



502 - Don't Lose the Battle of the Forms

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Faculty Biographies

Timothy Bass

Timothy P. Bass is the associate general counsel at Boston Communications Group, Inc., in Bedford, Massachusetts (bcgi). bcgi provides services and software enabling wireless (cellular) telecommunications billing, including prepaid call processing platforms and hosted services. His responsibilities include contract drafting and negotiation, management of internal contract management and approval systems, intellectual property management and coordination with outside patent counsel, and assistance with preparation of patent and trademark applications.

Prior to joining bcgi, Mr. Bass was general counsel for Innovative Telecom Corporation, in Nashua, NH, an early leader in prepaid telecommunications billing technology and hosted services.

Mr. Bass received a B.A. from Harvard College and is a graduate of Boston University School of Law.

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Ronald Peppe

Ronald Peppe serves as the general counsel, vice president of human resources, and corporate secretary for Canam Steel Corporation in Point of Rocks, Maryland. Canam Steel is the U.S. subsidiary of Canam Group Inc., a publicly traded Canadian manufacturing and construction company.

Mr. Peppe has served as vice president law and technology for ACC in Washington, DC. At ACC he managed several areas relating to the development of content and the provision of legal resources to members, including the ACC Online website, the ACC Docket magazine, as well as the association's educational programs, conferences, legal resources and national practice committees. He also oversaw the technology used by the association. Before Canam, Mr. Peppe was associate general counsel for The Prudential Insurance Company of America, and vice president of Prudential Home Mortgage.

Mr. Peppe is active in community affairs, especially education issues, and was recently elected to the school board for Falls Church City. He previously served for seven years on the board of education of Frederick County, MD, as president of the board. He was a member of the board of directors of the Maryland Association of Boards of Education.

Mr. Peppe earned a J.D. from the University Of Maryland School Of Law, where he served as Notes and Comments Editor of the Maryland Law Review, and M.A. and B.A. from The Johns Hopkins University in International Studies.

Illustration
Tim Bass
8/17/07

Say you have a passage with a ~~strikeout~~:

His responsibilities include contract drafting and negotiation, management of internal contract management and approval systems, intellectual property management and coordination with outside patent counsel, ~~and assistance with preparation of patent and trademark applications~~.

And you want to re-insert the language without accepting the ~~strikeout~~ (which causes it to disappear). MS Word will not allow you to copy ~~strikeout text~~ when track changes is used.

First, select the ~~strikeout~~:

His responsibilities include contract drafting and negotiation, management of internal contract management and approval systems, intellectual property management and coordination with outside patent counsel, ~~and assistance with preparation of patent and trademark applications~~.

Next, click "reject" on the reviewing toolbar and then copy the selection to the clipboard (edit/copy, Control-C, etc.):

His responsibilities include contract drafting and negotiation, management of internal contract management and approval systems, intellectual property management and coordination with outside patent counsel, ~~and assistance with preparation of patent and trademark applications~~.

Then, click "undo" (under change reject) to cancel the ~~strikeout rejection~~.

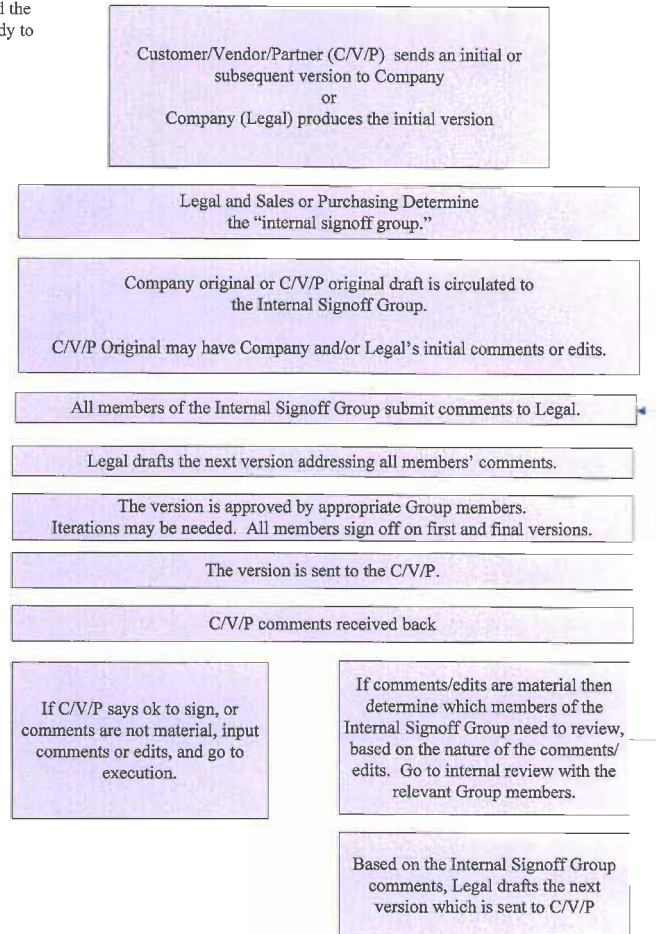
His responsibilities include contract drafting and negotiation, management of internal contract management and approval systems, intellectual property management and coordination with outside patent counsel, ~~and assistance with preparation of patent and trademark applications~~.

Finally, paste back the language you want:

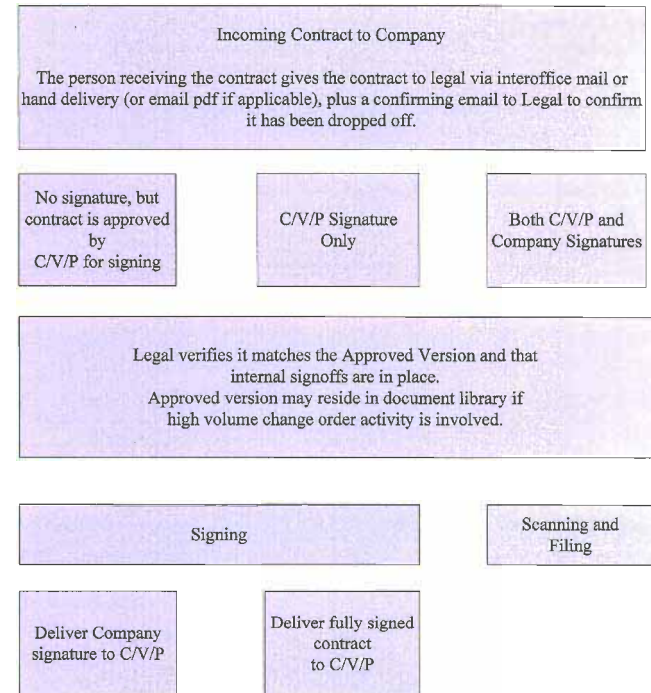
His responsibilities include contract drafting and negotiation, management of internal contract management and approval systems, intellectual property management and coordination with outside patent counsel, ~~and assistance with preparation of patent and trademark applications~~, and assistance with preparation of patent and trademark applications.

Sometimes its helpful to your counterpart to go to the trouble to make clear them exactly what you did.

This flow chart covers the process up until the point at which a contract negotiation is completed and the contract is ready to sign.



This flow chart begins at the point when a contract negotiation is completed and the contract (or amendment or change order) is ready to sign.



ACC 2007 Annual Meeting
502 Don't lose the Battle of the Forms
Presenter Outline
Tim Bass
8/17/07

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Version Control and Related Contract Admin Issues - Best Practices and Traps for the Unwary

- 1) The basic process and problem: Exchange versions in negotiation and sign an agreed-upon version.

Scenario: An agreement with detailed pricing and technical requirements is signed between your company and customer, and the deliverables required begin to be delivered. Six months later, it turns out that there is a requirement in the contract that is not possible for your company to deliver. No one in your company remembers discussing it. How did that requirement get in the contract? Why wasn't it picked up and dealt with before signing? Was it a change submitted by the other party that you missed? Was there a signoff process in place? Did the responsible subject matter experts within your company actually sign off on the requirement? Did you flag it to them as a change so they wouldn't miss it? Earnest discussions ensue between the your company and your customer, in order to assess how serious the problem is, what do about it, and how much financial pain your company is going to bear as a result.

This of course has never happened in your presenter's company, and the guidelines below will help you to ensure it never happens in yours.

- 2) Does it matter who does the first draft anymore?¹
- It still matters relative to the content of the contract. But in addition the "first drafter" can set the tone and rules of engagement to some extent. For example for purchase orders we use pdfs with the terms hard coded. But for most contracts I will send a Word document.
 - "Neither Party Considered Drafter" clauses. These are intended to prevent a claim that language which was not agreed upon, was inserted by the other party, and inadvertently allowed into the signed agreement by the complaining party. It

¹ Can one "control" the drafting if both sides have electronic versions?

may be impossible to get language rescinded which may have "slipped in unnoticed."

- 3) Should you negotiate rules of engagement? Perhaps we should consider asking the other side, in our initial transmittals, or in our initial responses to first drafts received, to use a few basic agreed-upon practices. It is interesting to note that many business practices have standard formats, such as letters of credit, may leases, etc. We lawyers have not thought of standardizing the contract negotiation mechanics. Here are a few suggestions for best practices which might be agreed-upon:
 - Please mark all changes.
 - You may accept our changes (and then redline in additional changes if needed) or leave them as marked (and redline over them if needed).
 - Please do not lock the document to prevent further editing until executable versions have been agreed-upon; both parties agree to follow these rules in good faith.
 - The parties agree to use Word redlining. I have had some problems when I receive documents in Deltaview, which is font-generating change tracking software. When I receive these they are difficult to edit in a way that is readable internally or to the other side. From my perspective, the use of Deltaview effectively hijacks the process and makes bilateral negotiation more difficult. I would be happy to hear views of anyone who uses Deltaview, perhaps I am missing something.
- 4) If a change is not marked, is it void? I would be interested in hearing opinions as to under what circumstances rescission of contracts has been granted as a remedy, or whether contract language has ever been constructively rewritten in equity as a result of an unmarked change.
 - You want to avoid ever having to consider these issues, however.
 - You will get contract versions in which are edited by non-lawyers, and there may be unmarked changes in any document you receive. Use the Word "compare" tool, as a check, and read everything over, to make sure there are no unmarked changes. Mark (highlight, redline, etc.) such changes for your internal reviewers within your company.
- 5) How to secure the FINAL text from further changes? You can further protect the document by:
 - Initialing each page; and/or
 - Use a locked pdf.
- 6) Components of the negotiation process on your side.
 - Internal approval process. Define a signoff group or internal review team. These must each sign off via email prior to a modified document going to the other side, in negotiation. Sometimes only a subset of signoffs are needed if changes are focused in one area such as technical or financial/pricing. See the attached basic internal signoff Flow Chart pdf.

- b) *Keeping track of what is the current version.*
- i) Electronic filing. One suggestion is to keep an electronic correspondence file. Its easiest if files are saved into it as they are received or sent. And/or naming conventions or custom programs can be used. Keep emails in Outlook or other email client, but copy or save selected ones into standard windows folders. I created an example of a single folder view with a few emails and files, in order to illustrate one approach. In our legal department we have all legal staff able to access a central directory. [See attached Directory Screen Shot pdf.](#)
 - (1) Don't get bogged down developing new systems, but keep trying to improve your use of the tools you have. You may be the only one working on a contract who keeps track of all of the internal and external emails and documents which need to be exchanged in order to make sure the correct requirements and terms end up in the contract.
 - ii) *Incorporation by Linkage* (referenced Web terms). Many vendor contracts will reference web terms, where a link or url is inserted into the soft or printed document.
 - (a) First, determine whether the contract or web terms themselves say that the web terms are subject to change. If they are subject to change, determine whether that is acceptable.
 - (b) In any case, I find it most easily understandable to print or save the web terms or create a separate soft copy of them, to be part of the contract file. Your team needs to know what they say and will be more likely to understand them if you make them available.
 - (c) Sometimes it is understood that the web terms *will* change. What control does the other party have? Right to notice? Right to terminate the contract? Ask for these as needed, depending on the terms. Or negotiate that certain terms will not change. For example, with pricing terms, a right of termination may not be good enough.
 - (d) Discussion of *Douglas v. United States District Court for the Central District of California ex rel Talk America*. The case may nor may not have a holding relevant to us in the trenches. However the 9th Circuit basically disapproved of web terms which can change without individual notice to the contract-holder. At the least, it is fuel for the argument that it is not a good idea to sign a contract having terms that can change by notice only via posting on the other party's web site.
- c) *Verifying a version which comes in.*
- i) Check it against the current version. Don't assume a redlined Word document has all changes redlined.
 - ii) Use a compare program or tool (Word has one) to compare an incoming version against your last version. If the other side sends you pdfs, I have had some success in asking for a Word version in addition.
 - iii) Communicate what the changes are, to the affected members of the signoff group.
 - iv) Sometimes contract documents are controlled by an area outside of the Legal department. For example high-volume change order activity. It is helpful to have the organization keep the current version of these in a document library accessible by the Legal department. When Legal needs to approve such a document, the document library version (which is approved per company policy before being checked in) can be consulted for comparison.
- d) *Generating a new version to be sent out.*
- i) Communicate the changes to the other side – Word redlining for example.
 - ii) One way to preserve clarity is to accept all changes, then redline in your counter-changes, ending with a document with only your redlines.
 - (1) Insertions to be rejected can be indicated with strikethrough font or redlined out.
 - (2) Deletions to be rejected can either be first accepted then redlined back in. Or, where you want to clarify they you are re-inserting previously proposed language (rather than inserting new language), Deletions can be redlined back in while leaving the redline strikeout in place. For a method to do this with MS Word, [see the attached Illustration pdf.](#)
 - (3) The goal is, first and foremost, not to be misleading, and, clarity to the other side as to what changes you have made.
 - iii) What about metadata? Internal comments, document summaries and notes. Part of the process should include use of a "remove hidden data tool." These are available as shareware, but you will need your IT department to select one and install it on your computer.
- e) *Execution.*
- i) Verify the document is correct. For a high volume business this can be a major task in itself. See the [attached contract execution Flow Chart pdf](#) which details the basics.
 - ii) Approval should be a formality if the internal approval process has been followed in negotiation.
 - iii) Try to agree on the execution details up front and then follow them. Members of your team will ask you about what logistics to use, there is no correct answer, it should simply be agreed upon.
 - iv) Consider sending the final unsigned agreement as a PDF. This will help lessen the likelihood of changes during the execution phase. The other party may prefer hard copies, in which case you can email the pdf, ask them to print two and sign then and proceed from there, for example.

- v) Check hard copies received against your approved soft copy version. Sometimes I feel like I'm wasting time, but I have discovered inked changes or even un-redlined changes a few times.

7) Conclusion.

- i) Keeping track of the mechanics of negotiation is part of the "Battle of the Forms". Having a good foundation using the ideas presented above will allow you to more effectively deal with the substantive issues discussed by my co-presenters.

Battle of the Forms Outline – ACCA Annual Meeting Presentation
Hannah K. Joseph
August 17, 2007

- I. Example: You want to view 1000 widgets from a particular vendor at a trade show. Before they will even permit you to VIEW the product at the show, you need to submit a credit application which states "The Company submitting this application understands and agrees that Acme's Terms and Conditions of Purchase shall provide the exclusive terms between the parties."
 - a. Acme's Terms and Conditions ("T&Cs") are extremely unfavorable to your business practices, especially with respect to warranties, indemnification, risk of loss, and IP protection
 - b. What do you do?
 - i. Revise their credit application and T&Cs
 - ii. Send your own T&Cs
 - c. If neither document is signed, but you are able to view the goods or purchase the goods, what terms govern the relationship?
- II. Battle of the Forms Generally
 - a. Definition: Often when two companies deal with each other in the course of business, they will use pre-printed standard form agreements. Often the terms in these agreements conflict and yet offer and acceptance are achieved forming a binding contract. The battle of the forms refers to the resulting legal dispute of these circumstances, wherein both parties recognize that an enforceable contract exists, however they are divided as to whose terms govern that contract.
 - b. Typical Situations:
 - i. Purchase Orders ("P.O.")(typically favors buyers)
 - ii. Acknowledgement (typically favors sellers)
 - iii. Performance (only after conflict arises during shipment or performance does the conflict in the terms come to light)
- III. UCC Section 2-207 and Second Restatement of Contracts
 - a. Text:

Additional Terms in Acceptance or Confirmation:

(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) *notification 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.*

b. Purpose: To do away with mirror-image rule of common law

c. Functions:

- i. To determine if a contract has been formed by the exchange of documents
- ii. If so, to determine what the specific terms are governing the relationship

d. Crucial Element: Between merchants, additional terms proposed in an acceptance can become part of the contract if the offeror remains silent.

e. Representative Situations covered by Section 2-207:

i. Acceptance expressly conditional on assent to changes

1. *EXAMPLE: "This acceptance of your offer is effective only if you agree to all of the terms listed on the reverse side of this acceptance form"*

2. Must track 2-207 exactly

- a. A contract is formed if language states "A contract is formed only upon the express condition that you assent to any terms in this order that are different from or additional

to any terms in your offer. If you do not assent, this document shall serve solely as a counteroffer, and shall not cause any contract between us to come into effect."

- b. A contract is not formed if language states "This acceptance of your order is subject to the terms and conditions on this order form, all of which you hereby accept."

ii. Additional term in acceptance

1. If both parties are merchants, an additional term MAY become part of agreement.

2. Three exceptions:

a. the offer expressly limits acceptance to the terms of the offer

b. the additional term materially alters the agreement

i. Disclaimer of warranties

ii. Arbitration (authorities split)

c. notification of objection to the additional term has already been given or is given within a reasonable time after notice of the additional term is received.

3. *EXAMPLE: Buyer sends a P.O. for 100 widgets. Seller sends an acknowledgment mirroring the terms of the P.O. and adds a forum selection clause for Indiana. Buyer does not respond to acknowledgement. Because both parties are merchants, forum selection clause is incorporated into the agreement.*

iii. Conflicting terms in documents

1. Knockout Rule – conflicting provisions knock each other out and neither becomes part of the agreement. Where applicable, UCC Gap Filler provisions or common law controls.

- a. *EXAMPLE: There is a one year warranty in P.O. In the Acknowledgement, there is a conflicting disclaimer of all warranties. UCC Gap Filler Section 2-314 provides an implied warranty of merchantability where there is a conflict.*

- 2. Minority Rule: Second Clause has no effect – Offer controls
 - a. *EXAMPLE: Same set of facts as above. In this case, a one year warranty would control.*
- iv. Response diverges too greatly to become a contract
 - 1. General principle: Forms give rise to a contract if they agree on price, quality, quantity, and delivery terms but disagree on remedies, arbitration, and other unbargained-for terms.
- v. Contract by parties' conduct – Despite conflict in terms, one party fully or partially performs
 - 1. Rule: Regardless of whether there was an offer or acceptance, if the parties act as if there is a contract, the agreement will be enforced and the terms will be the writings of the parties that are in agreement or applicable UCC gap-filler provisions will control.
- vi. Negotiations not involving battle of forms
 - 1. Arises where draft agreements are sent back and forth, form agreements are not used
 - 2. Rule: Typically, no clear offer and acceptance was made.
 - a. There is no contract OR
 - b. The parties' actions gave rise to a contract
- f. UCC Gap Filler Provisions
 - i. Open Price Term – Section 2-305
 - ii. Delivery in single lots – Section 2-307
 - iii. Place of delivery – Section 2-308
 - iv. Time provisions, notice of termination – Section 2-309
 - v. Time for payment – Section 2-310
 - vi. Performance – Section 2-311
 - vii. Implied Warranty of Merchantability – Section 2-314

- IV. Real Life Examples
 - a. Battle of the Purchase Orders
 - b. Strategy in exchanging P.O.s
 - i. Whose document do you start from?
 - ii. How do you communicate Terms and Conditions of a P.O.?
 - iii. How to analyze your bargaining power in negotiation
 - c. Analysis of earlier hypothetical:
 - i. Acme's credit app and P.O. was the offer
 - ii. You send a redlined P.O. (that is an acceptance) OR you send your T&Cs (that would be a counteroffer)
 - iii. If you perform, the terms in agreement will control with gap filler provisions
 - iv. If you agree on pricing, quality, quantity, etc. a contract is formed on those terms
 - v. If material terms are in conflict, i.e. warranty, knockout rule applies and gap filler controls.
 - d. Lessons learned:
 - i. Always affirmatively respond that you do not want a particular term or you risk it becoming a part of the contract
 - ii. Do not commence performance without the material terms being hammered out or you risk a contract arising unintentionally
 - iii. Always try and use your own T&Cs

Session 502
 Don't Lose the Battle of the Forms
 Ron Peppe
 8/13/2007

- 1) How do you convince the sales/procurement people?
 - a) What if there is no definitive signed agreement?
 - i) There are usually plenty of other paper or electronic documents exchanged
 - (1) Quotations, proposals
 - (2) Correspondence
 - (3) Invoices
 - (4) Email
 - ii) Moral: There is a contract, the issue is figuring out what it is, what terms are included
 - iii) As noted already, if you fight the "battle of the forms" to a draw, the UCC applies, and that includes course of dealing
 - iv) If there is a final integrated contract, the battle is over
 - v) Since you will not be able to review every agreement, and you may not see all the related paperwork even if you review the agreement, the goal is to make sure the folks (usually sales folks) who create this "paper" trail understand some of these issues, and know what to say or not say. Attached to the materials is a presentation I have used to train the sales force. Get invited to the sales meetings. It is a good time to train them, and they are more likely to stop and call you if they know you.
 - b) The sales folks like to refer to the contract terms as "boilerplate" and "verbiage"
 - i) Explain that each word means something, if they do not understand it, they should ask
 - ii) There should NEVER be verbiage- do YOUR part to write it in "plain English"
- 2) Typical Negotiated Clauses Overview and Examples
 - a) While you need to think about all the terms, certain topics are hot buttons, and often pose the most risk. To better manage your time, it is often useful to give the most attention to the problem areas. For a through discussion of many of these items, see the Small Law Department Committee Contracting Manual at <http://www.acc.com/infopaks/sldcontract.html>.
 - b) Indemnification
 - i) This is the big one, it can be like writing a blank check
 - ii) Can be problematic for both buyers or sellers
 - (1) Buyers- want the Seller to indemnify for anything remotely related to the product or service

- (2) Sellers want to know they will not face automatic liability for misuse of the product
- iii) Indemnification is not an appropriate method of risk allocation in many instances. Some things are not priced to cover every risk. Some Buyers, for example, try to use indemnifications instead of warranties to cover product defects. In many cases, the best response to an indemnification clause is to delete it.
- iv) If you have to take it, read it carefully and make sure you agree on the scope
 1. Limit liability to your negligence.
 2. Don't front legal fees, pay only once found liable by court
 3. Scope of coverage? "Area of your work" problem
 4. What if someone else is negligent? Limit it "to the extent of your negligence and not to the extent any other party not under your control is negligent"
 5. Check state laws about limitations- in some states, you can not enforce indemnification when there is not negligence.
- v) Sometimes it is like whack a mole- they keep popping up all over the contract
- vi) Note whether the clause requires payment of costs and assumption of defense based on a claim, versus indemnification after liability is determined.
- vii) Examples:
 - (1) **"Subcontractor assumes full liability for any and all damages, death, or injury of any kind to all person(s), whether employees or otherwise, and property arising out of or in any way connected with its work and shall to the fullest extent permitted by law defend, indemnify and hold harmless Contractor, its officers, agents, employees, and indemnitees from and against any and all claims, losses, suits, damages, legal and otherwise, arising out of or in any way connected with Subcontractor's work including, to the fullest extent permitted by law, the active negligence of the indemnitee. If any claim or demand is made against Contractor for any matter enumerated herein, any payment due, or thereafter to become due, to Subcontractor shall be held by Contractor to cover such losses and expenses, including reasonable attorney's fees."**
 - (a) This one is very broad, it covers things "in any way connected" to the work
 - (b) It specifies both property damages and injuries
 - (c) It includes active negligence of an indemnitee
 - (2) **"Buyer agrees to indemnify and hold Seller harmless from all claims, demands, and costs, including reasonable attorney fees, made by third parties against Seller relating to Buyer's use or installation of materials, and to pay any costs and expenses incurred by Seller to**

enforce Buyer's obligations, including, without limitation, the costs of collection for any unpaid amounts owed to Seller by Buyer."

- (a) In this case, the Buyer is indemnifying the Seller for problems relating to the use of the product
 - (b) Note how it throws in an attempt to get costs of collections covered
 - (c) It is limited to claims by third parties.
- (3) "Seller agrees to indemnify Buyer for any claims, demands and costs, including reasonable attorney fees, made by third parties against Buyer relating to Buyer's use of the product, but only to the extent of Seller's negligence and not to the extent of negligence of any party not under Seller's control."
- (a) See the difference?
- c) Confidentiality and Non Disclosure Agreements
- i) Sometimes a separate agreement, but train your business people to be on the lookout for it stuck into other documents
 - ii) Key issues are scope and duration
 - (1) You need a system to monitor the time
 - (2) Is the scope reasonable given your business operations?
 - (3) Do all the appropriate business people know about the restriction?
 - (4) Don't agree to keep something confidential that you already know!
 - iii) Examples
 - (1) "Written Confidential Information must be clearly marked in a conspicuous place with an appropriate legend identifying the information as confidential. Confidential Information that is not written must be identified as Confidential Information at the time of disclosure, and shall be protected hereunder if it would ordinarily be understood to be of a confidential or proprietary nature. In addition, such Confidential Information that is not written must, upon written request from the Recipient within 5 days following disclosure, be confirmed in writing delivered to the Recipient within 15 days following its disclosure. The protections of this Agreement will apply during those 15 days."
 - (a) This one very clearly spells out the scope
 - (b) Note how it covers written and non-written information
 - (2) "This agreement shall not be interpreted to restrict the assignments of employees of either party. This agreement shall not be construed to limit either party's right to independently develop, enhance, or market competitive products or services, so long as such activities do

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not involve the use of the other party's Confidential Information. Further, either party shall not be restricted by this agreement to use Residual Knowledge resulting from access to or work with the other party's Confidential Information. However such party must maintain the confidentiality of Confidential Information as provided herein. "Residual Knowledge" for purposes of this section means general ideas, concepts or know how contained in the Confidential Information that are retained in the unaided memories of the persons who had access to the other party's Confidential Information pursuant to this Agreement. A person's memory is unaided if (i) he or she has not intentionally memorized any information related to the Confidential Information for the purpose of retaining and subsequently using or disclosing it, and (ii) has not made reference to the written embodiment of the Confidential Information to refresh his or her memory. In addition, use of the Residual Knowledge is subject to the Disclosing Party's valid patents and copyrights."

- (i) Many such agreements fail to discuss the "residual knowledge" issue
 - (ii) It is important to include the concept of "independently developed" knowledge, though later fights depend on facts and proof of timing.
- (3) Pay special attention to copyright, patent, trademark and intellectual property indemnifications.
- (a) "Vendor will defend Customer against any claim by an unaffiliated third party that the Deliverables provided under this Agreement infringe or misappropriate any [United States] patent, copyright, trade secret or other intellectual property right of such third party. Vendor will pay the amount of any final judgment (or settlement to which Vendor consents) which may be suffered or incurred by Customer the basis that the Deliverables infringe or misappropriate any such patent, copyright, trade secret or other intellectual property right of such third party."
 - (i) Strict liability is the norm
 - (b) "Customer must give prompt written notice to Vendor of any such claim or liability, and must furnish, upon Vendor's request and at Vendor's expense, all information and assistance available to Customer relating to such defense. [Such expenses include out of pocket expenses approved by Vendor in advance (not unreasonably withheld) but do not include consultant or attorney fees]. Vendor will select counsel and assume the defense of such claim or action at its cost and expense. Customer may in addition

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to the foregoing elect to be represented in such claim or action by counsel of its own choosing, at its own cost and expense. Vendor will not settle any claim or suit in any manner which will result in any liability or obligation to Customer which is not fully discharged by Vendor, without first obtaining the written consent of Customer.

- (i) Require notice
- (ii) Require cooperation to defend
- (iii) Retain control of the process

(c) **“If any of the Deliverables becomes the subject of a claim of infringement or misappropriation, then Vendor may, at its option and expense, (a) procure for Customer the right to continue using such Deliverables (at no expense to Customer), or (b) modify such Deliverables to make them non-infringing, so long as such modification provides functionality and performance substantially equivalent to that of the unmodified Deliverables. If neither (a) nor (b) is reasonably practicable in Vendor's reasonable discretion, Vendor may terminate this Agreement upon ninety (90) days prior written notice without further penalty or liability[, except for as to infringement which may have occurred prior to termination]. Vendor's obligations under this paragraph do not apply to the extent that a claim or adverse judgment is based on (i) Deliverables based on specifications provided by Customer, (ii) software, equipment or services provided by Customer, (iii) use of the Deliverables in combination with software, equipment or services not provided by Vendor, if the Deliverables alone would not be infringing, or (iv) any other independent basis of liability apart from the Deliverables. The indemnification remedies set forth in this Section shall constitute the exclusive remedies of Customer, and the exclusive liability of Vendor, with respect to the claims described above. Vendor's liability under this Section shall be limited to the total amount of fees and charges received by Vendor from Customer under this Agreement in the twelve (12) months preceding Vendor receipt of written notice from Customer of any such claim or liability.”**

- (i) Again, retain control over remedies
- (ii) Make sure you are not indemnifying them for things they control
- (iii) Limit remedies

d) Warranties

- i) If you are selling a product, reinforce that a warranty is the proper solution for potential defects, rather than an indemnification. The warranty will cover the product itself, and, absent an indemnification, the other party can still sue is

something your product does causes a problem- it raises the bar a bit to avoid frivolous suits.

ii) **“All materials manufactured by Vendor are warranted for a period of 1 year following the date of delivery to be free from defects in workmanship and material. During such period Vendor will, without cost to Buyer, at Vendor's option, either (i) repair any such defective materials; (ii) furnish replacement materials; or (iii) grant a credit to Buyer's account in the amount of Buyer's net purchase price of such defective materials. Defective conditions in the materials caused by third parties, acts of God, defective installation, other trades, abnormal use or stress or other matters unrelated to the Vendor's activities are specifically excluded from the coverage of this warranty. THE FOREGOING WARRANTIES ARE EXCLUSIVE AND ARE GIVEN AND ACCEPTED IN LIEU OF ANY AND ALL OTHER WARRANTIES EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, AND ALL OTHER REMEDIES. THESE ARE THE ONLY REMEDIES OF BUYER FOR ANY BREACH OF WARRANTY OR ANY OTHER CLAIM. VENDOR'S TOTAL LIABILITY ARISING OUT OF THE SUPPLYING OF THE MATERIALS, OR THE USE OF THE MATERIALS, WHETHER ON WARRANTIES OR CLAIM OF NEGLIGENCE, OR OTHERWISE, SHALL NOT IN ANY CASE EXCEED THE COST PAID BY BUYER TO VENDOR FOR THE MATERIALS AND IN NO CASE SHALL VENDOR BE LIABLE TO BUYER OR ANY THIRD PARTY FOR ANY INCIDENTAL, CONSEQUENTIAL OR SPECIAL DAMAGES.”**

- (a) Limit the term, and not any contract provisions that tie you into longer terms specified elsewhere.
- (b) Control the choice of remedies
- (c) Limit the remedies

e) Damages

- i) Limitations
- ii) Liquidated damages

f) Insurance

- i) Contract provisions are nice, but you are only covered based on the actual policy
- ii) You need to review the actual policy, not just a declaration page, to be certain

3) Electronic Contract Issues

- a) It is usually not a matter of pure electronic contracting- it is often a mixture of paper and electronic terms.

- b) The law has changed in recent years. Early on, courts were split on how to treat electronic documents. In response, 46 states plus DC have adopted the Uniform Electronic Transactions Act which give electronic signatures and records the same validity and enforceability as manual signatures and paper-based transactions. See <http://www.nccusl.org/>.
- c) On the federal level, we have the Electronic Signatures in Global and National Commerce Act (E-SIGN). It applies in the absence of state law, but can be overridden by state law. Among other things, the act says it applies to agreements that the parties intend to be in electronic form, so we are back to the issue of discerning intent from the paper and electronic documents going back and forth and the conduct of the parties.
- d) Even though it is generally sufficient to have an electronic agreement or electronic elements as part of an agreement, there is still a question of proof- how do you prove someone read/agreed to something in electronic format. Is incorporation by reference from a website sufficient?
- e) For example, an ACC member showed in a recent discussion group exchange how his company's product terms and conditions are posted on the company website along with the other website legal terms. The idea is to place a reference in the agreement to the terms on the website. Here is a link to those terms. <http://www.ao-inc.com/legal/>
- f) Some tips if you decide to post terms online :
 - i) Make sure the terms appear as you expect- check the formatting. For example, use a PDF file so it retains the formatting, including highlighting certain terms such as warranty disclaimers and limitations of liability.
 - ii) Use a format that can be downloaded and not easily altered. Make it easy to download and print.
 - iii) Make links to the document prominent on both the paper part of the transaction and the website.
 - iv) Require the viewer to sign in so that you can verify that the terms were reviewed. Possible require clicking a consent.

Supplemental Material for ACC Annual Meeting 2007- Session 502 "Don't Lose the Battle of the Forms"- Example of Material to Train the Salespeople

In a small law department, you often can not be there to review every sale and every contract. What you can do is train your sales folks, or anyone else who handles contracts, to recognize and avoid hot button issues. This is a presentation I have used for a company that manufactures and sells construction products, and enters into construction contracts.

**You Don't Need a Lawyer, but you do need a contract-
Without a proper contract you will eventually need a lawyer!**

Agenda

1. **Discussion of contracts and purchase orders in General**
 - a. **Why do you need a contract?**
 - b. **Forms of contracts**
 - c. **"Standard" Purchase Orders**
 - d. **Formalities**
 - e. **The "Battle of the Forms"**
 - f. **Negotiation tactics**
 - g. **"Typical" Terms and Conditions**
2. **Sample "Bad" Contract (If you are the Material Supplier)**
3. **Sample "Good" Purchase Order (If you are the Material Supplier)**

1) Why do you need a contract?

- i) To make sure all parties agree on terms of the sale and purchase
- ii) Even without a "contract" there is a contract
 - (i) UCC applies to the sale of goods
 - (ii) Certain things are implied, even of no writing
 - (iii) Any writing and discussions can constitute a contract
 - 1. Phone calls
 - 2. Discussions
 - 3. Emails
 - 4. Other correspondence

2) Forms of Contracts?

- i) Doesn't have to be "legalese"
- ii) Many contractors use AIA documents
 - (i) Minus: they are complex, long
 - (ii) Plus: History of interpretation by the courts
- iii) Many companies have their own contract forms
 - (i) Note the difference between services vs. material only
 - (ii) Sometimes companies send out the wrong form
- iv) More likely a "standard" PO for a material supplier
 - (i) Even more important to make sure it is appropriate
 - (ii) Read the back!

3) "Standard" Purchase Orders

- i) Front
 - (i) Business terms
 - 1. What price
 - 2. When
 - 3. Where
 - 4. Payment terms
 - (ii) Refers to conditions on the back or attached
- ii) Back or attachments contains the "legal stuff"
 - (i) It is all there because someone had a problem once
 - (ii) Many lawyers seem to think two words are better than one

4) Formalities

- i) Signatures
- ii) Dates
- iii) Fill in all the blanks!
- iv) Is it readable?
- v) Initial all changes?
- vi) Do you need originals?

5) The "Battle of the Forms"

- i) In real life the "contract" is often more than one document
- ii) How to keep the ball in the air if you disagree
- iii) Ultimately, if no agreement UCC will govern sale of goods
- iv) Even with no signatures, performance can equal agreement

6) Negotiation Tactics

- i) If you don't understand it, don't sign it!
 - (i) Make them explain it
 - (ii) If they say "it means xyz," tell them to write it that way
 - (iii) Read the definitions
- ii) Give choices, don't just say "no"
- iii) Listen!
 - (i) Key to successful negotiation is finding what they really want
 - (ii) Strategically, don't move too fast
- iv) Preprinted means less likely to be amended
- v) Shorter is better, break out terms, use a master agreement

7) "Typical" Terms and Conditions

- i) Indemnification
 - (i) My number one concern-like writing a blank check
 - (ii) Not appropriate for a material-only contract
 - (iii) If you have to take it
 - 1. Limit liability to your negligence
 - 2. Don't front their legal fees, pay only once found liable by court
 - 3. Scope of coverage? "Area of your work" problem
 - 4. What if THEY are negligent?
 - 5. Check state laws
 - (iv) Can pop up in several different places in a contract
 - (v) Copyright, patent, trademark and intellectual property indemnification

- ii) Dispute Resolution
 - (i) ADR- Mediation and Arbitration
 - a. Can be a good things, but preserve your options
 - 2. Don't agree it is only at their option
 - 3. Mediation can be a better solution than arbitration
 - (ii) Waiver of Jury trial, venue. Choice of law
 - (iii) Architect or GC decision is "final"
- iii) Insurance
 - (i) They will ask for certificates
 - (ii) Nowadays looking for broader coverage, ex: defective products
 - (iii) Only safe bet is to read the policy if you need protection
 - (iv) Wrap ups/OCIP/CCIP
 - 1. does not cover off site work
 - 2. Not cover automobile
 - 3. Still need Builders Risk
- iv) Price and Credit Terms
 - (i) Make sure your standard credit terms are prominent
 - (ii) Right of Offset
 - (iii) Pay if paid/pay when paid
 - (iv) Right to stop work if not paid
 - (v) Waiver of Lien Rights
 - (vi) Retention
 - (vii) Taxes included?
 - 1. Just getting a tax certificate does not mean it is tax exempt
 - 2. If it is wrong, you can have to pay years later
- v) Assignment and Subcontracting
 - (i) Typically you need permission
 - (ii) Ask for it not to be unreasonably withheld, or get subs approved
- vi) Attorney Fees
 - (i) "Prevailing party"
 - (ii) In California, if mentioned, automatically becomes "prevailing party"
- vii) Inspection, rejection
 - (i) Put a time limit on their inspection
 - (ii) Limit remedy to warranty
 - (iii) Sometimes they say can be rejected until final acceptance
- viii) Transportation and risk of loss
 - (i) Transport included in price?
 - (ii) FOB destination or origin?
 - (iii) Often you are responsible until project acceptance
 - 1. At least limit liability to damage you cause

- ix) Cancellation, termination, Default
 - (i) Termination for convenience
 - 1. Does it "deem" a wrongful termination as "for convenience"
 - 2. How are you compensated if this happens?
 - (ii) Default
 - 1. Defaults are meaningless without remedies
 - 2. Cross defaults
 - 3. Waiting till bankruptcy can be too late
- x) Changes and modifications
 - (i) How will they pay for change orders?
 - (ii) What if a change affects the schedule?
- xi) Choice of law, venue, waiver of jury trial
- xii) Time for performance, "Force Majeure", Delays
 - (i) Allow yourself an out for things beyond your reasonable control
 - (ii) What if another trade delays your work?
 - 1. Some contracts have strict notice requirements
 - 2. Will you be compensated for schedule delays
 - (iii) Commercial Metals Case- punitive damages
- xiii) Integration, complete agreement
 - (i) Bound to parent contract?
 - (ii) Which takes precedence if conflict?
 - (iii) Be careful your sales literature does not become part of contract
- xiv) Limitation of Liability/Warranty
 - (i) These two things should go together
 - (ii) There are implied warranties of merchantability and fitness for purpose
 - (iii) Conspicuous disclaimer required
 - (iv) Limit liability to the contract amount to avoid backcharges
 - 1. You have to give some remedy, so limit it
 - 2. Detailing example- replace drawings only
 - (v) Limit time for making a claim
- xv) Headings, severability, inconsistent terms
- xvi) Government contracts
 - (i) OFCCP audits, reporting
 - (ii) Always bound by parent contracts
- xvii) "Buy American" requirements
 - (i) Federal
 - 1. Applies despite NAFTA to some projects
 - 2. Even if not federal facility, could be federal money
 - (ii) State
 - 1. Can be stricter than federal
 - 2. Can apply even to equipment
- xviii) Limitation on Publicity
 - (i) Permission for photos of product
 - (ii) Separate permission if people are in picture

Sample "Good" Purchase Order- for a material supplier**Standard Terms and Conditions (January 2006) Page 1 of 2**

These Terms and Conditions constitute a material part of the agreement between Seller and Buyer. Seller objects to, and does not agree to be bound by, any changes to these terms and conditions. These terms and conditions supersede any inconsistent terms and conditions in any documentation submitted by Buyer to Seller.

Quality. Products shall conform to the Seller's catalog and approved drawings.

Permissible Variations and Inspection. Material is to be furnished subject to manufacturing and commercial variations and the practices of Seller. Unless otherwise specified, the material is subject to Seller's standard inspections. If inspection by an inspector designated by the Buyer is a requirement, such inspection shall be made at the place of manufacture before shipment, and approval and release of the material by an inspector designated by Buyer shall constitute a determination binding upon Buyer that the material meets all requirement specifications. Buyer shall pay for the cost of inspection.

Warranties, Limitation of Liability and Indemnification. All materials manufactured by Seller are warranted for a period of 1 year following the date of delivery to be free from defects in workmanship and material. During such period Seller will, without cost to Buyer, at Seller's option, either (i) repair any such defective materials; (ii) furnish replacement materials; or (iii) grant a credit to Buyer's account in the amount of Buyer's net purchase price of such defective materials. Defective conditions in the materials caused by third parties, acts of God, defective installation, other trades, abnormal use or stress or other matters unrelated to the Seller's activities are specifically excluded from the coverage of this warranty. THE FOREGOING WARRANTIES ARE EXCLUSIVE AND ARE GIVEN AND ACCEPTED IN LIEU OF ANY AND ALL OTHER WARRANTIES EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, AND ALL OTHER REMEDIES. THESE ARE THE ONLY REMEDIES OF BUYER FOR ANY BREACH OF WARRANTY OR ANY OTHER CLAIM. SELLER'S TOTAL LIABILITY ARISING OUT OF THE SUPPLYING OF THE MATERIALS, OR THE USE OF THE MATERIALS, WHETHER ON WARRANTIES OR CLAIM OF NEGLIGENCE, OR OTHERWISE, SHALL NOT IN ANY CASE EXCEED THE COST PAID BY BUYER TO SELLER FOR THE MATERIALS AND IN NO CASE SHALL SELLER BE LIABLE TO BUYER OR ANY THIRD PARTY FOR ANY INCIDENTAL, CONSEQUENTIAL OR SPECIAL DAMAGES.

Buyer agrees to indemnify and hold Seller harmless from all claims, demands, and costs, including reasonable attorney fees, made by third parties against Seller relating to Buyer's use or installation of materials, and to pay any costs and expenses incurred by Seller to enforce Buyer's obligations, including, without limitation, the costs of collection for any unpaid amounts owed to Seller by Buyer. Notwithstanding any other agreement between Seller and Buyer, Buyer agrees not to assert or take any set-off or deduction from payment of any invoice except for any proven defective product, short shipments, or improper invoices, provided, however, that under no circumstances shall any set-off or deduction include claims for consequential, incidental or special damages or exceed more than 10% of the face amount of the invoice.

Standard Terms and Conditions (January 2006)**Page 2 of 2**

Credit Approval and Accuracy Information. All orders are subject to current credit approval. From time to time, Seller may review your creditworthiness. You agree to provide us with all credit information reasonably requested, and you represent and warrant to Seller now, and each time you place an order, that all information you have provided is true and correct, and that you have not omitted any information necessary to make such information not misleading. Seller may refuse to accept and order or refuse shipment if you do not meet Seller's current credit requirements.

Pricing, Payment and Acceptance of Shipment. Buyer agrees that Seller may change the price of any order that is not accepted for delivery within 90 days of the quotation date. Seller also reserves the right to invoice Buyer for an amount equal to 90% of the contract price for any materials that Buyer does not accept for delivery in a reasonable amount of time after fabrication.

Delivery. Title to and risk of loss for all materials vests in Buyer upon delivery. If, in Seller's opinion, it is impractical to reach the jobsite to deliver the material, the place of delivery shall be deemed to be that place where the delivery truck can reasonably proceed. The price for truck delivery includes two hours time for unloading after arrival of the truck at the place of delivery. Excess unloading time charges will be charged to Buyer. Under no circumstances will Seller be liable for any waiting time. Seller will not allow any claims for shortages unless noted on the shipping papers at delivery.

Force Majeure. Seller shall not be responsible for shipment delays and delays in performance in whole or part from any cause beyond Seller's reasonable control. In the case of any delays, the time of completion shall be extended accordingly.

Claims. CLAIMS FOR SHORTAGES, GOODS DAMAGED IN TRANSIT AND FOR ALLEGED DEFECTIVE MATERIAL MUST BE REPORTED TO SELLER PROMPTLY UPON RECEIPT OF MATERIAL AND IN WRITING NOT LATER THAN TEN (10) DAYS AFTER RECEIPT OF MATERIAL. ALL MATERIAL MUST BE HELD FOR INSPECTION BY SELLER AND SHALL NOT BE RETURNED TO SELLER WITHOUT SELLER'S WRITTEN CONSENT. BUYER SHALL NOT FURNISH ANY MATERIAL OR DO ANY WORK FOR SELLER'S ACCOUNT WITHOUT AUTHORIZATION FROM SELLER AS TO THE SCOPE OF WORK AND COST THEREOF. BUYER SHALL NOT WITHHOLD PAYMENT PENDING ADJUSTMENT OF CLAIMS.

Equal Employment Opportunity. Seller and Buyer agree to comply with all application provisions of Executive Order 11246, as amended, and its implementing regulations and all other applicable EEO Non-Discrimination Provisions of the State and Federal Order.

Buy American Requirements. Buyer must clearly and affirmatively notify Seller of the applicability of any order, law, regulation or other requirement that the products to be sold to Buyer consist wholly or partly of materials or components produced in the United States, or that the material comprising such products be assembled in the United States. If Buyer fails to notify Seller of any such requirements, Buyer shall be obligated to accept delivery and pay for the products, regardless of any such requirement, and Buyer agrees to fully indemnify and hold Seller harmless from and against any costs and expenses, including reasonable attorney fees, incurred by Seller in connection with Buyer's omission.

Sample "Bad" Contract (If you are the Material Supplier)

1. This agreement shall be construed according to the laws of the State of Missouri. No provision of this agreement which shall be found to be invalid or illegal shall affect the validity or legality of any other provision hereof, and all provisions hereof shall be construed independently of each other.
2. The use of the term "Owner" herein shall include the owner of the project with respect to which Supplier/Subcontractor shall furnish labor, materials, equipment, supplies, or work to Company hereunder, and any engineer, architect, Contracting Officer, or other person, firm, or corporation acting and designated as the representative of the Owner in the corporation acting and designated as the representative of the Owner in the supervision of the construction of such project. The use of the terms "Supplier/Subcontractor" and "Contractor" shall be construed to include a corporation, partnership, individual, or joint venture or plurality of parties composing, respectively, the Supplier/Subcontractor and the Contractor designated on the face hereof.
3. This agreement except at the option of Company, neither shall be in force, nor will any payments be authorized by Company, until and unless Supplier/Subcontractor properly executes the acceptance copy hereof and returns the same to Company, together with any required bonds, within ten (10) days from the date hereof. Supplier/Subcontractor agrees to deliver all material to Company at the place designated on the face hereof, perform all work free and clear of all claims, encumbrances, or liens and, upon request by Company, furnish from its subcontractors, suppliers, materialmen, and others connected therewith waivers, releases, performance or payment bonds or other evidence of payment or indemnity satisfactory to Company.
4. Supplier/Subcontractor may not assign or transfer this Purchase Order Agreement or any part hereof without the prior written consent of Company and any approved assignment or transfer does not relieve Supplier/Subcontractor of its obligations hereunder.
5. Supplier/Subcontractor, by its failure to promptly object in writing, or by furnishing all or any part of the material ordered or service provided or ordered hereby, or by Supplier/Subcontractor doing anything else required or ordered hereby shall conclusively be presumed to have assented to the terms and conditions set forth herein.
6. Supplier/Subcontractor acknowledges that it is aware that the work which is the subject of this order is to be performed as a part of, and the materials which are the subject of this order are purchased for use in performance of, a contract designated by the project on the face hereof. Supplier warrants that said work and materials furnished hereunder shall comply with all the requirements of said contract between Contractor and Company, as provided in this Purchase Order to Supplier by Company, erection of the building is not part of this contract and the Seller assumes no responsibility for the erection, construction of the foundation, preparation of the site or any other related function. Seller shall make available engineering plans and erection manuals and Company assumes full responsibility for making

such plans and manuals available to the erection contractor who shall be selected by Company.

7. Acceptance of the work and materials covered hereby shall not relieve Supplier/Subcontractor from any of its obligations and warranties hereunder. In no event shall payment therefor be deemed to constitute acceptance. Neither shall prior passage of title thereto unto Company, Contractor, or Owner, prior receipts therefore acknowledged by Company, Contractor, or Owner as being in good condition, prior payment by Company or acceptance, use or installation of any work performed or articles delivered hereunder (i) affect the responsibility of the Supplier/Subcontractor to perform as required, (ii) affect the right of Company, Contractor, or Owner to reject any such work or articles determined upon inspection not to be in the condition required, or (iii) be construed as acceptance of defective work or improper materials or as a waiver of Company' rights and Supplier's obligations hereunder.
8. It is expressly understood and agreed that Company has the same rights and privileges against Supplier/Subcontractor as the Contractor and the Owner of the project each have against Company and Supplier/Subcontractor shall fully perform, in all respects, Company' guarantee and responsibilities to the Contractor and the Owner with respect to work performed and materials furnished hereunder. Supplier/Subcontractor shall remain solely responsible for its work and materials covered hereby until Company, Contractor, and Owner shall accept the same.
9. Supplier/Subcontractor agrees to perform the work and furnish the materials called for so as not to impede or delay Company, Contractor, or others in the performance of said contract and to protect, defend, indemnify, and save harmless Company from all loss, cost, damage, liability, and expense which Company may sustain or incur by reason thereof. Supplier/Subcontractor shall not be liable for failure or delay in delivery due to acts of God; differences with workmen; local labor shortages; fire; flood or other casualty; government regulations or requirements; shortages or failure of raw materials; supplies; fuel, power or transportation; breakdown of equipment; or any other causes beyond Supplier/Subcontractor reasonable control whether of similar or dissimilar nature than those enumerated. If Company does not schedule unloading at the delivery site within a reasonable time, Supplier/Subcontractor may assess the costs of delay and shall not be responsible for any additional costs incurred as a result of such a delay.
10. Company reserves the right to order changes in the work and materials required hereunder and this Purchase Order shall be modified accordingly. No change shall be made in this Purchase Order and no claim of Supplier/Subcontractor for extras will be allowed unless such extra work and material are ordered by Company in writing and Company agrees in writing to pay such extra.
11. Time is of the essence on this order and if Supplier/Subcontractor materially defaults on any terms hereof, or if Supplier/Subcontractor shall fail to perform any work or deliver any of the materials when needed or at the time(s) specified in this order or otherwise, or if any work performed or materials delivered by Supplier/Subcontractor hereunder shall be

defective or not conform to samples or established standards of the industry or not comply with the contract and specifications on the project for which Company has ordered same or the terms thereof, or if Supplier/Subcontractor shall fail to repair or replace, to the full satisfaction of Company, Contractor, and Owner, such defective, nonconforming or non-complying work or material upon demand by Company to do so, and within the time allowed by Company therefore, then Company shall have the right among others granted by law, and in addition to and without limitation of any rights of Company or obligations of the Supplier/Subcontractor set forth elsewhere in this agreement to (a) reject such work and return such materials or any part thereof to Supplier/Subcontractor who shall pay and defray all transportation, handling, and other charges incurred by Company or Contractor, and (b) terminate this Purchase Order and obtain someone else to perform such work. In the event that supplier materially breaches this contract and fails to cure such breach within reasonable time after notice thereof, Company may, without liability to Supplier/Subcontractor, obtain such articles or any part thereof or substitute therefor from any other sources(s), and if the cost and expense incurred by Company or Contractor to obtain and perform the same shall exceed the amount which would have been payable under this order, Supplier/Subcontractor shall promptly pay and defray the difference and any other costs and expense incurred. Any payment to Supplier/Subcontractor for such work or materials shall be promptly refunded to Company.

12. Supplier/Subcontractor shall be paid by Company as the work progresses within ten (10) days of the date Company is paid by Contractor or Owner to the extent work of Company utilizing such work or materials supplied hereunder shall be approved in periodic pay estimates of the Contractor and of the Owner's representative and paid for by the Owner or the Contractor to Company. Company, at its option, and until it shall receive final payment may retain the same percent of each estimate as the Owner or the Contractor retains from Company and, if Company deems such retainage to be inadequate to secure Company for the performance hereunder by Supplier/Subcontractor or if Supplier/Subcontractor is in default of any terms or conditions hereof, Company may retain any and all sums otherwise due Supplier/Subcontractor until Company, in its discretion, deems itself secure or until such default has been rectified. Subject to the provisions hereof, final payment shall be made after Supplier/Subcontractor has satisfied Company, Contractor, and Owner of its compliance with all the terms and conditions hereof and, if so satisfied, twenty (20) days after Company has received final payment from the Contractor or the Owner.

13. In the event the Owner or Contractor contests or otherwise renegotiates any sums paid or otherwise due Supplier/Subcontractor hereunder, supplier shall be bound thereby and shall promptly reimburse Company the full amount of any overpayment as determined and Supplier/Subcontractor shall defend, protect, indemnify, and save harmless Company in connection therewith.

14. Supplier/Subcontractor, in the performance of this order, shall comply with the provisions of applicable federal, state, and local laws, regulations, rules, and ordinances including the Occupational Safety and Health Act of 1970 as amended and shall defend, protect, save harmless, satisfy, and indemnify Company for all loss, cost, delay, penalties, liability, damage, and expense, including all attorney's fees, which Company may sustain as

a result of the failure of Supplier/Subcontractor to comply therewith. Supplier/Subcontractor, upon request, shall furnish Company proof of Supplier/Subcontractor's fulfillment of all of its obligations under this paragraph in such form as Company may from time to time require. If any citations are issued under O.S.H.A. based on a claim of (a) Supplier/Subcontractor's noncompliance with the Act; or, (b) violations by Supplier/Subcontractor of the Act affecting Supplier/Subcontractor's employees or others, Supplier/Subcontractor shall defend, protect, save harmless, and indemnify Company for all loss, cost, delay, penalties, liability, damage, and expense, including all attorney's fees which Company may sustain as a result of such citation or contesting the same or both.

15. Supplier/Subcontractor shall protect, defend, save harmless, and indemnify Company for all loss, cost, delay, liability, damage, liquidated or otherwise, and expense, which Company may sustain, have assessed against it or incur in a consequence of any litigation, dispute, or claim with respect to all or any part of the scope of this Purchase Order or the work required to be performed or the materials, equipment, or supplies required to be furnished hereunder or anything done or omitted or claimed to have been done or omitted hereunder by Supplier/Subcontractor or anyone acting for Supplier/Subcontractor, including but not limited to, any claim or injury to person or property by reason of defects or infirmity in any such work or materials or both, or damage by reason of the failure of Supplier/Subcontractor to perform promptly and satisfactorily its obligations herein. Supplier/Subcontractor's obligations to Company under this Purchase Order and all terms thereof shall survive payment to Supplier/Subcontractor.

16. Supplier/Subcontractor acknowledges that Company is required to periodically update its job schedule for work on this project and Supplier/Subcontractor agrees to furnish all information and data requested by Company for these periodic updates. Supplier/Subcontractor agrees to be bound by and to perform its work in accordance with the then updated job schedule and in harmony and cooperation with Company and all others on the project with the various completion dates and milestones in the network or the job schedule. Supplier/Subcontractor will be able to perform in accordance with the job schedule or any updates thereof and in the event Supplier/Subcontractor is unable to perform its work in accordance with the job schedule or any updates thereof for what even cause beyond its control, Supplier/Subcontractor shall be entitled only to an extension of time as granted by the Owner but Supplier/Subcontractor shall not receive any additional compensation therefore unless provided for in a Change Order to this Purchase Order.

17. The Subcontractor/Supplier shall maintain such insurance as will insure the performance by the Subcontractor/Supplier of its obligations to indemnify and hold harmless Owner, Contractor and Company respectively, as provided herein. Such insurance shall provide the following coverages:

17.a1 Comprehensive General Liability. Throughout the period when Work is performed and until its final acceptance by Owner, Supplier/Subcontractor shall carry and maintain, Comprehensive General Liability insurance with limits of not less than Two Million Dollars (\$2,000,000) per occurrence for bodily injury, including death, and One Million Dollars

(\$1,000,000) per occurrence for property damage or, alternatively, Two Million Dollars (\$2,000,000) per occurrence combined single limits for bodily injury and property damage. Such insurance shall be in a form and with insurers acceptable to Owner, Contractor and Company, and shall contain coverage for broad form property damage, contractual liability (including without limitation, that specifically assumed herein), and products and completed operations insurance for a minimum of twenty-four (24) months after final acceptance of the Work by Owner. Such insurance shall not exclude explosion, collapse, underground excavation or lateral support. Any policy which provides the insurance required under this paragraph shall (i) be endorsed to name Owner, Contractor and Company, their subsidiaries, and their respective directors, officers and employees as additional insureds, without qualification, limitation or reservation, (ii) be endorsed to be primary to and noncontributory with any insurance maintained by Owner, Contractor and Company or their subsidiaries, (iii) contain a waiver of any rights of subrogation against Owner, Contractor and Company, their subsidiaries and their directors, officers, and employees, and, (iv) contain a severability of interest provision in favor of The Owner, General Contractor and Company, their subsidiaries and their directors, officers and employees.

17.a2 Automobile Liability. If licensed vehicles will be used in connection with the performance of the Work, Supplier/Subcontractor shall carry and maintain, and shall ensure that any Subcontractor who uses a licensed vehicle in connection with the performance of the Work carries and maintains, throughout the period when Work is performed and until its final acceptance by Owner, Automobile Liability Insurance covering all vehicles, whether owned, hired, rented, borrowed or otherwise, with limits of liability of not less than One Million Dollars (\$1,000,000) per occurrence combined single limits for bodily injury and property damage. Any policy which provides such insurance shall contain a waiver of rights of subrogation against Owner, General Contractor and Company, their subsidiaries and their directors, officers and employees.

17.a3 Workers Compensation. Throughout the period when Work is performed and until its final acceptance by Owner, Supplier/Subcontractor shall cover or maintain insurance in accordance with the applicable laws relating to worker's compensation, with respect to all of the Supplier/Subcontractor's employees working on the material for this project, regardless of whether such coverage or insurance is mandatory or merely elective under the law. Throughout the period when Work is performed and until its final acceptance by Owner, Supplier/Subcontractor shall provide, if required by law, insurance to meet the requirements of the Federal Longshoreman and Harborworkers Act or Federal Maritime Employers Liability Law (Jones Act). Throughout the period when Work is performed and until its final acceptance by Owner, Supplier/Subcontractor shall also carry and maintain Employers Liability coverage with limits of not less than One Million Dollars (\$1,000,000) per accident. Any policy which provides any of the insurance required by this Paragraph 3 shall contain a waiver of rights of subrogation against Owner, Contractor and Company, their subsidiaries and their directors, officers and employees. If Owner, Contractor or Company are required by any applicable law to pay any Workers' Compensation premiums with respect to employees of Supplier/Subcontractor, Supplier/Subcontractor shall reimburse Owner, Contractor or Company for such payment.

17.b Certificates of Insurance.

17.b1. Prior to the commencement of the Work, Supplier/Subcontractor shall provide for the Owner, Contractor and Company review and approval, certificates of insurance and policy endorsements reflecting full compliance with the requirements set forth in Section 17.a1 (Comprehensive General Liability), 17.a2 (Automobile Liability, if required), and 17.a3 (Workers Compensation). Such certificates and policy endorsements shall be kept current and in compliance throughout the period when Work is being performed and until its final acceptance by Owner (and for two (2) years thereafter for products and completed operations liability), and shall provide for thirty (30) days advance written notice to Owner, Contractor and Company in the event of cancellation or material change adversely affecting the interests of Owner, Contractor and Company.

17.b2 In jurisdictions requiring mandatory participation in a monopolistic state worker's compensation fund, the insurance certificate requirements for the coverage required under Paragraph 17.a3 (Workers' Compensation) will be satisfied by a letter from the appropriate state agency confirming participation in accordance with statutory requirements.

17.c Sub-Subcontractor's Insurance.

If Supplier/Subcontractor shall subcontract any of this work to a third party, Supplier/Subcontractor shall see to it that such third party maintains such insurance and shall furnish evidence thereof to Company. Supplier/Subcontractor will cause all such policies of insurance to name Company, Contractor and Owner as additional insureds and provide indemnification for Company, Contractor and Owner against liability upon the risks insured thereby to the amount of the coverage specified therein for Subcontractor.

17.d Acts or Omissions.

In addition to its obligations under this provision of the Purchase Order regarding Insurance, Supplier/Subcontractor agrees to pay and to protect, defend, save harmless and indemnify Company against any liability for damages sustained by another subcontractor, materialman or other party supplying labor, materials, or services in the performance of the work covered by the Prime Contract resulting from Supplier/Subcontractor's acts or omissions (whether or not negligent), failure to perform, delays in performance, interference or default in the performance of the work to be done under this Purchase Order. Supplier/Subcontractor shall protect, defend, and save Company harmless from any liability, including costs and expenses, for, or on account of, any patented or unpatented invention, article or appliance manufactured or used in the performance of this Purchase Order, including their use by Owner and further agrees to pay all loss and expense incurred by Company by reason of any such claims or suits, including attorneys' fees.

18. Indemnity

All claims, causes of action, liabilities, obligations, demands, costs and expenses arising out of injury to (including death of) any and all persons or damage to property alleged to have been caused by any act or omission of Supplier/Subcontractor its agents, employees or invitees, or growing out of or

incidental, directly or indirectly, to the performance of the Purchase Order regardless of how such injury, death or damage be caused, and (b) all damage judgments and expenses caused by any act or omission (whether or not negligent) of Supplier/Subcontractor or anyone who performs work in the prosecution of the Purchase Order. Supplier/Subcontractor expressly assumes with respect to the work to be done hereunder all liability imposed on Company by the provisions of the Prime Contract and, upon request by Company, Supplier/Subcontractor shall defend any and all suits brought against Company, Contractor or Owner on account of any such liability or claims of liability and shall pay any settlements made or judgments rendered with respect thereto, and shall reimburse and indemnify Company for all expenditures or expenses, including court costs and attorneys' fees incurred by Company by reason of any such accident, liability or claims of liability. If there are such injuries to person or damage to property unsettled upon completion of this Purchase Order, final settlement of sums otherwise due between Company and Supplier/Subcontractor may be deferred at the option of Company until such claims are adjusted or indemnity acceptable to Company is furnished by Supplier/Subcontractor. Supplier/Subcontractor agrees that the damage provisions of, and any damages assessed in relation to, the Prime Contract, both actual and liquidated, shall be enforceable and collectible by Company against Supplier/Subcontractor. In addition, Company can offset from sums otherwise due Supplier/Subcontractor an amount equal to said damages including any damages sustained by Company as a result of the failure of Supplier/Subcontractor to perform its work properly, timely or in accordance with its obligations and requirements herein.