Replace the Products with substantially equivalent Products.
 - g. The warranty covers only repair of the faulty workmanship. All other costs including any materials freight, dismantling, removal and fixing of components are for the Customer;
 - h. MESCO may specify the place at which the repairs are to be carried out and unless otherwise agreed the Customer shall at its expense arrange for the transport of the Products to and from that place;
 - (i). Once a claim is made in respect of the Products no further claims may be made under this warranty for those Products and no warranty is provided on repair done pursuant to this warranty.
- 5.8 Subject to clause 12.3, but despite any other Terms, if MESCO has any liability to the Customer whether for breach of any of these Terms or on any other ground including (without limitation) tort, breach of contract or breach of statutory duty. The Customer's remedy is confined to monetary damages, and those damages

are limited to the amount the Customer has actually paid to MESCO in the calendar year in which the liability arises for the specific part or parts of the Products in respect of which liability arises.

6 Risk, Ownership, Title and Possession

- 6.1 All risk in respect of the Products passes as follows:
 - a. Where the Customer orders Machinery then risk passes on payment of MESCO's invoice in full. Delivery and/or collection is at the Customer's risk and the Customer must have ensured the machinery before requesting MESCO to deliver or collecting the Machinery from MESCO.
 - b. For Credit Account Customers risk passes to the Customer upon delivery and MESCO shall retain title to the Products until the Customer has paid the price and all other sums owing to MESCO in full.
- 6.2 Until title in the Products passes to the Customer unless expressly agreed in writing the Customer shall:
 - a. Hold the Products as MESCO's fiduciary and bailee; and
 - b. Keep the Products insured for full replacement with MESCO's interest noted on the insurance policy (and upon request immediately supply a certificate of currency to MESCO); and
 - c. Not alter or modify the Products in any way;
 - d. Follow best practice in repairing and maintaining the Products; and
 - e. Store the Products so they are readily identifiable as MESCO's Products.
- 6.3 In addition to the rights in Section 109 of the PPSA, until title in all Products passes to the Customer, the Customer gives irrevocable authority to MESCO to enter, at any time without prior notice (by force if necessary) any land or premises occupied by the Customer, or any land or premises where MESCO believes the Products may be, to inspect, take possession of, and/or remove the Products or any part thereof.
- 6.4 MESCO shall not be liable for any damage, expense, or any other losses incurred by the Customer as a result of action under clause 6.3 and the Customer shall fully indemnify MESCO against all costs, claims, demands, and actions by third parties arising from action under that clause.

7 Personal Property Securities Act 1999

- 7.1 The Customer shall provide MESCO on demand from time to time with all the information required to register a financing statement or financing change statement, and to maintain and enforce a perfected security interest in the Products supplied from time to time in accordance with the PPSA.
- 7.2 The Customer shall on demand reimburse on an indemnity basis all costs incurred by MESCO:
 - a. Involved in obtaining, maintaining, registering and enforcing a perfected security interest in respect of the Products supplied from time to time by MESCO; and
 - b. Resulting from any application made by the Customer under Section 162 of the PPSA.
- 7.3 The Customer shall always give MESCO at least 10 Working days' prior notice of all proposed changes to the Customer's details (including, but not limited to trading name, operating structure, address, telephone or facsimile number, or e-mail address) and of any proposed financing change statement or change demand.
- 7.4 On Delivery unless all amounts payable to MESCO are paid in full the Customer grants MESCO a security interest in the Products and their proceeds to secure the obligations of the Customer to MESCO.
- 7.5 MESCO may enforce the security interest (without prejudice to any other remedy) if any of the following occur:
 - a. The Customer fails to pay any amount owing to MESCO by the due date; or
 - b. Other than by prior agreement in writing the Customer sells, parts with possession of, leases or disposes of or otherwise deals with the Products, or does anything inconsistent with MESCO's ownership of the Products prior to making full payment; or
 - c. The Customer becomes insolvent, commits an act of bankruptcy, has an application for liquidation started against the Customer, or if in the opinion of MESCO any of those events is likely to occur, or
 - d. Any of the circumstances or opinions referred to in clause 2.6 exist; or
 - e. The Customer commits any breach of these Terms.

- 7.6 Pursuant to Section 107 of the PPSA MESCO and the Customer agree:
- a. To contract out of Section 114(1)(a), Section 133, and Section 134 of the PPSA; and
 - b. To contract out of the sections referred to in Section 107(2)(a) to (i) (inclusive) of the PPSA; and
 - c. That the rights in Section 109 of the PPSA shall apply in addition to the rights given by clause 6.
- 7.7 The Customer waives the rights in s.148 of the PPSA.

8 Intellectual property

- 8.1 Unless expressly agreed in writing all intellectual property in respect of any Product provided by MESCO is, and remains at all times, the absolute property of MESCO.
- 8.2 All intellectual property owned by the manufacturer of the Product, where the manufacturer is not MESCO, remains the absolute property of the manufacturer and the Customer has no rights to use this unless specifically expressed in writing by MESCO on behalf of the manufacturer.
- 8.3 MESCO grants the Customer a licence to use MESCO's intellectual property only in connection with the Products as delivered, and the Customer agrees that it shall pay a licence fee determined by MESCO for all other uses (including duplication).
- 8.4 If the Products are supplied to a design or specification provided by the Customer, the Customer warrants that in supplying or carrying out the Products MESCO will not infringe any trademark, patent, copyright, registered design, or any other rights of a third party, and the Customer agrees to indemnify MESCO against any liability, costs, expenses and claims arising from any such infringement or alleged infringement.
- 8.5 Where MESCO creates custom products for the Customer the intellectual property in the designs, documents, drawings, photographs or Products is the property of MESCO.

9 Assignment

- 9.1 MESCO may from time to time license, outsource, assign, novate, or subcontract all or any part of its rights and obligations under these Terms without consent of the Customer.
- 9.2 The Customer shall not assign all or any of its rights or obligations under this contract without the written consent of MESCO.

10 Waiver

- 10.1 Any variation or waiver of any clause in these Terms shall not be binding unless expressed to be intended to amend these Terms, and in writing as described in clause 12.6.
- 10.2 A failure or delay in enforcing compliance with any clause of these Terms shall not be a waiver.

11 General

- 11.1 If the Customer is, or holds itself out to be acquiring the Products "for the purposes of a business" in terms of the Consumer Guarantees Act 1993, then all rights in that Act are excluded.
- 11.2 In respect of any work or installation the Customer shall be solely responsible for compliance with all legal or other requirements regarding consents, safety, fencing, inspection and any government or council requirements and will indemnify MESCO against any liability, costs, expenses or claims in respect thereof.
- 11.3 Nothing in these Terms takes away any statutory rights of consumers that cannot be taken away by contract.
- 11.4 The parties agree that should any circumstance occur where MESCO is prevented from or impeded in the conduct of its business by one or more factors beyond its control such as (but not limited to) flood, earthquake, fire, war, terrorist attack, loss of power, pandemic, ill health, strike, lockout, adverse weather, or force majeure, MESCO shall not be liable for any defect, delay, increased cost, or other loss or disadvantage arising directly, indirectly, or otherwise from such factors.

- 11.5 The various provisions of these Terms are severable and if any provision is held to be invalid or unenforceable by any Court of competent jurisdiction, then such invalidity or unenforceability shall not affect the remaining provisions of these Terms.
- 11.6 These Terms constitute the parties' entire agreement as to the matters referred to herein, and (except as expressly stipulated to the contrary in writing signed by a Director or Manager of MESCO) prevail over and/or supersede all other this agreements, arrangements, representations, negotiations, commitments and communications, written or oral.
- 11.7 The law of New Zealand governs these Terms and the Courts of New Zealand have jurisdiction.
- 11.8 MESCO may from time to time amend or substitute all or any of these Terms. Amended terms will be supplied on the website of MESCO or attached to the latest invoice issued to the Customer. Acceptance of the new terms by the Customer shall occur on payment of the invoice to which the new terms were supplied.
- 11.9 If the Customer wishes to negotiate their own terms of sale then MESCO reserve the right to obtain legal advice on those terms, the cost of which will be added to the deposit payable by the Customer to be paid on execution of the negotiated terms.

12 Dispute Resolution

- 12.1 If a dispute arises between the parties ("the Dispute") then the disputing party may not commence any court or arbitration proceedings relating to the Dispute unless it has complied with the clause 12.2.
- 12.2 A party claiming the Dispute must give the other party written notice specifying the nature of the Dispute. On receipt of that notice the parties shall use all reasonable endeavours to resolve the Dispute by discussion, consultation, negotiation or other informal means such as mediation. If the Dispute is not resolved within 14 days of the notice being given either party may, by giving written notice to the other party, require the Dispute to be determined by court proceedings (including disputes tribunal) rather than arbitration.

April 2023