

SECTION 7: ACQUISITION PROCEDURES

SUBJECT: ACKNOWLEDGMENTS Procedure 7.6.3

POLICY: Supplier order acknowledgements should not be accepted without review. Acknowledgments that differ in their terms from the order submitted by the University of Washington to the supplier may create unanticipated ambiguity in interpreting the terms and conditions of the order.

PROCEDURE:

The effect of a supplier order acknowledgment that differs in its terms from the University's Purchase Order depends on subject matter of the contract, which dictates the legal principles that apply. However, regardless of purchase type, the payment of an order where the supplier has submitted an order acknowledgment that differs in its terms from the University's Purchase Order will alter the terms and conditions applicable to the contract.

All contracts require an offer and an acceptance. What constitutes an "offer," a "counteroffer," or an "acceptance" will vary depending on the type of purchase. For purchases of services (or predominantly services), the common law of contracts will apply. For purchases of goods (or predominantly goods), the Uniform Commercial Code, Article 2 (UCC-2) will apply. The offer and acceptance will determine the terms and conditions of the contract.

Services Contracts (Common Law)

Under the common law of contracts (applicable to services), the "mirror image rule" applies. Under the mirror image rule, an acknowledgment with terms that differ from the purchase order constitutes a rejection and counteroffer. Once an offer has been rejected and a counteroffer has been made, that offer is no longer valid—under the common law, the terms of the original offer are entirely replaced by the terms of the counteroffer. Additionally, because the supplier's response constitutes a counteroffer and not an acceptance, no contract is formed.

In this case, a contract will be formed by performance. Typically, the supplier's acknowledgment will form the offer and UW's acceptance of the shipment and payment constitutes acceptance. The result is that the supplier's terms will likely prevail. In the services context, avoid accepting supplier acknowledgments. In the event a supplier transmits an acknowledgment inconsistent with the terms and conditions of a UW purchase order, expressly object to any terms inconsistent with the UW purchase order, or specific changes to the supplier's acknowledgment.

Goods Contracts (UCC-2)

Under UCC-2 (applicable to goods), the "battle of the forms" applies. The battle of the forms a term for the procedures for interpreting conflicting contract terms contained in UCC Section 2-207. A contract is typically formed, despite differences between the order and the acknowledgment. However, if the Supplier makes acceptance conditional on assent to the additional or different terms, a contract is not formed. The additional terms are considered "proposed" by the supplier as additions to the contract. These terms will become part of the contract unless the offer (purchase order) expressly limited acceptance to the terms of the offer

(purchase order), or the terms materially alter¹ the purchase order, or UW has already given (or within a reasonable time, gives) the supplier notification of its objection to the terms.

Generally, a contract will be created, despite differences in the terms and conditions. The additional terms proposed by the supplier will be included in the contract, but material alterations will not. Contradictory terms are “knocked out” under the UCC. Most protections added by the supplier will likely be construed as material alterations and will not be included in the contract.

If a contract is not created by the exchange of purchase order and acknowledgement a new contract **is** created by the supplier’s shipment and UW’s acceptance of this shipment. This is a contract by conduct. This contract is governed by the terms in both UW’s purchase order and the supplier’s acknowledgement that do not conflict. Remaining contract terms are supplied by the UCC “gap filler” terms and conditions. These terms and conditions favor UW.

In order to further protect UW’s interests, include the following language in the purchase order:

As an offer, this purchase order expressly limits acceptance to its terms and conditions, and notification of objection to any different or additional terms in any response to this offer by UW is hereby given. However, in the event that this purchase order is construed as an acceptance of the Supplier’s offer, rather than as an offer, this acceptance is expressly conditioned on the Supplier’s assent to any additional or different terms contained in this purchase order. Regardless of its construction as an offer, acceptance, confirmation or use to place orders for goods or services pursuant to an earlier contract, this purchase order incorporates by reference all terms of the Uniform Commercial Code providing any protection for UW, including, without limitation, all express and implied warranty protection and all buyer’s remedies under the Uniform Commercial Code.

This language limits acceptance of the purchase order to the purchase order’s terms, which should, in most cases, prevent the addition or alteration of the terms and conditions of the contract by a supplier.

¹ Materially alter typically includes changes to price, quantity, warranty requirements, limitations of liability, changes to dispute resolution procedures and attorneys fees, etc.