Contracts for the Sale of Supplies on a Construction Project – You Don't Need Much for a Contract to Exist

By Michael Bosse

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In this first article, I will focus on contract formation for material suppliers to a subcontractor or general contractor on a construction project. If you are only supplying materials (without labor on the project), you are subject to the relevant state's Uniform Commercial Code, which was first created in 1952 and seeks to harmonize laws governing the sale of goods. I will primarily refer to Maine law for purposes of this article, but each state's code is roughly similar. This article demonstrates that the requirements for a binding contract for the purchase of goods under the Uniform Commercial Code is minimal indeed, which can be important to different trades on construction projects in New England and nationwide.

The essence of the Code is a change from old contracting laws that made an acceptance exactly match the terms of an offer in order for a contract to exist. Called "the mirror image" rule, any variation no matter how small meant that there was no contract, only an offer and a rejected offer. Instead, "the Uniform Commercial Code must be liberally construed and applied to promote its underlying purposes and policies," which include simplifying, clarifying and modernizing the law governing commercial transactions, permitting the continued expansion of commercial practices through custom, usage and agreement of the parties, and to make uniform law across various jurisdictions. 11 M.R.S.A. § 1–103. The Code is premised on the fact that many contracts do not expressly cover every term, often rely on custom and trade, and sometimes do not dot every "I" or cross every "T" even though the parties understood they had an agreement of some kind. Finally, the Code imposed a duty of good faith for the parties to every contract under the Code.

Section 2-204(1) of the Code provides that a "contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." *See Zamore v. Whitten*, 395 A.2d 435, 440 (Me. 1978). All you need is a sufficient meeting of the minds. A contract for the sale of goods "may be found even though the moment of its making is undetermined." 11 M.R.S.A. § 2-204(2). Importantly, the fact that one or more terms are left open does not mean that a contract fails to exist "if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy." *Id.* at § 2-204(3). These prongs demonstrate that the Code has created a very liberal approach to contract formation, a radical change at the time it was passed from the old "mirror image" rule.

Typically, contracts have to be in writing under the Code but not always so. The Code's Statute of Frauds provides in relevant part that "a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought." 11 M.R.S.A. § 2-201(1). The Statute of Frauds was enacted to prevent fraud "and the courts will not condone its use for a fraudulent purpose." *Dehahn v. Innes*, 356 A.2d 711, 718 (Me. 1976). What this means in plain English is that it is much harder to lie about the existence of a contract when there is a "writing" (the "writing" can be almost anything – paper, a napkin, or probably even email) signed by the party. So, most of the time, a "writing" needs to exist for your supply contract.

That writing, though, need not be much at all to satisfy the requirement of the Code, "The required writing need not contain all the material terms of the contract and such materials terms as are stated need not be precisely stated. All that is required is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction. It may be written in lead pencil or on a scratch pad. It need not indicate which party is the buyer or the seller." 11 M.R.S.A. § 2-201 comment 1. So, yes, the back of a napkin might actually be OK.

Signatures are not always required under the Code. Between merchants, if within a reasonable period of time a "writing" is sent in confirmation of a contract and the party receiving it knows that it is such a confirmation, the writing is sufficient to establish the writing requirement unless a written objection to its contents is sent within 10 days after it is received. 11 M.R.S.A. 2-201(2). Thus, mere writings confirming the contents of a contract received, for instance, a general contractor, can be considered by a court later to be the terms of a contract between that general contractor, and say, an electrical supply company when the general contractor fails to object to the writing in 10 days.

And sometimes a "writing" is not even required. A "writing" is not required if the goods are specially manufactured, if a party admits that a contract for sale was made, or if goods have been paid for or accepted. 11 M.R.S.A. § 2-201(3). Each of these exceptions has a policy rationale behind it. For instance, if the goods are specially manufactured for a buyer and they are not suitable for sale to others (they are not regular inventory), and the seller has started to make the goods, this under the Code confirms that there was an agreement for someone to make certain goods (say custom plumbing fixtures) for someone who intended to buy them (the general contractor for the project for the new high end condominiums). "It is a reasonable assumption . . . that a seller will not make or procure goods not suitable for sale to others in the normal course of the seller's business unless a purchaser has contracted with the seller to purchase these goods." *Colorado Carpet Installation, Inc. v. Palermo*, 668 P.2d 1384, 1390 (Colo. 1983).

The policy behind the admission requirement is an obvious one: if you have admitted in court or a deposition that you had an agreement that overcomes the lack of a "writing." This makes sense and is based on fairness. If you have admitted that there was an agreement, you cannot avail yourself of procedural defenses such as the lack of a "writing" and basically take back the fact you admitted that agreement existed.

Finally, if goods have been received and accepted, or even paid for, the lack of a "writing" will not allow that party to later claim that there was no agreement. This exception also makes sense because receipt and acceptance or payment "constitutes an unambiguous over admission by both parties that a contract actually exists." 11 M.R.S.A. § 2-201 comment 2.

This clearly is not an article of best practices for suppliers in the construction industry. Your purchase orders and business practices should be much more formal and tighter than what the Code prescribes as the absolute basics for an agreement to exist. But in those cases where things did not get signed, or the mechanics of a deal may be less than optimal, if it concerns the supply of materials to a construction project, an enforceable agreement likely will be found to exist.