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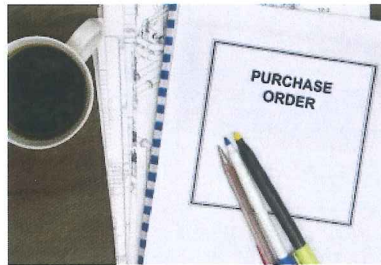
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PURCHASE ORDERS AND SALES QUOTATIONS: DON'T BE CAUGHT BY SURPRISE!

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By: Timothy J. Woolford, Esquire

Subcontractors perform 75-85 percent of the work on construction projects. Often, a significant part of the subcontract work is comprised of material or equipment purchases. This is particularly true for certain trades, such as electrical and mechanical subcontractors, whose work often involves the purchase and installation of expensive and specialized equipment or machinery. The purchase



of equipment or machinery usually involves a series of form documents exchanged by the buyer and seller of the equipment or machinery. In many cases, the seller/vendor provides a sales quotation or proposal. The subcontractor purchasing the equipment may then issue a purchase order to the seller/vendor. The seller/vendor may then send an acknowledgement of order form or some other similar document. These documents often contain terms and conditions which conflict with or are inconsistent with one another.

In many cases, none of these documents are signed by both parties to the transaction. If a dispute arises, there is often disagreement as to which form constitutes the contract and which terms and conditions are in the contract. When the parties to a construction dispute cannot agree on which documents even make up the contract, it adds another level of legal expense that can make the dispute not worth pursuing.

The Uniform Commercial Code (the "Commercial Code") – which has the force of law in Pennsylvania – contains rules for determining what forms and terms and conditions make up the contract when the parties have exchanged a series of forms. Unfortunately, the rules are confusing and courts cannot always agree on their interpretation. For that reason, buyers and sellers of equipment, machinery and construction materials are well-advised to make sure that there is an agreement signed by both parties so the terms of the deal are clear. From the supplier's or manufacturer's standpoint, the sales quotation should be signed. The buyer, on the other hand, will want its purchase order signed by the seller.

If none of these documents are signed, do the parties have an agreement? Under the Commercial Code, the answer is yes. Under Section 2-207 of the Commercial Code, the contract will consist of the terms on which the parties' written forms agree, along with any supplementary terms that are incorporated into the agreement under other sections of the Commercial Code. Any conflicting terms in the forms are "knocked out" and do not become part of the agreement. For example, assume the seller of a particular piece of equipment sends a proposal to the subcontractor requiring all disputes between the parties be resolved by arbitration in the state of Kansas. The subcontractor, who is based in Pennsylvania, subsequently issues a purchase order to the seller stating that all disputes are to be resolved in Pennsylvania courts. Under the Commercial Code, the conflicting dispute resolution provisions would be knocked out – there would be no requirement to arbitrate disputes in Kansas. Instead, the parties would have to resolve their disputes in whatever court(s) have jurisdiction to hear their disputes.

If the purchase order contains terms which do not conflict with the terms and conditions of the proposal or quotation, will they be enforceable as part of the contract? The answer is that it depends. If the additional terms of the purchase order materially alter the terms of the proposal/quotation, they will not be considered part of the contract. Many – if not most – of the terms added by subcontractors in their purchase orders to protect themselves are likely to be considered material alterations and will not become part of the contract. These would include: changes to price, quantity, quality or delivery; additional warranty requirements; limitations on liability; and dispute resolution provisions, such as arbitration requirements or requirements that disputes be resolved in a certain state, county or other court of law. Thus, subcontractors who think they are "covered" by the language of their purchase orders better think again. This is another reason that

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parties who want their terms and conditions to be part of the contract should insist on the signatures of both parties. Proceeding without signed writings is risky because it leaves uncertainty as to what terms and conditions are included in the contract. If the other party will not sign a document containing your terms, consider negotiating a set of terms and conditions that both sides can agree upon. This will eliminate potentially expensive legal proceedings in which you are arguing about the contents of the contract rather than the merits of the underlying dispute.

In one case, a subcontractor purchased expensive equipment from a manufacturer in Florida. The manufacturer's quotation stated, among other things, that all disputes had to be resolved in court in Tampa, Florida. The subcontractor sent the manufacturer a purchase order stating that all disputes had to be resolved in Pennsylvania. When a dispute arose over the manufacturer's performance and the delays it caused, the subcontractor withheld payment of the last installment. One day, a sheriff showed up at the subcontractor's office and served it with a lawsuit filed in the state of Florida. The subcontractor would have been forced to hire a lawyer in Florida just to argue that Florida did not have jurisdiction over it. Rather than incur that expense, the subcontractor simply paid the manufacturer in full since it was prohibitively expensive to seek dismissal of the Florida case and then file another suit in Pennsylvania to recoup the costs of the delays caused by the manufacturer. If there had been a signed agreement stating that suits had to be brought in Pennsylvania, the manufacturer would never have attempted to sue in Florida. Failing to pay attention to the forms cost the subcontractor.

Avoid uncertainty regarding your contracts and insist on signatures when exchanging forms with manufacturers/vendors. If signatures are not possible, understanding the rules as to what terms and conditions will apply will help you avoid surprises and manage risk.



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Timothy J. Woolford, Esq. is the founding member of **Woolford Law, P.C.**, a law firm that provides legal services exclusively to the construction, design and real estate development industries.

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