

UCC SALE OF GOODS “BATTLE OF THE FORMS”



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Construction Law Survival Manual

By James D. Fullerton

Construction Law Survival Manual

- Credit Management
 - Fair Credit Reporting Act
 - Equal Credit Opportunity Act
- Contracts and Preserving Rights
 - Drafting Credit Applications, Quotes, Guarantees, Joint Check Agreements
 - Reviewing and Revising Contracts
- UCC Sale of Goods
- UCC Security Agreements
- Default & Termination

- Mechanic's Lien General Principles
- Mechanic's Liens in Virginia, Maryland, Pennsylvania and District of Columbia
- Payment Bonds
- Trust Fund Laws and Agreements
- Enforcement of Judgments
- Bankruptcy Primer for Creditors
 - What to do when your debtor files bankruptcy
 - Defending preference claims

Construction Law Survival Manual is
available

in NACM Bookstore

in NACM Reference Library

At www.FullertonLaw.Com



Contract Forms

- Proposals
- Quotes
- Confirmations
- Purchase orders

Drafting Contract Forms

- Use YOUR FORM not theirs
- Leverage
- Costs
- Profit

Have forms available

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Attorney's Fees and Service Charges

Customer agrees that any amount not paid within 30 days of invoice date will carry interest at the rate of 1 1/2% per month, both before and after judgment, and further agrees to pay all costs incurred in collection, including attorney's fees in the amount of 1/3 of the total balance due if this account is placed with an attorney for collection, whether suit is filed or not.

Forum Selection Clause

Customer expressly agrees to submit to personal jurisdiction in Virginia and agrees that the forum for any litigation pursuant to this Agreement or any other contract between Seller and Customer, whether Seller or Customer brings suit, shall be the County of Fairfax, Virginia. This Agreement shall be governed by and construed in accordance with the laws of Virginia.

Notice and Opportunity to Cure

- ❑ Buyer shall make a careful inspection at the time of delivery.
- ❑ Buyer's failure to give written notice specifying any claim within ten (10) days of delivery shall constitute an unqualified acceptance of the labor and material delivered and a waiver of all claims.
- ❑ Seller will not be liable for any damage, warranty or remedy and back charges will not be accepted without prior notification, an opportunity to view and repair, replace or otherwise cure, and approval by Seller.



Exclusion of Express and Implied Warranties

THE FOREGOING WARRANTY IS
EXCLUSIVE AND IS IN LIEU OF ALL
OTHER WARRANTIES, WHETHER
WRITTEN, ORAL, EXPRESS OR IMPLIED,
INCLUDING THE WARRANTY OF TITLE,
AGAINST LIENS, INFRINGEMENT, THE
WARRANTY OF MERCHANTABILITY AND
THE WARRANTY OF FITNESS FOR A
PARTICULAR PURPOSE.

Limitation of Liability

Supplier agrees to replace or, at Supplier's option, repair any defective labor or materials within a reasonable time. Buyer's remedies for any delay or any defect in any materials are subject to and limited by any limitations contained in the manufacturer's terms and conditions to Supplier. Further, Buyer's sole and exclusive remedy and Supplier's limit of liability for any and all loss or damage resulting from defective labor or materials shall be for the purchase price of the particular delivery of labor and materials with respect to which loss or damage is claimed. In no event shall Supplier be liable for any damage due to delay of any type, nor consequential, special or punitive damages. THE FOREGOING WARRANTY IS EXCLUSIVE AND IS IN LIEU OF ALL OTHER WARRANTIES, WHETHER WRITTEN, ORAL, EXPRESS OR IMPLIED, INCLUDING THE WARRANTY OF TITLE, AGAINST LIENS, INFRINGEMENT, THE WARRANTY OF MERCHANTABILITY AND THE WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE.

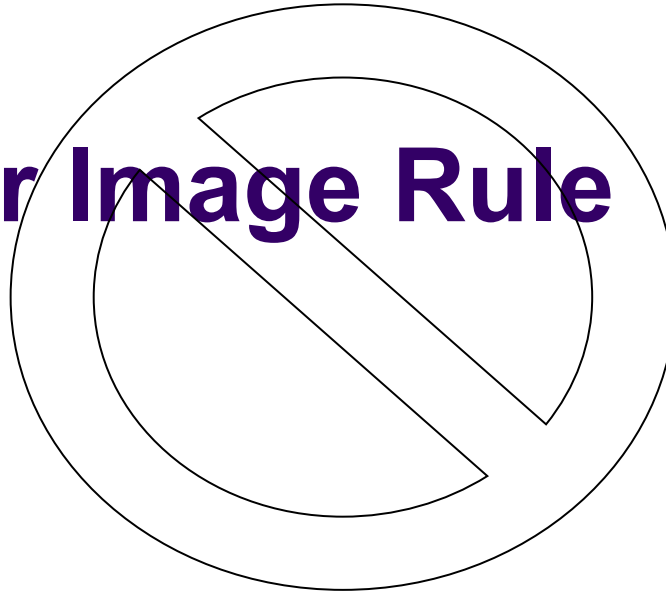
| SUPPLIER QUOTE/ORDER ACKNOWLEDGMENT | | | |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|--------------|--|
| Seller/Lender Company Name: | | | |
| Address: | | | |
| Phone Number/Contact Name: | | | |
| PROPOSAL SUBMITTED TO | | JOB NAME | |
| OWNER | | | |
| STREET | | JOB LOCATION | |
| CITY, STATE AND ZIP CODE | | ARCHITECT | |
| DATE OF PLANS | | | |
| PHONE | | DATE | |
| GENERAL CONTRACTOR | | JOB PHONE | |
| Seller proposes to supply the following OR Seller acknowledges the following order: | | | |
| | | | |
| | | | |
| | | | |
| Project shall start by: _____ Project shall be complete by: _____ | | | |
| Exclusions: _____ | | | |
| Units of: _____ | | | |
| To be Delivered each: _____ | | | |
| <p style="text-align: center;"><i>We Propose</i> hereby to furnish the described for the sum of:</p> <div style="display: flex; justify-content: space-between;"> <div>Price: _____</div> <div>Dollars (\$ _____)</div> </div> <div style="display: flex; justify-content: space-between; margin-top: 10px;"> <div> <p>Payment Terms:</p> <p>To be returned with this proposal to Seller</p> <p>To be paid upon storage of materials by Seller</p> <p>To be paid upon completion of each unit</p> <p>To be paid monthly for work in place</p> </div> <div> <p>\$ _____</p> <p>\$ _____</p> <p>\$ _____</p> <p>\$ _____</p> </div> </div> | | | |
| Authorized Signature By: _____ | | Date: _____ | |
| The undersigned authorized signature agrees to all terms and conditions on the reverse side. | | | |
| Acceptance of Proposal: | | | |
| Signature: _____ | | | |
| Name Printed: _____ | | | |
| Date of Acceptance: _____ | | | |

1. Acceptance is limited to terms of this Quote. Seller objects to any different or additional terms contained in any purchase order, offer or confirmation sent or to be sent by Buyer, which are expressly rejected. The price quoted is firm only if an executed copy of this Quote is received by Seller at its office within 30 days of the date of this Quote. All terms of this Quote shall be incorporated into and shall become a part of any further or additional agreement regarding these goods.
 2. The full price is due and payable on each unit when Seller is ready for delivery of each unit of the described materials. Buyer agrees to pay a reasonable storage fee if Seller stores materials after ready for delivery. Quoted price is based upon representations made by Buyer to Seller concerning the work and the work schedule. Buyer agrees that Seller shall be compensated at Seller's normal rates for any different or additional work or schedule requested verbally or in writing by Buyer. Quoted price assumes a clean and unoccupied delivery or installation site and unencumbered access from a reasonable unloading location.
 3. Seller agrees to replace or, at Seller's option, repair any defective goods within a reasonable time. Buyer's remedies for any delay or any defect in the materials are subject to and limited by any limitations contained in the manufacturer's terms and conditions to Seller. Further, Buyer's sole and exclusive remedy and Seller's limit of liability for any and all loss or damage resulting from defective goods shall be for the purchase price of the particular delivery and materials with respect to which loss or damage is claimed, plus any transportation charges actually paid by the Buyer. In no event shall Seller be liable for any damage due to delay of any type, nor consequential, special or punitive damages. THE FOREGOING WARRANTY IS EXCLUSIVE AND IS IN LIEU OF ALL OTHER WARRANTIES, WHETHER WRITTEN, ORAL, EXPRESS OR IMPLIED, INCLUDING THE WARRANTY OF TITLE, AGAINST LIENS, INFRINGEMENT, THE WARRANTY OF MERCHANTABILITY AND THE WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE.
 4. Buyer shall make a careful inspection at the time of delivery. Buyer's failure to give written notice specifying any claim within ten (10) days of delivery shall constitute an unqualified acceptance of the labor and material delivered and a waiver of all claims. Seller will not be liable for any damage, warranty or remedy and back charges will not be accepted without prior notification, an opportunity to view and repair, replace or otherwise cure, and approval by Seller. No returned product will be accepted without prior approval. A restocking charge of 25% will apply on products approved for refund.
 5. Buyer shall indemnify and hold harmless the Seller and their agents and employees from and against all claims, damages, losses and expenses, including attorney's fees, arising out of this agreement or the described supply of labor or materials, provided that any such claim is attributable to bodily injury, sickness, disease or death or injury to or destruction of tangible property, including the loss of use resulting therefrom, caused in whole or in part by any negligent act or omission of Buyer, any subcontractor, employee, agent, or anyone else directly or indirectly employed by any of them or by any third person, regardless of whether or not it has been caused in part by a party indemnified.
 6. Buyer agrees to pay a late charge of \$20.00, plus 1 1/2% interest per month on any amount not paid when due, both before and after judgment, and further agrees to pay attorney's fees equal to 33% of any balance due on default, whether or not suit is filed. Buyer further agrees to submit to personal jurisdiction in Virginia and that the forum for any litigation pursuant to any agreement with Seller shall be the County of Fairfax Virginia, whether suit is brought by Buyer or Seller.
 7. I/we authorize Seller from time to time to obtain Business and Consumer Credit Reports on Buyer or any principals of Buyer or to obtain credit and funding information from any other source. Seller shall have no obligation to begin or continue performance until adequate credit and funding information is provided, at any time on request of Seller. Seller may stop the manufacture or supply of any labor or materials when it, in its sole discretion, determines that Buyer is in breach of this Agreement or any other contract with Seller, or Seller has insecurity with respect to funding or creditworthiness, until payment is made and any dispute or insecurity has been resolved.
 8. Buyer agrees that all funds owed to Buyer from anyone or received by Buyer to the extent those funds result from the labor or materials supplied by Seller shall be held in trust for the benefit of Seller (Trust Funds). Buyer may commingle Trust Funds, but agrees it has no interest in Trust Funds held by anyone and to promptly account for and pay to Seller all such Trust Funds. Buyer further irrevocably assigns to Seller any rights it has to Trust Funds to the extent that sums are justly due to Seller under this Agreement. All mechanic's lien, payment bond or similar waivers or restrictive endorsements on checks shall be effective only to the total dollar amount of payments actually received without any bankruptcy filing for ninety days thereafter. Customer agrees that Seller retains its mechanic's lien, payment bond or other legal rights for unpaid deliveries, regardless of what other waiver documents may imply otherwise. Customer further agrees that Seller has the right to determine, in its sole discretion, how to apply payments and which invoices to pay with all payments received on this account, despite any advice to the contrary.
 9. The undersigned hereby individually guarantee Buyer's performance of this Agreement.
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Battle of the Forms

- Quotes
- Purchase Orders
- Responses
- Confirmations

Mirror Image Rule




Acceptance must match Offer

Change in terms = rejection of offer

= counter offer

= no contract unless accepted

- A definite and seasonal 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
- The additional terms are to be construed as proposals for additions 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

- 
- Acceptance is limited to terms of this Quote. Seller objects to any different or additional terms contained in any purchase order, offer or confirmation sent or to be sent by Buyer, which are expressly rejected.

Response

- I will not purchase unless you agree that the express warranty applies.

Battle of the Forms

Seller Quote

Lumber

Price: \$1.39 per 2x4

Exclusion of
Warranty

Limitation of Liability

Attorney's Fees &
Service Charges

Buyer Purchase Order

We will take 1,000 2x4s at
\$1.39 a piece

- No objection from Buyer on terms?
- The Quote is the Contract with all terms in the Quote

Battle of the Forms

Seller Quote

Lumber

Price: \$1.39 per
2x4

Exclusion of
Warranty

Limitation of
Liability

Attorney's Fees &
Service Charges

Buyer Purchase Order

We will take 1,000 2x4s at
\$1.39 a piece

UCC Implied Warranties will
apply

- There is a contract on agreed terms
- No objection from Seller on UCC Warranties?
- The Quote is the Contract
- Except UCC Implied Warranties apply

Battle of the Forms

Seller Quote

Lumber

Price: \$1.39 per 2x4

Exclusion of
Warranty

Limitation of Liability

Attorney's Fees &
Service Charges


Acceptance is limited
to the terms of this
Quote

Buyer Purchase Order

We will take 1,000 2x4s at
\$1.39 a piece

UCC Implied Warranties
apply

- There is a Contract on agreed terms
- Does Buyer take delivery?
- The Quote is the Contract
- UCC Implied Warranties will not apply



Confirmation
of verbal contract
is enforceable

Confirmations

Seller Confirmation

Lumber

Price: \$1.39 per 2x4

Exclusion of Warranty

Limitation of Liability

Attorney's Fees & Service
Charges

Buyer Phone Call

We will take 1,000 2x4s at
\$1.39 a piece

- No objection from Buyer on terms?
- The Confirmation is the Contract with all terms

Battle of the Forms

Seller Quote

Lumber
Price: \$1.39 per 2x4
Exclusion of Warranty
Limitation of Liability
Attorney's Fees & Service Charges

- No objection from Seller on terms?
- Does Seller ship?
- The Purchase Order is the Contract with all terms
- **Seller may need to have the hard conversation and may need to refuse to ship unless original quote is accepted**

Buyer Purchase Order

We will take 1,000 2x4s at \$1.39 a piece
Terms in this Purchase Order will control over any Quote
Buyer objects to all terms in any Quote or Confirmation
Pay if Paid
Any dispute shall be resolved in courts of Ulan Bataar, Mongolia
Seller responsible for all of Buyer's Attorney's Fees



Battle of the Forms

- ★ Buying or selling “goods” = construction materials
- ★ What you do not know can hurt you
- ★ You must read your mail and object to terms
- ★ You must “join the Battle of the Forms”
- ★ No counteroffers
- ★ No Mirror Image Rule

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