What Are the Contract Terms When You Buy Goods?

5-19-2011 by James H. Breay

Whenever you buy goods or services, you enter into a contract with the seller. But what are the terms of that contract? If you do not have your own terms on your purchase order or other form, then the terms of the contract likely will be either the seller's terms or terms supplied by the Uniform Commercial Code. Either way, the terms of the contract aren't likely to be very favorable to you.

That's why you should have your own set of standard terms of purchase, and your own set of procedures, which make it reasonably likely that your terms will apply to each contract you enter.

A buyer's standard terms should provide for full warranties by the seller and comprehensive remedies for the buyer, including the right to recover lost profits. Your standard terms should cover a number of other areas, too, including ownership of intellectual property, duties of confidentiality, the buyer's right to terminate and the obligation of the seller to return tooling and other equipment.

Printing your standard terms on your purchasing form generally is not sufficient to ensure that your terms will be the terms of the contract. To increase your chances of winning the “battle of the forms,” you will need specific and detailed wording on your purchasing forms. In some cases, you may need to take additional steps.

If you are transmitting or receiving quotations, orders or acknowledgments electronically, then you may not be able to include your terms of purchase in the transmission. But there are certain helpful techniques you can use when you are contracting electronically.

Your Progress Payments May Be At Risk

Occasionally a supplier that builds and sells expensive machines may require the buyer to make progress payments toward the purchase price. When this happens, the buyer is really acting as the supplier's bank. Therefore, the buyer should protect itself in the same manner that a bank would.

If the supplier gets into financial difficulty, then you will want to be able to credit your progress payments against the price of the machine, obtain possession of it and transfer it to another supplier for completion. The courts are split as to whether you are entitled to do this, however.

To avoid having to litigate the issue, you should obtain a security agreement from the supplier and file a UCC financing statement to protect your interest in the machine.

You will also need to obtain UCC financing statement searches that will tell you whether anyone else has a prior, perfected security interest in the machine. For example, the supplier's bank may have a security interest in all of the supplier's inventory, which includes your machine. If the bank or other creditor has a previously filed UCC financing statement covering the machine, then you will want to obtain the other creditor's written agreement that your interest in the machine will have priority over the other creditor's security interest.

These documents, as well as your purchase order, must be carefully worded to preserve your right to recover possession of the machine without having to pay for it twice.

Are You Vulnerable to Supplier "Blackmail"

Often a supplier has possession of tooling or other equipment that belongs to the buyer. If the buyer decides to end its relationship with the supplier and asks the supplier to turn over the equipment, it is not unusual for the supplier to refuse until the buyer pays additional money or buys certain materials or finished goods. Occasionally the supplier claims ownership of the equipment. Sometimes the supplier claims a statutory lien on the equipment.

This can create a very difficult situation for the buyer, particularly if the buyer needs to transfer the tooling or other equipment to a new supplier to produce much-needed parts. Unfortunately, the only way to force the supplier to turn over the equipment is to obtain a court order. This can be expensive and time consuming.

There is no foolproof way to prevent an unscrupulous supplier from using possession of a buyer's equipment to "blackmail" the buyer. But a well-drafted “tooling agreement” with the supplier can be very helpful. Such an agreement specifically describes the equipment and includes the supplier's acknowledgment that the equipment belongs to the buyer, the supplier's waiver of any lien on it and the supplier's agreement to turn it over to the buyer on demand, even if the buyer owes the supplier money.

If you own tooling or other equipment that a supplier uses to produce inventory for you, then you should have a tooling agreement with the supplier. It can save you time and money.

If you need assistance in any aspect of buying or selling goods or services, contact Jim Breay (616.752.2114 or jbreay@wnj.com), Chair of the Commercial Transactions Group at Warner Norcross & Judd.