

# Avoiding disputes

How to discuss terms and conditions prior to commercial transactions **Interviewed by Heather Tunstall**

**S**ales transactions between companies are a typical part of day-to-day business — whether it's purchasing components as part of a whole product, buying equipment or contracting services. It's so common, in fact, that it's likely that a company may overlook or ignore terms and conditions, which could result in serious disputes in the event of a defective product or loss.

"Sometimes the terms and conditions of the purchase order or the invoice are not clearly communicated to the other merchant," says Stephan A. Barber, a senior partner at Ropers Majeski Kohn & Bentley, PC. "Thus, a dispute can arise as to whose terms and conditions control if some kind of event occurs."

Situations like this are widespread and may lead to a conflict if there's an issue with the product or service purchased.

*Smart Business* spoke with Barber to find out more about the troubles that may come up during commercial transactions between companies, and how to avoid them.

## What may cause a dispute between companies during a commercial transaction?

Business owners have to be careful with competing or conflicting terms and conditions relating to shifting or accepting the risk of a loss. When ordered goods are in transit, who is responsible if the goods are damaged, lost or delayed? Is there a warranty, and if so, what are the terms and how long is it in effect? Are there disclaimers or limitations on liability or damages? Are there any terms relating to indemnification for claims made by third parties for damages relating to the goods that have been purchased?

Also, attention must be given to payment terms. Many times, the purchase order has very liberal payment terms, and the purchasing company does not have to pay the whole amount or has excuses for not paying everything. However, the invoice may state that the entire payment is due within 10, 15 or 30 days. Sometimes there is no formal purchase order at all — just a telephone call or email and an invoice that is faxed or emailed confirming the order.

## Who is responsible for the loss or damage of goods?

The Uniform Commercial Code, adopted in virtually all states, can resolve some of these issues, often called the 'battle of the forms.' Section 2-207 of the code addresses additional or different terms in an accep-



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tance or contract, and there are several sections dealing with deterioration, casualty, nonarrival, etc., as well as what happens if there is no agreement between the parties as to a risk of loss.

The situation becomes complicated if parties attempt to make an agreement regarding risk of loss or if there is a course of dealings or conduct between the parties. The court can look at the course of dealings to see how to interpret the contract. It's problematic when companies do not give each other their respective terms and conditions, or when the entities do not pay strict attention to terms and conditions. Additionally, the terms and conditions in the invoice, purchase order and other contract documents or communications could compete or be contradictory.

## What happens when the terms and conditions are contradictory?

If you have a discrepancy in the purchase order and the invoice as to who is responsible for defective or nonconforming goods, then determine whose term supersedes, if at all. There are a number of Uniform Commercial Code rules as to how that dispute can be resolved. However, a court could disregard both terms if they are in such conflict and then resort to general law.

If the purchaser sends a purchase order

and someone on the receiving end signs it but then sends back an invoice with different terms and conditions, the purchaser could argue that because the seller signed the order, in effect agreeing to its terms and conditions, the invoice's conflicting terms and conditions are superseded by the purchaser's terms and conditions. Or, if evidence shows that when you started doing business, you met with the seller and showed the terms and conditions in your standard purchase order, the purchaser's terms and conditions can be part of the contract despite different terms in the invoice.

## How often do these types of arguments escalate to legal trouble or litigation?

Trouble happens more frequently than people think. Problems do not always reach the level of lawyers, but they certainly get to management and the respective companies getting together to try to resolve the issue, or even going to mediation. It also can sour a relationship so that even after a successful resolution, companies do not want to do business anymore. Sometimes, litigation ensues if a large amount of money is involved.

## How can a business owner avoid disputed terms and conditions from the beginning?

Try to require the party with whom you are contracting to sign a document acknowledging that it has reviewed and agrees to your terms and conditions or other contract terms. Then, your terms and conditions should supersede any contradictory terms and conditions. However, additional or supplementary terms in the other party's purchase order or invoice will probably be a part of the contract. Additionally, if you will have repeated transactions with a company, have a master contract negotiated and signed, controlling the commercial relationship.

Both companies should determine whether the other has standard or general terms and conditions and read them. Find important ones that may be in conflict and then specifically agree to the terms that will control the commercial relationship.

An ounce of prevention is worth a pound of cure, so business owners should pay attention to what's going on before a problem arises, not after. Therefore, relevant employees must be trained what to do and instructed to consider all possible ramifications. <<

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