

The Battle of the Forms

Your company probably uses its own purchase order to procure supplies and services. Usually, there is more to the purchase order than just quantity and price—your purchase order probably includes specific terms and conditions that you expect will govern each purchase. Your terms may even contain a clause that says that your terms are the only terms that count.

And sooner or later you will encounter a supplier who includes its sales order with each shipment of product. There is no warning or notice from your supplier, just a sales order, which is quietly ignored by whoever receives it within your company.

Some time goes by, and then it happens. Your supplier's product turns out to be defective, and now your customer is very upset with your company. You send a carefully worded letter to the supplier that invokes the terms and conditions of your purchase order and demands that the supplier stand ready to account for all the heartache that your customer has experienced.

Your supplier replies with a short note that says you are mistaken about its obligations to you, and that its sales order terms control. You pull the file, and you are horrified to read that your supplier's sales order does indeed state clearly that its terms control over any other contract terms, and the supplier's terms are quite different from your own. Your boss was copied on the supplier's reply, and now she is standing outside your office, waiting for you to tell her the answer. Well, what is it? Is the supplier right?

This is a classic example of what lawyers refer to as the "Battle of the Forms." Every situation is different, but most times the answer is that your supplier is wrong. Chances are, however, that your purchase order terms do not control, either. Generally, the rule that is gaining most favor is that if terms contained in your purchase order conflict with the seller's sales order terms, neither party's terms control. Instead, the law supplies substitute terms for terms and conditions that conflict with each other.

Now, is that good or bad for you? Generally, the substitute terms favor the buyer, and I can explain exactly how they favor the buyer in a later article. But the substitute terms will never protect your company to the same degree that your own terms and conditions would have. After all, your purchase order terms were drafted with your company in mind. There may be protections contained in your terms that are important to your company that do not appear in the generalized substitutes that the law stands ready to supply.

So the next question should be, how do I win the battle? The answer is that no amount of legal draftsmanship will win this battle. The better view is not to focus on how to win it--- instead, you should concentrate on how to avoid it altogether.

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And like most good things in life, it takes hard work to do that. There is an extra effort that is required in order to avoid this battle. That effort takes the form of communicating with your supplier and getting the supplier's agreement to your terms in writing. While it is always better to have every single detail agreed upon before goods are shipped or services are performed, you can go a long way by getting to an agreement with your suppliers on fundamental terms such as warranty, damages for defective products, and patent indemnification. The next time your supplier includes its sales order with its shipment, call them up. Tell them that your purchase order terms define the contract for your purchase, and get them to agree in writing that your terms control. As hard as it sounds, it represents the only way to preserve the protections that your company wants to have in place for every purchase.

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