

Exercise caution when contracts are negotiated via email

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At a time when contract negotiations are commonly taking place via electronic forms of communication, it is becoming increasingly important for contractors to examine all contract documents closely and not commence work until they are certain they can agree to the terms and conditions governing that work. An Illinois case demonstrates the importance of these precautions.

In *Compass Environmental, Inc. v. Polu Kai Services, L.L.C.*, 318 Ill. Dec. 26 (Ill. App. 2008), an Illinois court of appeals ruled that a subcontractor (Polu Kai) was bound by the terms and conditions of a purchase order sent via email, even though the email did not include the backside of the purchase order, which contained the terms and conditions.

Compass Environmental was retained as a subcontractor to install roofing on a government project providing temporary housing in Louisiana for the victims of Hurricane Katrina. Compass subcontracted Polu Kai Services to perform some of the work. Compass emailed a purchase order for the work to Polu Kai. The bottom of the purchase order contained the following language: "SEE TERMS AND CONDITIONS ON REVERSE SIDE." When Compass emailed the purchase order to Polu Kai, however, it sent only the front page and did not include the reverse side containing the terms and conditions.

Polu Kai started work on the project before it received the emailed copy of the purchase order. Four days after Polu Kai started work, it received a Fed Ex package from Compass containing the printed purchase order, which did include the reverse side with terms and conditions.

A dispute arose between the parties, and Compass brought suit against Polu Kai. In determining whether Polu Kai was bound by the terms and conditions printed on the backside of the purchase order, the court made three observations. First, Polu Kai started work before receiving the purchase order via email. Second, when Polu Kai received the emailed purchase order, it did not ask Compass about the terms and conditions on the reverse side. Finally, when Polu Kai received the complete purchase order via FedEx, it continued to work and did not move to rescind the contract. As such, the court concluded that, through its course of conduct, Polu Kai had assented to the terms and conditions of the purchase order.

A similar result was reached in *M & K Chemical Engineering Consultants, Inc. v. Mallinckrodt, Inc.*, 2008 U.S. Dist. LEXIS 47190, *5-6 (S.D. Ill., June 18, 2008), in which a federal district court in Illinois concluded that "The mere fact that [the subcontractor] did not negotiate or read the terms and conditions section of the purchase order does not mean that it is not bound by them."

As explained by a court in Pennsylvania, a contractor has a "duty to inquire as to the content of the terms and conditions" that are incorporated by reference in a contract. *Globe Metallurgical Inc. v. Westbrook Resources Ltd.*, 2006 U.S. Dist. LEXIS 2307, *6-7 (W.D. Penn. 2006).

These cases demonstrate the importance of reviewing contracts carefully and inquiring about any terms and conditions that might be incorporated by reference. This is especially important when contracts are being transmitted via facsimile or email, because the reverse side of these documents, or subsequent pages altogether, may not always be successfully transmitted. These cases also point to the risks involved in commencing work before a contract has been fully reviewed and executed by both parties.

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