

UCC Tip of the Month - What Does My Contract Include Anyway?

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Matthew J. Boettcher
(248) 901-4035
mboettcher@plunkettcooney.com

It's not at all uncommon, and in fact it's rather typical, that a customer's purchase order will contain terms that are different than those included in the seller's written offer.

When the parties' documents differ, the question becomes: by placing the order, did the buyer accept the offer or make a counter-offer? And, if the seller were to ship the ordered goods, what terms would the contract include?

In a perfect world these questions are answered before a dispute arises. Unfortunately, business is almost never conducted in such a utopia.

Historically, when a purchase order did not "mirror" the terms of the seller's offer, no contract was formed, even when the parties assumed an agreement had been reached. The adoption of the Uniform Commercial Code, however, changed this *in some cases*.

Under the UCC, the inclusion in a purchase order of additional or different terms to those found in the offer will not always prevent an acceptance of the offer. When the acceptance does not attempt to alter so-called "dickered terms," the parties' contract will be enforced, but the contract will not include any of the differing terms unless the acceptance was made conditional on an agreement to the additional or different terms.

The UCC did not completely eliminate the common law "mirror" image rule. Rather, §2207 of the UCC merely *altered* it with the federal and state courts interpreting that section to preserve the "mirror" image rule as it applies to "dickered" terms. The sales price will be a dickered term. Other important provisions such as terms of payment, who assumes transportation responsibility, when title passes, the date of delivery, and others, also can be deemed "dickered" terms. An exhaustive list of dickered terms does not exist. Therefore, the parties' intentions will be judged on a case-by-case basis.

Simply put, where a response to an offer changes any "dickered" terms, a counteroffer likely will be the result. Where, however, the response merely includes additional or different "non-dickered" provisions, §2207 will preserve the contract but jettison the differing terms.

UCC TIP OF THE MONTH - WHAT DOES MY CONTRACT INCLUDE ANYWAY? Cont.

This can be a confusing area, and it is important to know your rights and duties before problems arise. When you are uncertain about the terms of a prospective deal, or if a dispute has already arisen and you are not clear on what to do next, contact one of our commercial litigation attorneys. They can help clear away any doubts, so you can get back to doing business.