For a Supply Contract to be Enforced There Must Be at Least Something in Writing

Supply Contracts and Enforceability

In order to control the costs of materials and equipment which are to be used in the construction, contractors should obtain fixed-price supply contracts with suppliers. Under such a contract, the supplier agrees to deliver the materials at a fixed price as the contract calls for delivery, no matter what happens to the market price or availability of the materials.

Under the Uniform Commercial Code, which is the governing law of supply contracts in most states, certain supply contracts are not enforceable unless they are in writing because the UCC provides, Section 2-201 (1):

Except as otherwise provided in this section 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 or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

A contract for the sale of goods can be an oral agreement developed in a phone conversation. But, in order for an agreement to be enforceable, there must be some writing, some memorandum, indicating that a contract does indeed exist, and it must be “signed” by the party against whom the contract is to be enforced; that is it must be authenticated in some way. The memorandum may not necessarily be the contract itself but merely evidence of the existence of a contract. Once that evidence exists, any and all competent evidence can be introduced to prove the exact terms of the contract.

In some cases where the contract could not be enforced because there was no sufficient written memorandum, the partial performance of the contract by the parties may be enough to show the existence of the contract and make it enforceable.

Parties often disagree about what are the actual terms of an oral contract, and sometimes they even disagree about whether a contract has been entered into at all.

Misunderstandings easily develop. An old maxim states that an oral contract is “not worth the paper it is written on.”

For a contractor to protect himself from such disputes and misunderstandings with his suppliers and to ensure that the courts will recognize his actions as having actually created a fixed-price supply contract, the contractor should seek to have as much of the agreement as possible included in writing and signed.


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The UCC recognizes letters of confirmation and purchase orders as a normal method of satisfying the written-memorandum requirement, and the UCC provides [Section 2-201(2)]:

Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements [of a written memorandum] against such party unless written notice of objection to its contents is given within 10 days after it is received.

Section 2-201(2) thus provides that self-executing memoranda prove the existence of a contract even though it is not signed by the other party. It is, of course, to the contractor’s advantage to include in a self-executing memorandum as much of the terms of the agreement as is possible in order to facilitate proof of the terms of the supply contract. It is possible, however, under the UCC, for the supplier to object later to any of the specific terms of the memorandum as inaccurate representations of the actual contract.

Often, memos that are sent by a contractor to a supplier confirming an oral agreement differ in their terms. Under the UCC, the mere fact that a written confirmation accepting an offer contains different or additional terms does not mean that there is no contract, unless the memorandum specifies that acceptance of the offer is conditioned on assent to the additional or different terms or materially alters the contract.

If an oral agreement is followed by a formal acknowledgment or confirmation and there are additional terms or suggestions (for example, “ship by Tuesday” or “rush”), the UCC Section 2-207 says that where the parties are “merchants” (a material or equipment supplier and a contractor purchasing supplies would normally be considered “merchants” for the purposes of a purchase of these materials), additional terms will become part of the contract unless:

1. The offer expressly limits acceptance to the terms of the offer.
2. They materially alter the contract (for example, negating standard warranties, reserving a power to cancel upon minor defaults, or in some way altering normal trade practice).
3. Notification of objection has already been given or is given within a reasonable time after a party learns of the additional terms.

Therefore, if a contractor received a written confirmation of an order or an acknowledgment of an oral discussion and the confirmation contains additional or different terms to which the contractor does not feel he should agree, the contractor should notify the supplier immediately and object to the terms.

These terms then merely become proposals for addition to the contract and are not enforceable.

Where a contractor wishes to add terms to an oral agreement, the contractor may do so in his confirmation that is sent to the supplier. Then the shoe is on the other foot, and the supplier has the burden of objecting.

Or, as mentioned previously, either party may condition the making of a contract on the other party accepting the additional or different terms.