Dueling, Dickering, and Delivering

UCC Battles of the Forms in Manufacturing Contracts

By Jeffrey G. Raphelson and Jane Derse Quasarano

Contract forms exchanged between customers and suppliers in automotive or other manufacturing industries have evolved. Today, parties to such sales transactions typically exchange documents with provisions designed to assure that their terms and conditions prevail under the Uniform Commercial Code (UCC).[1] When faced with contract documents of relatively equal sophistication, courts must examine the circumstances behind the parties' exchange of documents to determine whether a contract exists and, if so, what are its terms. However, Michigan UCC "battle of the forms" caselaw provides limited guidance on drafting supply contracts because courts often have to resolve these disputes by examining the circumstances surrounding the parties' exchange of forms and performance—a fact-specific inquiry. Thus, having robust contracting procedures is important.

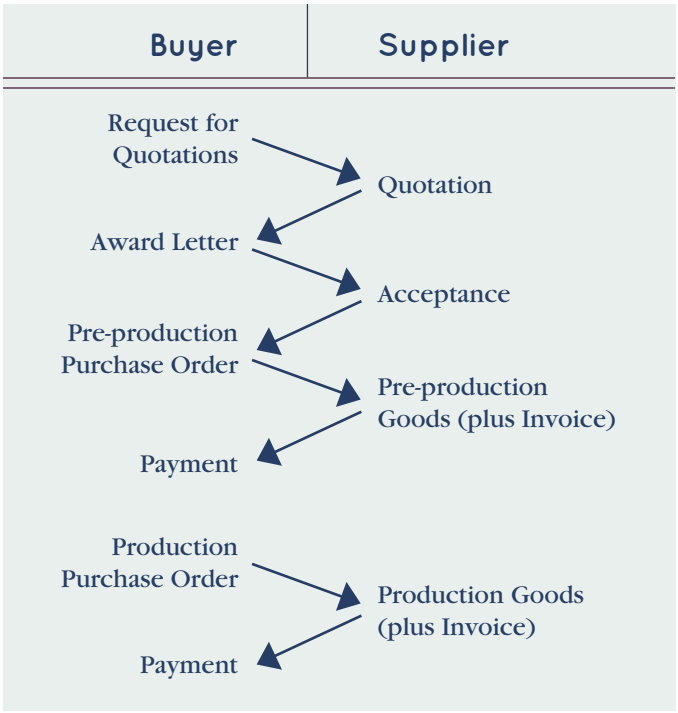
The basic principles for analyzing a battle of the forms are in UCC 2-207.[2] In short, the parties' contract may be memorialized in writing if there is an offer and an acceptance. If not, the parties' conduct might demonstrate that they had an agreement. In either case, UCC 2-207 explains which terms from the parties' documents and which provisions of the UCC comprise their agreement.

MCL 440.2207 provides:

> (1) 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.
>
> (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
>
> (a) the offer expressly limits acceptance to the terms of the offer;
>
> (b) they materially alter it; or
>
> (c) notifications of objection to them has already been given or is given within a reasonable time after notice of them is received.
>
> (3) 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 act.

The process of determining whether the parties' writings memorialize an agreement begins with establishing which document was the offer. Under the UCC, the offer acts as a foundational document and the offeror can limit the offeree's ability to alter its terms through its acceptance.[3] Thus, there is an advantage to characterizing your form as the offer, and both sides will often tender a document that purports to be the offer.[4]

Automotive and manufacturing supply contracts are generally reached through a form-driven process. The figure on the following page details some of the documents or performance



that parties to supply contracts might exchange. Often, the parties exchange these forms electronically.

Using these exchanges as an example, one party or the other might characterize the request for quotation, quotation, award letter, acceptance, or a purchase order as the offer. It is also common for parties to provide in one of these forms that they reject all terms in any prior document that might have been considered an offer, and limit acceptance of their "offer" to their own terms.

The UCC does not define "offer," so Michigan courts rely on common law for a definition. A party's writing can be an offer if it expresses a willingness to enter a binding contract and invites the other party to accept the terms, thereby forming a binding contract.[5] When faced with dueling offers, courts look beyond the conflicting language to identify which document was the offer.

> Given the use of standardized forms, the language employed by the parties will not always be determinative. Courts must often look beyond the words employed in favor of a test which examines the totality of the circumstances.[6]

With respect to the forms described in the figure at left, the U.S. Sixth Circuit Court of Appeals has recognized that a price quotation generally does not constitute an offer but rather an invitation to make an offer.[7] However, Michigan courts have found that quotations can be offers.[8] Again, this has become a fact-specific inquiry.

Once the offer has been identified, the next step in the battle-of-the-forms analysis is to determine whether the offer was accepted. Under UCC 2-207(1), an acceptance is any "definite and seasonable expression of acceptance or a written confirmation"; for example, signing and returning the offer. Commonly, buyers in supply contracts will provide that the seller can accept the terms of a purchase order simply by delivering the ordered goods, which is authorized under UCC 2-206.[9] Thus, a seller should be cautious about delivering goods before the contract documents reflect its understanding of the agreement. For example, if a production schedule is accelerated and failure to deliver goods will idle several production facilities, a seller might not risk the potential loss of goodwill and reputation it could suffer by holding up deliveries. Yet this concession to commercial pressure can compromise the seller's argument that its terms are included in the agreement.

Often, a party will respond to the offer with a document. To constitute an acceptance, the response need not "mirror" the terms of the offer as was required at common law.[10] If the response omits terms of the offer or includes different or additional terms, it can still function as an acceptance of the original offer unless

FAST FACTS

Most manufacturing customers and suppliers use contract forms that include provisions designed to assure that their terms and conditions prevail under the Uniform Commercial Code. Faced with competing forms of relatively equal sophistication, courts frequently employ facts-based analyses to make important determinations, such as which writing was the offer or whether a response was an acceptance. Thus, contract formation procedures have become very important in establishing which provisions govern a supply contract.

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it is specifically conditioned on the offeror agreeing to the additional or different terms. Provisions purporting to condition the offeree's acceptance on the offeror's assent to the different or additional terms are narrowly construed. Such provisions must expressly state that the offeree is unwilling to proceed with the agreement unless the offeror agrees to the additional or different terms.[11] This limitation has resulted in decisions that are difficult to reconcile. For example, the following provision was ruled sufficient: "acceptance was 'expressly made conditional on [the plaintiff's] assent to the terms and conditions contained in [the defendant's] Standard Terms and Conditions of Sale.'"[12] However, this provision was not: "buyer expressly limits acceptance to the terms hereof and no different or additional terms proposed by seller shall become part of the contract."[13]

If the different terms change aspects of the agreement that the parties actually negotiated—so-called "dickered terms"—the response will probably not constitute a "seasonable expression of acceptance." Indeed, the Michigan Court of Appeals has stated that "the common law 'mirror-image rule' must be applied with respect to 'dickered terms.'"[14] Those provisions the parties consciously discussed are, therefore, excluded from a battle-of-the-forms analysis. If the parties' exchanges differ on such terms, there is no acceptance and the documents are not the basis for concluding that an agreement was in effect.[15]

Assuming the party responding to the offer has not tried to change a dickered term, UCC 2-207(2) explains how additional terms[16] appearing in the acceptance become incorporated into the parties' agreement. Because manufacturing buyers and suppliers are generally deemed to be "merchants,"[17] additional terms are incorporated into the agreement unless (1) the offer limited acceptance to the terms of the offer, (2) the offeror objects to the additional terms, or (3) the additional terms materially alter the agreement.

Interesting disputes arise under this section when the parties have not effectively disclaimed each other's forms—that is, if the offer does not "expressly limit acceptance to the terms of the offer," as contemplated under UCC 2-207(2)(a),[18] or the acceptance is not "expressly made conditional on assent to the additional or different terms," as provided in UCC 2-207(1).[19]

In these circumstances, whether the additional terms become part of the parties' agreement depends on whether they are material alterations. There are some potential alterations that courts deem material as a matter of law. Comment 4 to UCC 2-207[20] suggests some of these, such as inserting a disclaimer of standard warranties of merchantability or fitness for a particular purpose. Similarly, in *Metropolitan Alloys v State Metals Industries*,[21] the Eastern District of Michigan ruled as a matter of law that the addition of a forum selection clause constituted a material alteration:

> [I]f faced with the issue, the Michigan Supreme Court would rule that a unilateral addition of a forum selection clause to a contract governed by the UCC is a material alteration of the contract that does not become a part of the contract by operation of M.C.L. 440.2207(2)(b).[22]

If there is no precedent establishing the materiality of an additional term as a matter of law, courts apply a facts-based test to determine whether the additional terms are material changes and, therefore, excluded from the contract. Michigan courts conclude that the additional term is a material alteration if it will "result in surprise or hardship if incorporated without express awareness by the other party…."[23] The first Michigan case to apply this test was an unpublished Michigan Court of Appeals opinion, *Plastech Engineered Products v Grand Haven Plastics, Incorporated*,[24] but it has been cited and followed in subsequent published opinions.[25] In assessing whether the addition would result in surprise, courts consider the parties' prior course of dealing, the documents they exchanged, industry custom (or lack of custom), and the conspicuousness of the additional terms, among other factors.[26] Hardship is primarily an economic analysis. Applying this test, Michigan courts have determined that a clause prohibiting a seller's assignment of its rights under a contract was a material alteration[27] and a provision awarding a produce supplier its attorney fees was not a material alteration.[28] Of course, these rulings depended on the particular facts of each case.

Finally, if the parties' written exchanges do not establish an agreement but they conducted themselves as if they had an agreement, this conduct may be sufficient to establish a contract under UCC 2-207(3). In such cases, the terms of the agreement would be those on which the parties' writings agree. All other provisions would be determined under the UCC's "gap filler" provisions. In the context of a manufacturing supply contract, if a buyer requests delivery of goods which the supplier delivers and for which the buyer makes payment, a court may conclude that these exchanges demonstrate an agreement.[29]

Conclusion

In modern manufacturing supply contracts, both buyers and sellers often use forms seeking to secure the same contractual advantages under the UCC. The circumstances surrounding their exchange of forms and performance will determine whether either party's terms, or neither party's terms, prevail. Fact-based inquiries are relevant at several stages of the battle-of-the-forms analysis. Thus, parties to such agreements must be counseled to be sure their communications and actions—not just their forms—are consistent with the terms they want included in their agreements. ■

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ENDNOTES

1. MCL 440.1101 *et seq.*
2. MCL 440.2207.
3. See *QC Onics Ventures, LP v Johnson Controls, Inc,* unpublished opinion of the U.S. District Court for the Northern District of Indiana, issued June 21, 2006 (Docket No. 1-04-CV-138-TS) at *6–7 (applying Michigan law).
4. Of course, doing so does not prevent the other party from responding with a rejection of the purported "offer" and tendering its own "offer," technically a counteroffer.
5. *Kloian v Domino's Pizza,* 273 Mich App 449; 733 NW2d 766 (2006) ("An offer is defined as 'the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it'"; quoting *Eerdmans v Maki,* 226 Mich App 360, 364; 573 NW2d 329 (1997)).
6. *Challenge Machinery Co v Mattison Machine Works,* 138 Mich App 15, 21; 359 NW2d 232 (1984), citing *Mead Corp v McNally-Pittsburg Mfg Corp,* 654 F2d 1197 (CA 6, 1981).
7. *Dyno Constr Co v McWane, Inc,* 198 F3d 567, 572 (CA 6, 1999), citing *White Consol Indus, Inc v McGill Mfg Co,* 165 F3d 1185, 1190 (CA 8, 1999), and *Realty Dev, Inc v Kosydar,* 322 NE2d 328, 332 (Ohio Ct App, 1974). Accord *QC Onics Ventures, LP, supra* at *5.
8. See, e.g., *Challenge Machinery,* 138 Mich App at 21; *Compass Automotive Group, LLC v Denso Mfg Tennessee, Inc,* unpublished opinion and order of the U.S. District Court for the Eastern District of Michigan, issued February 22, 2013 (Docket No. 12-10919) at *3 (finding that an RFQ preceding the quotation was not an offer).
9. MCL 440.2206.
10. *Challenge Machinery,* 138 Mich App at 22.
11. *Id.*
12. *Walter Toebe Constr Co v Kard Welding, Inc,* unpublished memorandum and opinion of the U.S. District Court for the Eastern District of Michigan, issued January 25, 2008 (Docket No. 05-73605) at *2.
13. *Challenge Machinery,* 138 Mich App at 22.
14. *Laforce Inc v Pioneer General Contractors Inc,* 75 UCC Rep Serv 2d 624 (2011).
15. *Id.*
16. There is some disagreement as to whether different terms are also proposals for addition to the contract under Michigan law. Compare *Gage Products Co v Henkel Corp,* 393 F3d 629, 641 (CA 6, 2004) ("'[w]hether or not additional or *different* terms will become part of the agreement' depends upon the provisions of § 2-207(2)," citing MCL 440.2207 Comment 3) with *American Parts Co v American Arbitration Ass'n,* 8 Mich App 156, 167 (1967) ("between merchants additional, but not different, terms become part of the contract" subject to MCL 440.2207(2)).
17. Under MCL 440.2104, merchants are persons who "deal[] in goods of the kind" involved in the transaction.
18. MCL 440.2207(2)(a).
19. MCL 440.2207(1).
20. "Although lacking the force of law, the official comments appended to each section of the UCC are useful aids to interpretation and construction." *Shurlow v Bonthuis,* 456 Mich 730, 735 n 7; 576 NW2d 159 (1998).
21. *Metro Alloys v State Metals Indus,* 416 F Supp 2d 561 (ED Mich, 2006); see also *Compass Automotive Group, LLC v Denso Manufacturing Tennessee, Inc,* 2013 WL 655112 (ED Mich 2013).
22. *Metro Alloys,* 416 F Supp 2d at 567, but see *Belanger, Inc v Car Wash Consultants, Inc,* 452 F Supp 2d 761, 765–766 (ED Mich, 2006), in which the court relied on the analysis of *Metro Alloys* but also considered the circumstances surrounding the inclusion of a forum selection clause in the plaintiff's acceptance.
23. Comment 4 to UCC 2-207.
24. *Plastech Engineered Prod v Grand Haven Plastics, Inc,* unpublished opinion per curiam of the Court of Appeals, issued March 31, 2005 (Docket No. 252532). The *Plastech* Court adopted this test from *American Ins Co v El Paso Pipe & Supply Co,* 978 F2d 1185, 1189 (CA 10, 1992), noting "We find no Michigan case that has addressed whether an integration clause is considered a material alteration." *Id.* at *5.
25. See, e.g., *ISRA Vision, AG v Burton Industries,* 654 F Supp 2d 638, 648 (ED Mich, 2009).
26. *Plastech, supra* at *5; *ISRA Vision, AG,* 654 F Supp 2d at 648.
27. *ISRA Vision, AG, supra.*
28. *Beardon v Great Lakes Produce and Mktg LLC,* 80 UCC Rep Serv 2d 967 (WD Mich, 2013).
29. *Gage Products Co, supra,* citing *McJunkin Corp v Mechanicals, Inc,* 888 F2d 481, 488 (CA 6, 1989), *Quaker State Mushroom Co v Dominick's Finer Foods, Inc,* 635 F Supp 1281, 1285 (ND Ill, 1986), and *Benedict Mfg Co v Aeroquip Corp,* unpublished opinion per curiam of the Court of Appeals, issued July 8, 2004 (Docket No. 242563).