What to Do With Non-Conforming Goods

AWCI’s General Counsel Advises On What to Do When the Shipment You Get “Isn’t What’s Ordered”

During the course of a construction project, a contractor or subcontractor may be delivered defective or non-conforming goods. The contractor is faced with the problem of what to do with such products. The contractor does not have to sit back and accept defective supplies but rather has several actions available against the supplier.

Construction contracts normally contain warranties to assure the buyer that the materials and workmanship supplied will be free from defects and of good quality. If a contract does not expressly contain such guarantees, the courts will sometimes imply a warranty of “merchantability” or “fitness for a particular purpose.” Legal remedies are thereby available even if the contractor has neglected to include any guarantees and warranties in the contract or where the supplier has not provided a warranty of its own. This article deals with the rights and remedies available to a buyer when materials supplied do not conform to their intended use.

The buyer may be able to bring an action against the seller for breach of contract if the goods which are delivered don’t conform to the requirements of the contract. Once defective or non-conforming goods are delivered, the contractor may either accept or reject the products. In either situation, the buyer should notify the supplier immediately of the defects.

Best Course: Notify

The best course is to orally notify the seller immediately and then to follow up with a written confirmation of the rejection. This allows the supplier the opportunity to remedy the defect and/or to deliver additional goods.

After notification, if no action is taken by the seller, the buyer may choose to reject the goods and pursue a breach of contract action against the seller. In such an action, the contractor has a duty to mitigate its damages. That is, it could not sit idly by and allow damages to accumulate.

As soon as it is clear that the supplier has breached the contract, by delivering defective or non-conforming goods, the contractor should make a reasonable effort to find similar conforming materials at as low a price as possible.

The buyer will be able to recover the damages foreseeable by the seller’s breach, such as the difference in costs of substitute materials and losses due to delay in obtaining new materials.

Can Sue Later

If the nonconforming goods which were delivered can still be used in the project, the buyer may choose to accept the goods and later sue the seller for breach of contract. The buyer must give the seller notice that the goods are considered to be defective or nonconforming so the seller is aware of the potential of future action. The amount of damages available to the buyer would be the difference in value of what was contracted for and that which was received.

Furthermore, where both conforming and nonconforming goods are delivered, the buyer may choose to accept the conforming goods and reject the nonconforming goods. As long as the buyer informs the seller of this, the buyer will not later be stopped from recovering its damages for the rejected products.

Strict liability in tort has also been allowed for damages caused by defective products. A supplier who furnishes nonconforming goods to a buyer may be liable on a theory of negligence for any defect in the goods that the supplier knew or had reason to know would likely result in injury to those using it.

In such an action, the burden of proving the defect is on the buyer. The difficulty in asserting such a claim is that the supplier will usually pass the blame of the defect on to the manufacturer, which thus involves additional parties and makes the case more complicated.
In determining which remedy to pursue, the buyer should consider the requisite notice requirements, burdens of proof, time limitations for bringing the action and types of damages available.

Whatever action it chooses to take, the buyer will normally be limited to those damages that were foreseeable by the supplier’s breach. If the buyer wants to recover consequential damages such as loss of profit, it would be necessary to prove that the supplier had reason to know that such damage would result from its failure to deliver conforming goods.

When a seller delivers defective or nonconforming goods to a buyer there has been a breach of contract. Moreover, if the defective goods are used and cause injury, the seller is liable in tort for the damages sustained.

Both parties to a contract expect full compliance with its terms. The buyer should pursue its rights under the contract and recover fully for losses due to defective performance by a supplier. The buyer is entitled to receive what it contracted for and if necessary, should pursue the available remedies it has against the seller.