SAN FRANCISCO
Daily Journal
www.dailyjournal.com
FRIDAY, APRIL 27, 2012

Battle of the forms: which terms control?

By Marc van Niekerk

Purchase orders are commercial documents issued by buyers to sellers, indicating types, quantities, and prices for products or services. The purchase order allows a buyer to explicitly communicate intentions to a seller, and the seller is protected in case the buyer refuses to pay for the goods or services.

Sending a purchase order to a supplier constitutes a legal offer to buy products or services. Acceptance of a purchase order by a seller confirms the order and results in a one-off contract between buyer and seller. Terms and conditions in the purchase order are standard procedure and usually boilerplate.

In some cases, the exchange of these documents between the buyer and seller implicates two different sets of terms and conditions. The customer's purchase order contains pre-printed terms, usually on the reverse of the form, which specify that the purchase of products or services be expressly made subject to the buyer's terms and conditions. On receipt of the purchase order, the vendor generates a confirmation or acknowledgement of the order with pre-printed terms, which specify that the sale be expressly made subject to the seller's terms and conditions.

The parties involved in the transaction are often unaware of, or perhaps unconcerned by, the discrepancy in terms, and business can proceed without incident for years — until there is a problem. The conflicting terms and conditions become an issue when the relationship between the buyer and seller becomes litigious, and then it becomes a "battle of forms" and the implications can be huge. Was there a contract? If so, what were the terms and conditions?

I represented a Fortune 500 manufacturer of expensive, sophisticated machines that are sold to companies that fabricate silicon wafers. My client had a long and prosperous relationship with their customer, until another fabricator acquired the buyer. At the time of the acquisition, there were outstanding orders totaling $20 million for purchases of six machines; two built and ready for shipment, one partially built, and parts ordered for the final three. It soon became apparent that the acquiring company did not want the machines and was not going to accept delivery of, or pay for, them.

The acquiring company attempted to avoid liability by pointing to the forms that were exchanged, arguing that since the terms did not match up, there was no contract. Under traditional common law, the terms of the offer must exactly meet the terms of acceptance or there is no contract. This "mirror image" rule of offer and acceptance is unfair and unrealistic in the commercial context. The fact that the parties did intend a contract to be formed, and both had a reasonable commercial understanding that the deal was closed, is ignored.

Fortunately, the California Commercial Code has adopted a more modern view of contracts formulated in the Uniform Commercial Code which contemplates this very situation. Section 2207 states that "[a] definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms."

As a result, and according to Section 2207, "Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this code."

We went to trial, and the jury found that there was indeed conduct by both parties recognizing the existence of a contract. My client had already manufactured two of the machines, started building another, and had ordered parts for the rest. The customer had asked for several delays in delivery, provided custom parts for integration into the machines, and asked for discounts on the equipment. The result was an $11.5 million verdict in my client's favor.

Marc van Niekerk *is Special Counsel with Silicon Valley Law Group's business litigation and intellectual property & licensing group. His practice focuses on business litigation, with emphasis in the areas of intellectual property disputes, business torts and commercial contract disputes. He can be reached at (408) 573-5700 or mvn@svlg.com*