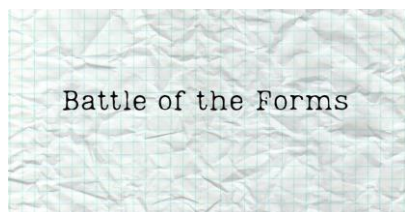


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ATTORNEYS AND COUNSELORS

Win the Battle of the Forms and Have Your Contract Terms Prevail

by Michael C. Gibbons



There is an endless variety of contracts that businesses enter into everyday. They can range from a verbal order for a single product to a heavily negotiated, long-term written supply agreement covering many years and millions of dollars in goods. Most businesses do not have lawyers regularly review the contracting process for each transaction. Many transactions are based on the exchange of forms that often conflict. Where the transaction is for the sale of goods, as opposed to services, the Uniform Commercial Code (UCC) will typically apply. Therefore, employees negotiating and finalizing contracts for their employers need to understand some basic contract rules in order to better protect the company should a contract dispute later arise. What follows are some

common sense tips for doing so, mostly from the perspective of a smaller parts supplier (seller) doing business on quotations and purchase orders:

- At its most basic level, a contract is formed by one party accepting another party's offer. Under the UCC, **you are usually in the better position if you are making the offer** (i.e. the "offeror"). Provided the proper language is used and documents like quotations and purchase orders are handled correctly, **the offeror controls the contract terms**. So try to think of your quotation as an offer to sell, or (for a buyer) your purchase order as an offer to purchase. Carry that thought through in subsequent correspondence during the process of negotiating and adjusting contract terms.
- Make sure to use a **good set of "general terms and conditions."** Those would

address important terms like "offer and acceptance" language, termination rights and obligations, warranties and disclaimers of warranties, direct and consequential damages (or exclusions), and indemnification rights. These are often referred to as "boilerplate" and found on the **reverse side of the form**. These cover important and potentially costly issues, so make sure those are read, understood and updated every year or two by a competent lawyer.

- When working with forms, the parties need to **ensure that your terms and conditions actually become part of the contract**. You may be required to prove that the other party actually had notice that they were bound by those terms. Reference ("incorporate") them on the first page of the form, stating that they are a part of the parties' agreement. Make that

reference **conspicuous**.

Because busy employees neglect to have these forms signed, **do not include a signature line for the other party unless you consistently insist on receipt of the signed form** (otherwise there may be a question as to whether they agreed). Post your standard terms and conditions on your **website**, and draw attention to that fact on the front of your form.

- If the purchaser inserts terms that you do not agree with, either on the face of a purchase order or in their own terms and conditions (like broad consequential damages language), **object in writing if you are able**. Don't rely on your own form

language to win the day on critical issues; make your position clear in writing. Courts are historically unpredictable in negotiating through a "battle of the forms" analysis (which can work for you or against you). But few judges are inclined to "bail you out" of a bad contract where the terms are clear and unambiguous.

- Too many smaller suppliers fail to understand how important they are to a larger parts customer like an OEM or Tier 1. **So be aware of your leverage**, whether that is due to the timing of the part sourcing, the nature of the parts, the sourcing of other critical parts through the same supplier, or other aspects of

the relationship that may have developed over years.

Having said this, businesses operate in the real world. Often one party has superior bargaining power and the other party will have little opportunity to negotiate terms and conditions. That makes remembering these concepts even more important.

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