

***Whitney***

The **Leader** in **Plate**  
**Technology**

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W. A. Whitney Co.

## **Terms & Conditions**

Domestic

Form Number SF-255

February 23, 2009

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**1. PRICES AND TERMS:**

- (a) Standard terms of payment are "net 30 days from date of invoice." All sales are subject to credit approval. In the case of "special or non-stock" machines/equipment over \$10,000 purchase price, or "standard stock" machines or equipment over \$200,000 purchase price, a 40% down payment must accompany the purchase order; 30% due within thirty days of order; 20% will be due prior to shipment, and the 10% balance will be due thirty days from invoice date, unless otherwise agreed upon in writing by W. A. Whitney Co. ("Whitney"). "Special or non-stock" items are items for which the shipment date provided in Whitney's proposal is more than six weeks from date of acknowledgment of purchase order. "Standard stock" items are those items for which the shipment date provided in the proposal is six weeks or less from such date.
- (b) A service charge of one percent (1%) per month will be payable on any balance past due and unpaid.
- (c) Prices are F.O.B. factory unless otherwise agreed by Whitney in writing. Claims against the carrier for damage caused during shipment must be made by the Buyer.
- (d) After formal acknowledgment of purchase order, prices are firm, except on items having an acknowledged shipment date of twenty-four weeks or more after acknowledgment of the order, which are subject to escalation. Such escalation will equal the percent change in the Wholesale Index for Industrial Commodities of the U. S. Department of Labor or equivalent replacement index, as reported by The Association for Manufacturing Technology, from the date of acknowledgment to the date of shipment.
- (e) Acknowledged orders for standard stock items placed on "hold" or "do not release before" status will be billed at the price in effect at date of shipment, or a service charge at the rate of one (1%) per month will be added to the original quoted price from the date when delivery was originally due until date of shipment, whichever method shall result in the higher price. Acknowledged orders for special or non-stock items placed on "hold" or "do not release before" status must be paid for as if shipment were effected on the originally specified date, and the goods will after such date be stored at the risk and cost of the Buyer. Whitney reserves the right to treat a request for "hold" or "do not release before" status as a cancellation under subparagraph (h).
- (f) Prices do not include sales, use, excise, or similar taxes. Any such tax that is required to be collected or paid by Whitney is considered the Buyer's responsibility and as such may be added to the invoice, or invoiced later, as a separate charge to be paid by the Buyer, unless the Buyer has furnished Whitney with an applicable exemption certificate.
- (g) All prices are based upon standard packaging for domestic shipping in accordance with Whitney's standard specifications. If special packaging is required or requested, refer to the factory for price additions.
- (h) Cancellations of Purchase Orders: Customer may terminate this Agreement only on the terms and conditions, and upon payment of the termination fees, as described herein. Any notice of termination by Customer must be in writing and will only become effective upon actual receipt by Whitney at Whitney's address as set forth herein. Customer's termination rights (and attendant payment obligations) are as follows:
  - (1) Prior to Start of Manufacturing - If Whitney receives written notice of termination of this Agreement from Customer prior to the time Whitney commences manufacturing the product or products specified herein, Customer shall be liable for payment of a termination fee equal to the sum of the following amounts:
    - (a) All materials purchased by Whitney in connection with this Agreement prior to Whitney's receipt of notice of termination. The price of such materials, plus any administrative fees, material handling fees, freight charges, tariffs, taxes or other charges incurred by Whitney in connection with such purchase, shall be determined after all materials and charges are received. Whitney will provide an invoice for these items; and
    - (b) The cost of all engineering and administrative services performed by Whitney associated with this Agreement prior to Whitney's receipt of notice of termination (as determined by Whitney in accordance with its pricing for such services as established by Whitney from time to time in its discretion).
    - (c) Manufacturing is defined as the actual fabricating and/or welding and/or assembly of components associated with this Agreement. Whitney shall be entitled to apply any down payment received by it to the payment of the termination fee. If Customer's down payment is insufficient to pay the termination fee described above, Customer will nevertheless be liable to Whitney for any deficiency and will promptly pay any such amount on demand.
  - (2) After Start of Manufacturing - If Whitney receives written notice of termination of this Agreement from Customer after Whitney has commenced manufacture of any of the products identified in this Agreement, Customer is obligated to pay Whitney the full Agreement price.
- (i) All claims against Whitney for shortages on shipments must be made within five days of delivery by carrier at destination or fourteen days of date of invoice, whichever comes first.
- (j) The Buyer agrees to permit Whitney, at their option, to file security interest, in compliance with Uniform Commercial Code (UCCM Form), in the purchased equipment until payment in full for the same has been received by W. A. Whitney.

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**2. INVOICING:**

- (a) Invoices to Buyer will be issued at time of shipment or as soon as practicable thereafter, except as otherwise provided in the proposal or acknowledged order for progressive payments.
- (b) Partial invoices may be issued for partial shipments.

**3. ACCEPTANCE OF ORDER:**

Purchase orders based on this proposal are subject to acceptance only at Whitney's home office, and no contract shall be deemed to have been created until written acknowledgment has been mailed or delivered to the Buyer by Whitney.

**4. ELECTRICAL EQUIPMENT:**

- (a) Electrical equipment included in this proposal will be supplied by Whitney, and will be the make available in stock. However, when mutually agreed upon, it will be the make specified by the Buyer, provided it conforms to the specifications applicable for use on the products listed in this proposal and subject to any necessary price adjustments.
- (b) Electrical equipment is built to Whitney standards making it suitable for normal applications in accordance with its specifications and operating instructions. Compliance with state and local electrical codes or specific company or industry electrical standards must be requested by the Buyer and be mutually agreed upon. The Buyer must furnish the standards, specifications or codes requested.
- (c) Wiring and protective conduit from the machine to a Control Panel mounted off the machine is not included in this proposal. Buyer must supply clean (noise and spike) free electrical power.

**5. SHIPMENT AND RISK OF LOSS:**

- (a) Risk of loss and title shall pass to the Buyer upon delivery to carrier by Whitney. Risk of loss passes to Buyer whether or not shipment is made prepaid.
- (b) The shipping date specified is:
  - (1) Subject to the scheduling of prior orders and to confirmation by Whitney in its acknowledgment of Buyer's order.
  - (2) Computed from the date of acknowledgment of Buyer's order by Whitney and in case of special items from receipt of complete information necessary to design and manufacture the special items.
  - (3) Subject to any changes that may be caused by procedures or priorities which may be set by the U. S. Government or any of its agencies.
  - (4) To be considered approximate and not of the essence, since the ability of Whitney to complete and ship the equipment ordered by such date may be dependent upon conditions over which it has no reasonable control or which it cannot predict exactly. For example, time needed for such work as debugging and run-off of complicated electronic and mechanical equipment cannot be predicted exactly. In no event shall Whitney be liable for damages, including without limitation, lost profits, lost production, consequential or other special damages, resulting from delays in production or shipment caused by strikes, labor disturbances, fires, war, civil riots, acts of Providence, shortage of labor and/or materials, failure of suppliers or subcontractors to satisfactorily meet scheduled deliveries or any other cause over which it has no reasonable control.
- (c) Buyer's or designated consignee's acceptance of delivery from the carrier shall constitute a waiver of any claim for delay.
- (d) Shipments of numerically controlled console units or other electronic controls by other than common carrier truck (air ride trailers) will void all warranties relating thereto.

**6. INSTALLATION AND ACCEPTANCE OF GOODS:**

- (a) Rigging of machinery and equipment will be at Buyer's cost and must be performed strictly in accordance with manuals and instruction sheets furnished by Whitney. Except as otherwise expressly provided in this proposal, Whitney will not be obligated to furnish personnel or other on-site assistance for installation.
- (b) Buyer's acceptance of machinery and equipment shall be deemed to occur no later than the initial successful run of a standard test part as specified by Whitney, or forty-five (45) days from delivery, whichever comes first. Buyer shall provide material and tooling at its expense to run a test part.

**7. SPECIFICATIONS AND PERFORMANCE:**

- (a) Unless expressly set forth in this proposal and as a term of the acknowledged order, descriptions, specifications, drawings and other particulars, excluding software materials (which are covered by paragraph 9), however issued by or on behalf of Whitney, are not warranted and Whitney will not be bound thereby. If any such items are warranted, the Buyer's rights and obligations with respect thereto will be the same as those set forth in paragraph 9, subject to the limitations contained therein.

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- (b) Production data, where given, is based on Whitney's careful analysis and understanding of the limits of accuracy, strength of materials, material condition, handling facilities provided, etc., but is nonetheless an estimate only and is not guaranteed or warranted. In no event shall Whitney be responsible for performance figures supplied by subcontractors or other third parties.

**8. RETURNED GOODS POLICY:**

- (a) No goods will be accepted for return without prior written authorization from the Returned Goods Manager of Whitney. All returns are subject to Whitney's inspection upon receipt. Credit will not be allowed on damaged or used material.
- (b) Restocking charges on returned goods with an invoice value not exceeding \$100.00 will be \$20.00. Restocking charges on returned goods with an invoice value greater than \$100.00 will be 20% of the invoice price.
- (c) All goods authorized for return are to be shipped prepaid to Whitney, Rockford, Illinois. Collect shipments will be refused unless written authorization has been given prior to shipment.

**9. WARRANTY; LIMITATION OF LIABILITY:**

- (a) THE WARRANTY CONTAINED HEREIN IS IN LIEU OF ANY OTHER WARRANTY OR CONDITION, WHETHER EXPRESSED OR IMPLIED BY STATUTE OR OTHERWISE, INCLUDING ANY WARRANTY OR CONDITION OF MERCHANTABILITY OR FITNESS FOR PURPOSE (*WHICH ARE SPECIFICALLY EXCLUDED UNDER THIS CONTRACT*), OTHER THAN A WARRANTY OF TITLE.
- (b) Whitney warrants the products listed in this proposal to be free from defects in material and workmanship under normal use and service in the plant of the original user thereof for twelve (12) months or 4,000 running hours, whichever occurs first, from date of shipment by Whitney. There is no warranty on tooling, hoses, seals, torch and consumables, and other perishable items, the life of which depends upon care and use normally beyond Whitney's control.
- (c) Whitney warrants any computer program, parts program, or programming manual ("software materials") to be free from defects under normal operating conditions in the plant of the original user for twelve (12) months from the date of shipment by Whitney. This warranty will not require Whitney to furnish new software materials to serve a function not intended to be served by the original item and will be void if any change or addition has been made in or to Whitney's software materials without its prior written consent.
- (d) This warranty applies only if the user has in its employ qualified maintenance and operating personnel and maintenance and operation are in accordance with applicable manuals and instruction sheets furnished by Whitney. Personnel who have satisfactorily completed Whitney's Training School are qualified for purposes of this warranty.
- (e) This warranty is extended to the Buyer only and is not transferable or assignable, except that if the goods are resold to the original user by a Buyer which is a distributor or original equipment manufacturer, this warranty will be deemed assigned to such user provided the Buyer gives prompt written notice to Whitney of the name and address of such user, and the date of delivery to such user.
- (f) Any products or parts covered by this warranty that are defective, will be repaired or replaced at Whitney's option, as the sole and exclusive remedy available to Buyer. Whitney reserves the right to inspect products or parts that are asserted to be defective to confirm their condition.
- (1) parts, factory labor, and field service labor at no charge.
- (g) Whitney's obligation hereunder to furnish field service labor at no charge shall extend only to furnishing one Service Engineer or representative. If additional labor is needed, as will frequently be the case for larger pieces of machinery and equipment, it must be furnished by the Buyer or user at its cost and in cooperation with Whitney's Service Engineer or representative. Whitney will not grant any allowances for repairs or alterations made without its prior written consent.
- (h) Whitney shall not be liable under this warranty unless Buyer gives written notice of any claimed defect, including a detailed description of the problem or difficulty, and establishment that the product has been properly installed, maintained, and operated, to Whitney immediately upon Buyer's discovery of the defect within the warranty period and the right of inspection is given to Whitney while the product is in the claimed defective condition. Operation of the product must be suspended until written clearance is issued by Whitney for continued operation, provided that Whitney, upon receipt of notice of a claimed defect, will proceed without unreasonable delay (subject to the capacity and prior commitments of its Service Engineer staff) to remedy any defect coming within the warranty that is found by Whitney's inspection to exist.
- (i) Where products are used with consumables, tooling, hydraulic power units, accessories and/or modifications not furnished by Whitney that have not been recommended or approved by Whitney in writing, such use shall not be considered normal use under this warranty, and this warranty shall not apply. This warranty will not apply to products that have been subject to misuse, negligence or accident in installation or operation, or which have been modified or otherwise altered, or which have been used for purposes other than the purposes for which the products were designed.
- (j) Whitney will pay shipping charges on warranty replacements equal to normal parcel post or ground transportation on parts found defective by its Inspection Department. Excess charges for special handling, such as Air Freight, shall be paid by the

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Buyer. Shipment of such replacement parts is on the condition that Buyer concurrently return the defective parts to Whitney's factory in Rockford, Illinois, with shipping charges prepaid.

- (k) Whitney warrants repair or replacement parts, except for non-warranty items as outlined in paragraph 9.(a), used under normal operating conditions, to be free of defects in material and workmanship for 90 days from the date of shipment by Whitney or until the expiration of the machine warranty, whichever is greater.
- (l) Whitney reserves the right to make changes in design or to make additions to or improvements in its products without imposing any obligation upon itself to install them on its products previously manufactured.
- (m) This warranty will be effective only if and for so long as the Buyer complies with all payment obligations under the acknowledged order.
- (n) Buyer's sole remedy under this warranty and for any other claim, including without limitation negligence, with respect to the products covered by this proposal (and their design, manufacture, sale, delivery, resale, installation, inspection, repair, operation and use) shall be for repair or replacement as expressly set forth herein. Whitney shall in no event be liable for loss of production, loss of profits or other indirect, consequential or incidental damages, and Whitney's maximum liability under no circumstances shall exceed Buyer's purchase price allocable to the defective product or part thereof. Whitney may, at its option, repurchase at the Buyer's purchase price a defective product under warranty in full satisfaction of Whitney's obligations hereunder.

#### **10. SERVICE:**

Except for warranty service (see paragraph 9), all field service must be initiated by the Buyer's purchase order and will be charged at the rate in effect from time to time (see price schedule) per eight (8) hour day, plus expenses. Service will be performed by an authorized Whitney Service Engineer or representative. Service time begins at departure from Whitney's factory or regional office (for Regional Service Engineers) and ends upon return to the same. Hours in excess of eight (8) hours, or Saturday hours, will be billed at one and one-half (1-1½) times normal rate, and Sunday and Whitney holidays will be billed double normal rate. Minimum billing is four (4) hours.

#### **11. PATENT INDEMNITY:**

- (a) Whitney agrees to defend any suit or proceeding brought against Buyer or the original user based on the claim that the product as furnished by Whitney infringes any claim of any currently existing United States patent, other than a claim covering a process or product thereof, and to pay any damages and costs awarded therein against Buyer or such user, provided Whitney is given prompt written notice of any such claim, together with copies of all demands and complaints, is given the right to procure for Buyer or such user the right to continue using the product, to modify it so that any infringement no longer exists or to remove the product or part thereof and refund the original user's net book value thereof, and is given control over any negotiations looking toward settlement and the defense of any such suit or proceeding, and provided Buyer or such user extends full cooperation to Whitney in all such matters. This agreement shall not apply to infringements by reason of the manufacture, use or sale of the product in combination with other equipment or in the operation of any process, or the product of any process.
- (b) The foregoing states the entire obligation of Whitney for patent infringement and is in lieu of any statutory warranty relating to infringements, and under no circumstances shall Whitney be liable for loss of production, loss of profits or any other indirect, consequential or incidental damages. The foregoing indemnity shall not apply to any products manufactured by Whitney in accordance with drawings, specifications or designs furnished by Buyer but in such case Buyer shall indemnify Whitney in the same manner and to the extent set forth in subparagraph (a). Whitney is entitled to indemnity from certain of its suppliers, and the rights and options vested in Whitney hereunder shall extend to such suppliers and may be exercised by them.

#### **12. SAFETY:**

- (a) Whitney assumes no responsibility for damages, injuries or accidents caused by improper or other than normal use of this or any related equipment.
- (b) Whitney warrants that the products listed in this proposal will comply, to the best of its knowledge and belief, as of the date of the acknowledgment of Buyer's order, to all OSHA rules and regulations of general application to the manufacturer. Whitney, however, reserves the right to dispute any interpretation which may be applied to such rules and regulations as they related to this order and shall in no event be responsible for the application of such rules and regulations peculiar to the Buyer's (or its original user customer's) industry or installation.
- (c) This system or equipment includes Whitney's standard safety devices normal to such system or equipment. Additional safety devices may be required for other than Whitney or OSHA rules or regulations of general application to the manufacturer, and because of Buyer's (or its original user customer's) superior knowledge of its plant and operating conditions, it is Buyer's responsibility to identify and furnish additional safety devices particular to Buyer's (or its original user customer) intended usage. Whitney will, at Buyer's request, make recommendations for additional safety devices, and will furnish Buyer with a proposal for the supply and installation of these devices. If Buyer elects not to purchase the safety devices proposed or does not request a recommendation for such devices, Buyer will (and will require its original user customer, if any, to agree to) hold harmless, indemnify and defend Whitney against any and all claims, suits, losses, costs and expenses arising out of injury,

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death, or damage to person or property, caused, or allegedly caused, directly or indirectly by the absence of a safety device on the machinery or equipment described herein.

- (d) Buyer will (and will require its original user customer, if any, to agree to):
- (1) hold harmless, indemnify and defend Whitney against any and all claims, suits, losses, costs and expenses arising out of injury, death or damage to person or property caused or allegedly caused directly or indirectly by operation of machinery or equipment described herein without all safety devices, guards and proper safe operating procedures as set forth in manuals and instruction sheets furnished by Whitney or with persons other than qualified operating personnel closer than ten feet of the machinery or equipment; and
  - (2) notify Whitney promptly, and in any event within 24 hours, of any accident or malfunction involving Whitney's products which result in personal injury, death or damage to property, cooperate fully with Whitney in investigating and determining the cause of such accident or malfunction, and hold harmless, indemnify and defend Whitney from any claims arising from such accident or malfunction as to which such notice is not given.

**13. WORKING DRAWINGS, ETC.:**

Any proposals, prints, brochures, drawings, or other information furnished to the Buyer by Whitney is intended for confidential use by the Buyer (or Buyer's original user customer), shall remain the property of Whitney and shall not be used to the detriment of Whitney's competitive position. Should such confidential information ever be used to the detriment of Whitney's competitive position, Whitney shall be entitled to liquidate damages in the amount equal to the purchase price of the purchased goods, an injunction by any competent court to enjoin and restrain the unauthorized disclosure of such information, and any other available remedy at law or in equity.

**14. GOVERNING LAW:**

All rights of the parties hereto shall be governed by and construed in accordance with the laws of the State of Illinois, and any dispute or cause of action arising hereunder shall be heard in Winnebago County, State of Illinois, for state jurisdiction, and the Northern District of Illinois, Western Division, for federal jurisdiction.

**15. CLERICAL ERRORS:**

Clerical errors are subject to correction. Errors noted by Buyer must be brought to the attention of Whitney as soon as noted or suspected.

**16. ENFORCEMENT:**

Should it become necessary for Whitney to file suit to enforce the terms of this document, it shall be entitled to recover all reasonable attorney fees associated with enforcement providing that Whitney is the prevailing party. (For the purpose of this provision, the term "prevailing party" shall have the same meaning as is ascribed under 42U.S.C. §§1983, 1988).

**17. ENTIRE CONTRACT:**

Acceptance by Whitney of any order, and therefore the imposition of responsibilities by Whitney, is expressly made conditional on Buyer's assent to all Terms and Conditions set forth, herein, and this writing shall constitute the entire Terms and Conditions of the contract of sale notwithstanding any different or additional provisions on Buyer's order, unless otherwise expressly agreed in writing by Whitney.