1990

Herm Hughes and Sons, Inc., a Utah corporation v. Quintek, a Utah corporation : Reply Brief

Utah Court of Appeals

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Clark B. Fetzer; Howell, Fetzer & Hendrickson; Attorneys for Appellant.

IN THE UTAH COURT OF APPEALS

HERM HUGHES & SONS, INC., a Utah corporation,	:	
Plaintiff and Appellant,	:	Docket No. 900529-CA
vs.	:	Argument Priority Classification 16
QUINTEK, a Utah corporation	:	REPLY BRIEF
Defendant and Appellee.	:	

ON APPEAL FROM THE FOURTH CIRCUIT COURT,
UTAH COUNTY, OREM DEPARTMENT

HONORABLE ROBERT J. SUMSION
Circuit Judge

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Herm Hughes submits the following brief in reply to Quintek's appellee brief.

SUMMARY OF THE ARGUMENTS

Point I. To be entitled to raise issues on appeal, it is sufficient that the issues were raised in a manner sufficient to obtain a ruling thereon. Herm Hughes presented sufficient facts and arguments at the trial to raise the issues regarding Utah Code Ann. § 70A-2-207 and waiver. At the trial, the trial court announced that the provisions of the Utah Uniform Commercial Code would govern the case. In its objections to Quintek's proposed findings and conclusions, and at the hearing held December 5, 1990, Herm Hughes argued the provisions of Utah Code Ann. § 70A-2-207 and the issue of waiver clearly and specifically. The trial court entered conclusions of law on these issues.

Point II. Quintek's three theories, Uniform Commercial Code, statute of frauds, and bid shopping, do not sustain the trial court's judgment. Quintek misapplies Section 2-207 of the Utah U.C.C. The statute of frauds is satisfied by the writings and conduct of the parties. Any alleged bid shopping did not preclude a contract.

Point III. Public policy favors enforcing contracts between general contractors and their suppliers for the sale of goods under Utah Code Ann. § 70A-2-207. U.C.C. Section 2-207 has sufficient safeguards to protect against being bound to unwanted terms. In this case, Quintek did not raise price as an issue in its objections to Herm Hughes's supplier agreement and presented no

evidence that it was prejudiced by herm Hughes's acceptance.

Point IV. Quintek's request for a contract is inconsistent with the position Quintek takes now, that the ten-day acceptance period expired. Any negotiation Quintek pursued was on the additional terms in the supplier agreement only--not on the terms of its proposal, which form the basis of the contract.

Point V. Quintek's Rule 33 argument is without merit because this appeal has a reasonable basis in both fact and law.

ARGUMENT

I. The trial court had squarely before it the provisions of Utah Code Ann. § 70A-2-207 and the issue of waiver; these issues are properly before this court.

The Utah Supreme Court has enunciated the following standard for determining when an issue has been sufficiently raised in the trial court to enable the appeals court to consider it:

> For a question to be considered on appeal, the record must clearing show that it was timely presented to the trial court in a manner sufficient to obtain a ruling thereon . . ..[1]

This Court has further refined the standard by stating that if a matter is sufficiently raised at the trial court level, it may be raised on appeal if the matter has been submitted to the trial court and the trial court has had an opportunity to make findings of fact or conclusions of law.[2] The record shows that Herm Hughes raised these issues at the trial court level timely and in a manner

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[1] Franklin Financial v. New Empire Development Co., 659 P.2d 1040, 1045 (Utah 1983) (citations omitted).

[2] James v. Preston, 746 P.2d 799 (Utah App. 1987).

that enabled the trial court to rule on them.

A. Herm Hughes raised the provisions of Utah Code Ann. § 70A-2-207 in the trial court.

The argument that Utah Code Ann. § 70A-2-207 governs the formation of the contract between Herm Hughes and Quintek in this case was not raised for the first time on appeal. As early as the pleadings, Herm Hughes alleged facts to which that section applies. At trial, counsel alluded to those facts and made reference to the elements of that section, and the trial court itself acknowledged that several sections of the Uniform Commercial Code applied to the case. By its objection to Quintek's proposed findings and conclusions, by its own findings and conclusions, and by its arguments at the hearing held December 5, 1990, Herm Hughes specifically argued that Utah Code Ann. § 70A-2-207 applies to this case.

Plaintiff's complaint alleges in paragraph 8:

> Plaintiff sent a Supplier Agreement to defendant which conformed to defendant's written cost estimate (bid), but defendant failed and refused to execute said agreement and has failed and refused to perform pursuant to its telephone bid and written cost estimate.[3]

Consistent with its pleading, at trial Herm Hughes presented evidence of an offer and acceptance for a contract for the supply of roof trusses, particularly Quintek's "Cost Estimate" or bid (Exhibit 6) and Herm Hughes's Supplier Agreement (Exhibit 11). Herm Hughes also put on evidence of conduct that recognizes the

[3] Record, page 18 (hereinafter abbreviated as, e.g., R. 18).

existence of a contract.

At the trial, following the presentation of plaintiff's evidence, Quintek moved for dismissal of plaintiff's case. In response to the motion, Herm Hughes frankly acknowledged that there was no agreement signed by both parties.[4] But Herm Hughes argued that the parties had reached an agreement on the terms of Exhibits 6 and 11 that were the same, and that there were no "material" new terms in Exhibit 11.[5]

In closing arguments, Herm Hughes argued that the differences between Exhibit 6 and Exhibit 11 were de minimis[6] and that the supplier agreement did not "materially" differ from the bid submitted by Quintek.[7] These are the very concepts and terms used in Utah Code Ann. § 70A-2-207. Indeed, the import of these arguments was not lost upon the trial court:

> MR. WEEKS: And we believe, your Honor, that contrary to Counsel's argument that the--the differences in the Exhibit No. 11 are de minimus [sic] as to the items that have been added to the performance.
>
> Exhibit 6 says--
>
> THE COURT: They may very well be, Mr. Weeks. I hate to keep interrupting you here, but I think that the UCC is going to come into play much more than either of you have indicated to the Court before this is through.
>
> MR. WEEKS: Well, but even the Code, your Honor, requires that the--the counter-offers be--

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[4] Transcript of trial, page 106, lines 17-22 (hereinafter abbreviated as, e.g., T. 106 ll. 17-22).

[5] T. 111 ll. 6-11. See Addendum B.

[6] T. 177 l. 16; T. 181 l. 1. See Addendum B.

[7] T. 181 ll. 14-17. See Addendum B.

> THE COURT: Yeah, but it handles a lot of the other problems that have arisen in this particular case. And that's what I'm--all I'm saying is that there are a lot of problems that the Code treats directly by one or other --or another section in sales relating to matters of this nature that I think we're going to have to give some consideration to, that's both with respect to what Mr. Lambert is claiming and with respect to what you're claiming.
>
> In fact, I glanced at it during our recess and it is replete with sections that bear directly on the problem that you're presenting to me, and I'm not asking you to refer to them and expound on them at this time. I just want you to know that I know that there's a lot of law there that I'm going to have to take a hard look at and try and see if it will help me resolve the factual issues, some of which may be important and some may not.[8]

After the trial Herm Hughes objected to Quintek's proposed findings and conclusions and proposed its own findings and conclusions.[9] Herm Hughes's proposed finding no. 39 suggested that the Court find that Quintek and Herm Hughes, by their conduct and by their writings, had made a contract for the sale of roof trusses on the essential terms of Quintek's bid proposal.[10] Herm Hughes objected to proposed conclusion no. 1 (that there was no meeting of the minds) on the grounds that there was a meeting of the minds on the essential terms of an agreement for the supply of roof trusses, which essential terms were those set forth in Quintek's bid

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[8] T. 177 l. 14 through T. 178 l. 16 (emphasis added); see also T. 193 l. 22 through T. 194 l. 1.

[9] R. 153-157; 188-203. See Addenda C and D.

[10] R. 194.

proposal.[11] Herm Hughes's proposed conclusions of law specifically recited the elements of Utah Code Ann. § 70A-2-207, and referred to that section by section number.[12]

On December 5, 1990, the trial court held a hearing on Herm Hughes's objections to Quintek's proposed findings and conclusions. At the hearing, Herm Hughes argued that this case is a contract formation case governed by Sections 2-204 and 2-207 of the Utah Uniform Commercial Code, citing those sections specifically.[13]

The following excerpt from the transcript of that hearing shows that the trial court clearly understood Herm Hughes's position and rejected it:

> MR. FETZER: I think the Code says that if you've got a counter-proposal that under--under non-U.C.C. contract law would normally kill the offer, but that proposal essentially meets the terms of the--excuse me, the counter-offer essentially meets the terms of the proposal, you've got a contract on . . . those points where it meets, and you don't have it on the other ones if they're material, but as between merchants, you do if there--the additional terms are to be construed as proposals for addition to the contract--this is on the counter-proposal. Between merchants, such terms become part of the contract unless, and then it lists some--unless the offer expressly limits acceptance to the terms of the offer or they materially alter it, or notification or objection to them has already been given, or is given within a reasonable time after notice of that is received.

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[11] R. 193, ¶ 1.

[12] See proposed conclusions nos. 1 - 9 and 13, R. 189-191.

[13] Transcript of hearing held December 5, 1990, page 9 line 24 through page 11 line 16 (hereinafter referred to as, e.g., Hg.T. 9 l. 24 through 11 l. 16). See Addendum E.

> And I think Boyd Jacobson gave those timely, that no, we're not going to agree to A, B, C, and D, but I don't think A, B, C, and D included the essential terms of the agreement. . . . That's--that's my view of the case and if I'm up in the night, I want to know.
>
> THE COURT: Well, my problem is, I have some difficulty with maybe even the Code in a circumstance such as that. I don't think that a bidder ought to be put in the position of having in every case to establish a contract with the person to whom he submitted that bid if that person hasn't done something to confirm it, and I don't think these Herm Hughes people did. They were . . . too busy . . . to pay attention to that thing. That's the impression I got. . . .
>
> MR. FETZER: What about that supplier agreement, your Honor? Is--didn't that--
>
> THE COURT: That was a Johnny-come-lately thing that gives me some problems, but I don't think that it's the type of thing that is going to make a contract in this case. You may convince the Appellate Court to the contrary, but I gave you my impressions, and after I sat through this thing, I couldn't, in good conscience, find sufficient evidence, as far as I was concerned, to find in favor of your party.[14]

The trial court's conclusion of law number 6 reflects the thinking of the trial court expressed in the foregoing excerpt.[15]

Herm Hughes does not dispute that the main theory of its case at trial was that the conduct of Herm Hughes and Quintek showed that they had formed an agreement. That theory is recognized by both Utah Code Ann. § 70A-2-204(1) and § 70A-2-207(3). That Herm Hughes did not point out those specific provisions to the trial

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[14] Hg.T. 68 l. 13 through 70 l. 12. See also Hg.T. 37 l. 9 through 38 l. 1; 64 l. 23 through 65 l. 6; 66 l. 20 through 68 l. 8; 70 l. 12.

[15] R. 228. See Addendum F.

court does not matter. Neither was it inconsistent for Herm Hughes to admit that it could not pin down the day the contract existed and at the same time argue that there was a contract. Utah Code Ann. §70A-2-204(2) provides: "An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined." It is clear the trial court believed the provisions of the Uniform Commercial Code were applicable. Furthermore, the trial court excused the parties from presenting arguments regarding those provisions at trial. Herm Hughes did present arguments specifically directed to those two sections at the hearing on December 5, 1990. The relevant provisions of the Uniform Commercial Code were squarely before the trial court, the trial court had a clear opportunity to rule on those theories, and it did enter a conclusion of law related to them.

B. Herm Hughes raised the issue of waiver before the trial court.

The trial court also ruled on Herm Hughes's argument that Quintek waived the ten day acceptance limit in its proposal. The principal evidence supporting Herm Hughes's theory of waiver is the testimony of Quintek's president, Boyd Jacobson, a witness for Quintek. It was Mr. Jacobson who testified that in the middle of November 1983 he called Todd Walker, an employee of Herm Hughes and asked why Quintek had not received a contract. A few days later, he went to the office of Herm Hughes to ask for a contract and to pick up a set of plans. He testified that Mr. Walker had a set of

plans for Quintek and gave him a supplier's agreement.[16]

Herm Hughes's proposed findings nos. 15-19[17] and its proposed conclusion no. 10[18] specifically addressed the evidence of waiver. At the December 5, 1990, hearing Herm Hughes argued the issue of waiver.[19] It is clear the Court understood and considered that argument:

> Now, you've talked about waiver and maybe the Appellate Court will look at this thing and say, well, by doing this and doing that, they waived the right to declare the contract--that there was no binding contract. I don't know; but the thing that impressed me at the trial is that everything that Herm Hughes came up with, these other people seemed to have a reasonable and logical explanation for it apart from the fact that they were intending to go forward with the contract. They were accommodating, and that may be their downfall.[20]

The trial court's conclusion no. 7 specifically addresses waiver.[21] Conclusion no. 7 was added after the hearing on December 5, 1990.[22]

Herm Hughes presented the issues of Utah Code Ann. § 70A-2-207 and waiver in the trial court. The trial court considered those issues, but ruled on those issues against Herm Hughes. Herm Hughes

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[16] T. 126 l. 4 through 127 l. 20.

[17] R. 197-198; Addendum D.

[18] R. 190; Addendum D.

[19] Hg.T. 11 l. 17 through 12 l. 19; Addendum E.

[20] Hg.T. 62, ll. 12-21.

[21] R. 228.

[22] Cf. R. 153-154.

has properly preserved the issues for appeal.

II. The trial court's judgment is not sustainable under the theories advanced by Quintek.

A. Herm Hughes challenges the trial court's conclusions of law, not findings of fact.

Herm Hughes does not challenge the findings of fact of the trial court, except in one minor respect that Herm Hughes has already addressed in its appellant's brief.[23] Herm Hughes is therefore not required to shoulder the burden of marshalling all of the evidence to challenge the findings of fact. Herm Hughes challenges the trial court's legal conclusions.

B. The trial court's judgment cannot be sustained on any of the legal theories advanced by Quintek.

Quintek argues that the trial court's judgment can be sustained on alternative legal grounds. Quintek advances three theories: Utah Code Ann. § 70A-2-204 (Quintek discusses § 2-207, as well), Utah Code Ann. § 70A-2-201 (statute of frauds), and alleged bid shopping.

1. Quintek improperly applies Utah Code Ann. Sections 70A-2-204 and 2-207.

The thrust of Quintek's argument regarding Section 2-204 of the Utah Uniform Commercial Code is that there is no contract because Herm Hughes did not accept Quintek's proposal within the ten-day period. This was the trial court's stated ground for its Ruling. Herm Hughes has addressed this issue in Appellant's Brief

[23] See pages 16 and 17 of Appellant's Brief regarding the date on which Quintek received the supplier agreement.

at pages 17-20. Due to the restrictions of Rule 24(c), which limits reply briefs "to answering any new matters set forth in the opposing brief," Herm Hughes will not reiterate its arguments here.

Also as part of its arguments under Section 2-204, Quintek maintains that Utah Code Ann. § 70A-2-207 is not applicable because Quintek did not admit there was a contract. Herm Hughes asserts there is a contract, arising from the exchange of Quintek's bid proposal (Exhibit 6) and Herm Hughes's supplier agreement (Exhibit 11), and from the conduct of the parties. This is precisely the kind of contract formation issue that Utah Code Ann. § 70A-2-207(1) addresses.

In its brief, Quintek leaps past the contract formation function of subsection 1 of § 70A-2-207 and erroneously emphasizes subsection 2, whose purpose is to determine whether additional terms in an acceptance are part of the contract. That question is not before this Court. The authority cited by Quintek itself states:

> In other words, a contract comes into being when the responsive form is sent, irrespective of variances in the printed terms. That is the first purpose of Section 2-207(1); namely, to decree that in an exchange of forms transaction, where the responsive document repeats the names of the parties, the price, the description of the goods, the quantity and the delivery date, it consummates a contract as an acceptance. It is a "definite and seasonable expression" of response that binds both parties.[24]

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[24] R. Duesenberg & L. King, Bender's Uniform Commercial Code Service § 305, at 3-51.

Cases cited by Quintek in support of the proposition that the parties must admit that there is a contract do not support that proposition. Marlene Industries Corp. v. Carnac Textiles, Inc., 45 N.Y.2d 327, 380 N.E.2d 239 (1978), is not relevant because it was a case under subsection 2 of the Uniform Commercial Code § 2-207. The issue of contract formation was not before that court. Duval & Co. v Malcom, 233 Ga. 784, 214 S.E.2d 356 (1975), is not helpful to Quintek's position. In that case, the buyer's response to the seller's proposal for a quantities contract differed so materially on the critical element of quantity that the court concluded there had been no meeting of the minds. It therefore held § 2-207 inapplicable. In this case, by contrast, Herm Hughes's supplier agreement matched Quintek's bid on all essential elements.

In U.S. Industries, Inc. v. Semco Manufacturing, Inc., 562 F.2d 1061, 1067 n. 8 (8th Cir. 1977) the court found that the sequence of negotiation and the exchange of the buyer's form and seller's form clearly showed an agreement and an intent to enter into a contract. In this case Quintek submitted its bid proposal and then, less than one month later, went to the office of Herm Hughes to ask for a contract. Herm Hughes complied by delivering the supplier agreement. That conduct, together with the subsequent conduct of the parties, evinces a clear intent of the parties to form a contract.

The Court in the U.S. Industries case also examined the terms of the offer and acceptance to determine if the acceptance diverged significantly with regard to a dickered term. Finding that it did

not, the Court concluded that a definite and seasonable expression of acceptance had been given. Likewise, in this case, Herm Hughes's supplier agreement left the essential terms of Quintek's bid intact. The only modification of those terms was the proposal to include a ten percent retention. But that was not a significant enough diversion to evince a lack of intent to contract.

Quintek cannot escape the formation of a contract on the essential terms of its proposal by arguing that it did not agree to the additional or different terms. The Uniform Commercial Code does not allow an offeror to welsh on its agreement simply because the acceptance states terms that are additional to or different from the offer. The result is fair because the offeror has at least the grounds provided in subsection 2 of § 2-207 for alleging that the additional or different terms are not part of the contract.

Herm Hughes respectfully suggests that the proper interpretation of § 2-207, therefore, is not to rely upon the parties' subjective intent or even upon their express statements about whether a contract exists, because the effect of § 2-207(1) is to allow acceptances that fairly meet the terms of an offer to "operate as an acceptance," that is, to form a contract. The standard should therefore be the standard of the U.S. Industries case: the responding form operates as an acceptance unless it significantly changes a dickered term.[25]

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[25] Accord, J. White and R. Summers, Uniform Commercial Code §1-3, pp. 47-48 (3d ed. 1988).

2. The statute of frauds is satisfied by the writings and conduct of the parties.

The trial court disregarded the statute of frauds argument raised by Quintek at the trial court level. Quintek had originally proposed a conclusion of law as follows:

> Any agreement between the parties was required to be in writing pursuant to Utah Code Ann. § 70A-2-201, unless excused by one of the exclusions stated therein.[26]

At the hearing on December 5, 1990, regarding plaintiff's objections to the proposed findings and conclusions, the trial court stated that he was not influenced by the statute of frauds and that the finding was unnecessary.[27] The findings and conclusions signed by the trial court do not contain a conclusion of law referring to the statutes of frauds although there is a conclusion (no. 5) referring to partial performance.[28]

The trial court's reasoning on the statute of frauds is correct. It is inapplicable to this case. Either the writings of the parties formed a contract pursuant to Utah Code Ann. § 70A-2-207, or the conduct of the parties formed such a contract under subsection 3 of Utah Code Ann. § 70A-2-207(3) (in which case "the terms of the particular contract consist of those terms on which

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[26] R. 154. ¶2[sic].

[27] Hg.T. 78 l. 22 through 79 l. 19. See Addendum E.

[28] R. 229, ¶5.

the writings of the parties agree")[29], or their conduct formed a contract pursuant to Utah Code Ann. § 70A-2-204. In either eventuality, Quintek's bid proposal binds Quintek and Herm Hughes's supplier agreement binds Herm Hughes to the terms of each that overlap. These terms are sufficiently definite to take the contract out of the statute of frauds.

None of the cases cited by Quintek applies to the facts of this case where there has been a written offer and a written acceptance as well as conduct recognizing the existence of a contract. None of the cases involved either Section 2-207 or Section 2-204 of the Uniform Commercial Code.

Nevertheless, if this Court determines that the statute of frauds applies to the contract between Herm Hughes and Quintek, and further, that the contract has not satisfied the requirements of subsection 1 of the Utah Code Ann. § 70A-2-201 regarding a writing, then Herm Hughes respectfully submits that Quintek's activities in preparation for manufacturing the roof trusses satisfy subsection 3 of that section, particularly when considered in connection with the exchange of documents between the parties. Quintek's preparations to perform included opening and making entries in a job log, having shop drawings drafted and approved by an engineer, and discussing with Herm Hughes the specifications related to those shop drawings. Under the circumstances of this case, where Quintek's proposal and Herm Hughes's supplier agreement overlap on critical terms, and where Quintek prepared shop drawings that were

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[29] Utah Code Ann. § 70A-2-207(3).

intended to comply with particular specifications for the Midland Elementary School Project, there was sufficient protection against the kind of dishonesty the statute of frauds is designed to avoid.

3. Alleged bid shopping did not affect the formation of the contract between Herm Hughes and Quintek.

The trial court was not influenced by Quintek's evidence regarding the alleged bid shopping, other than to conclude that Quintek had reason to wonder what Herm Hughes's intentions were.[30] It was after Quintek had learned from Mr. Gilson of the Oscar E. Chytraus Company that Herm Hughes was supposedly shopping Quintek's bid that Mr. Jacobson went to Herm Hughes's office and asked for a contract. Obviously Quintek was not dissuaded from seeking a contract with Herm Hughes. By seeking the contract Quintek revived the proposal or waived any argument that Herm Hughes could not accept the proposal.

III. Public policy favors enforcing contracts formed under Utah Code Ann. § 70A-2-207.

Giving effect to Utah Code Ann. § 70A-2-207 in this case will uphold an important public policy in the construction industry: maintaining the integrity and the predictability of the contracting process between contractors and suppliers. One of the purposes of those who drafted § 2-207 of the Uniform Commercial Code was to

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[30] Hg. T. 28 l. 11 through 30 l. 19; 77 ll. 20-25. See Addendum E. Herm Hughes disputes the characterization of its inquiry with Oscar E. Chytraus Company as bid shopping.

keep the welsher in the contract.[31] In addition, enforcing § 2-207(1) according to its terms will bring predictability to dealings between contractors and suppliers of good. In the context of commercial sales neither contractors nor suppliers should be surprised that they have consummated a contract when their written offers and written acceptance overlap on critical, bargained terms. Nor will either party be bound to additional or different terms unwittingly, because both will be armed with the tools provided by subsection 2 to escape such terms.

Quintek complains that applying § 2-207 to the circumstances of this case would violate public policy because materials prices can change if a contractor is allowed to accept price terms after substantial time passes. But Quintek was not without the means to protect itself. Quintek could have expressly withdrawn its offer. Instead, Quintek approached Herm Hughes after approximately two or two and one-half weeks, requesting a contract. If price had been a concern to Quintek after the passage of that time, it could have made its request conditioned on a new price term. Quintek presented no evidence that it did so. When Herm Hughes responded to Quintek's request by handing Mr. Jacobson a supplier agreement, Mr. Jacobson made no objection to the price term in the supplier agreement. Instead, he objected to such matters as the flow-down clause, liquidated damages, indemnification, and the ten percent retention. Quintek presented no evidence at the trial that the

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[31] J. White & R. Summers, Uniform Commercial Code § 1-2, p. 27 (3d ed. 1988).

lumber prices actually increased between November 5 (the end of the ten day acceptance period in its proposal) and the date just after the middle of November on which Quintek received Herm Hughes's supplier agreement.

IV. Quintek waived the ten day notice requirement in its bid.

Perhaps the pivotal fact in this case is that Boyd Jacobson of Quintek went to Herm Hughes in mid-November 1983 and requested a contract. Mr. Jacobson did so after the ten day acceptance period in Quintek's bid had expired, and after Mr. Gilson of the Oscar E. Chytraus Company had alerted Quintek that Herm Hughes was supposedly shopping Quintek's bid. When it received the supplier agreement, Quintek did not say anything about the ten-day acceptance period having lapsed. Quintek objected to the additional terms in the supplier agreement, but never objected to terms that harmonized with its proposal. Quintek submitted shop drawings, set up its job file, and had communications with Herm Hughes about the project.

Quintek characterized this conduct as mere negotiation. But was it? Quintek did not ask for a proposal from Herm Hughes; it asked for a contract. Quintek expected to receive a contract even if Herm Hughes had signed its proposal[32], indicating that Quintek considered the contract to be the consummation of the deal.

What was Quintek negotiating about? Quintek presented no evidence that it expected any other terms than those contained in

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[32] T. 141 ll. 17-22.

its proposal (Exhibit 6). When it received the supplier's agreement it did not object to the terms in the supplier's agreement that were consistent with the terms in Quintek's proposal. Quintek submitted shop drawings, as required by the plans and specifications. Apparently Quintek believed it was negotiating only on the additional terms in the supplier's agreement. That conduct is not inconsistent with the idea that a contract was formed on the terms of Quintek's proposal. It does not demonstrate that Quintek was still asserting the lapse of the ten-day acceptance period in its proposal.

Quintek cannot have it both ways. Quintek has presented no evidence and has asserted no argument tending to show that when it asked Herm Hughes for a contract, it had any other terms in mind than those contained in its original proposal. Therefore, if Quintek was seeking a contract, it was on those terms. Quintek cannot by its silence have the benefit of those terms and still assert that the proposal containing those terms has expired. It cannot on the one hand argue that it wanted a contract, and on the other hand argue that it did not waive the ten-day acceptance period in its proposal.

V. Herm Hughes's appeal is meritorious and not subject to sanctions under Rule 33(a).

An appeal is not frivolous if it has a reasonable basis in fact and law.[33] Among the facts that form the basis for this appeal are the exchange of Quintek's proposal and Herm Hughes's

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[33] Rule 33(a), Utah Rules of Appellate Procedure; Maughan v. Maughan, 770 P.2d. 156, 162 (Utah App. 1989).

appeal are the exchange of Quintek's proposal and Herm Hughes's supplier agreement, which overlap on the critical terms for the supply of wood trusses; the fact that Mr. Boyd Jacobson, the president of Quintek, went to Herm Hughes well after the ten day acceptance period in Quintek's proposal had expired and asked for a contract; and the facts that Quintek prepared and sent to Herm Hughes shop drawings, prepared a job file, and kept a log of communications between Herm Hughes and Quintek regarding the project. Herm Hughes believes these facts and this conduct evidence a contract between the parties.

Herm Hughes bases its legal arguments upon Utah Code Ann. §§70A-2-207 and 2-204. Herm Hughes believes that these statutes apply very helpfully and very directly to the issues in this case. This appears to be a case of first impression for the application of § 2-207(1). Herm Hughes has cited case law from other jurisdictions together with well-recognized authorities on the Uniform Commercial Code in support of its position. Finally, Herm Hughes believes that, even if its appeal is unsuccessful, the result of this appeal will be greater understanding about the role of the Uniform Commercial Code, particularly § 2-207, in the relationship between contractors and suppliers in the construction industry. Herm Hughes respectfully submits that this is not the kind of appeal for which sanctions should be imposed.

CONCLUSION

The facts and arguments critical to decision of this case are properly before this Court on appeal. Those issues include an

provide a basis for concluding that a contract was formed between Herm Hughes and Quintek for the supply of roof trusses. Those issues also include whether Quintek waived the ten day acceptance period in its proposal when it requested a contract from Herm Hughes. On these issues Herm Hughes is entitled to a reversal of the trial court and an entry of judgment in its favor. That ruling will vindicate a contractor's expectation that its suppliers will honor their bids according to their terms, and will give guidance to the construction industry in the critical context of contract formation.

Respectfully submitted this 7th day of October, 1991.

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Herm Hughes & Sons Inc.

CERTIFICATE OF SERVICE

I hereby certify that four true and correct copies of the foregoing REPLY BRIEF were mailed, postage prepaid, on this 7th day of October, 1991, to the following:

D. David Lambert, Esq.
HOWARD, LEWIS & PETERSEN
120 East 300 North
Provo, Utah 84606

\wp51\cbf\90140\brief

ADDENDUM A

STATUTES

those relating to the present or future sale of goods. "Contract for sale" includes both a present sale of goods and a contract to sell goods at a future time. A "sale" consists in the passing of title from the seller to the buyer for a price (Section 70A-2-401). A "present sale" means a sale which is accomplished by the making of the contract.

(2) Goods or conduct including any part of a performance are "conforming" or conform to the contract when they are in accordance with the obligations under the contract.

(3) "Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On "termination" all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.

(4) "Cancellation" occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of "termination" except that the canceling party also retains any remedy for breach of the whole contract or any unperformed balance. 1965

70A-2-107. Goods to be severed from realty — Recording.

(1) A contract for the sale of minerals or the like (including oil or gas) or a structure or its materials to be removed from realty is a contract for the sale of goods within this chapter if they are to be severed by the seller but until severance a purported present sale thereof which is not effective as a transfer of an interest in land is effective only as a contract to sell.

(2) A contract for the sale apart from the land of growing crops or other things attached to realty and capable of severance without material harm thereto but not described in Subsection (1) or of timber to be cut is a contract for the sale of goods within this chapter whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance.

(3) The provisions of this section are subject to any third party rights provided by the law relating to realty records, and the contract for sale may be executed and recorded as a document transferring an interest in land and shall then constitute notice to third parties of the buyer's rights under the contract for sale. 1977

PART 2

FORM, FORMATION AND READJUSTMENT OF CONTRACT

70A-2-201. Formal requirements — Statute of frauds.

(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.

(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 Subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received.

(3) A contract which does not satisfy the requirements of Subsection (1) but which is valid in other respects is enforceable

(a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

(b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

(c) with respect to goods for which payment has been made and accepted or which have been received and accepted (Section 70A-2-606). 1965

70A-2-202. Final written expression — Parol or extrinsic evidence.

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(a) by course of dealing or usage of trade (Section 70A-1-205) or by course of performance (Section 70A-2-208); and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement. 1965

70A-2-203. Seals inoperative.

The affixing of a seal to a writing evidencing a contract for sale or an offer to buy or sell goods does not constitute the writing a sealed instrument and the law with respect to sealed instruments does not apply to such a contract or offer. 1965

70A-2-204. Formation in general.

(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

(2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

(3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy. 1965

70A-2-205. Firm offers.

An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror. 1965

70A-2-206. Offer and acceptance in formation of contract.

(1) Unless otherwise unambiguously indicated by the language or circumstances

(a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;

(b) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of nonconforming goods, but such a shipment of nonconforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.

(2) Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance. 1965

70A-2-207. Additional terms in acceptance or confirmation.

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this act. 1965

70A-2-208. Course of performance or practical construction.

(1) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

(2) The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade (Section 70A-1-205).

(3) Subject to the provisions of the next section on modification and waiver, such course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance. 1965

70A-2-209. Modification, rescission and waiver.

(1) An agreement modifying a contract within this chapter needs no consideration to be binding.

(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

(3) The requirements of the statute of frauds section of this chapter (Section 70A-2-201) must be satisfied if the contract as modified is within its provisions.

(4) Although an attempt at modification or rescission does not satisfy the requirements of Subsection (2) or (3) it can operate as a waiver.

(5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver. 1965

70A-2-210. Delegation of performance — Assignment of rights.

(1) A party may perform his duty through a delegate unless otherwise agreed or unless the other party has a substantial interest in having his original promisor perform or control the acts required by the contract. No delegation of performance relieves the party delegating of any duty to perform or any liability for breach.

(2) Unless otherwise agreed all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance. A right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation can be assigned despite agreement otherwise.

(3) Unless the circumstances indicate the contrary a prohibition of assignment of "the contract" is to be construed as barring only the delegation of (to) the assignee of the assignor's performance.

(4) An assignment of "the contract" or of "all my rights under the contract" or an assignment in similar general terms is an assignment of rights and unless the language or the circumstances (as in an assignment of (for) security) indicate the contrary, it is a delegation of performance of the duties of the assignor and its acceptance by the assignee constitutes a promise by him to perform those duties. This promise is enforceable by either the assignor or the other party to the original contract.

(5) The other party may treat any assignment which delegates performance as creating reasonable grounds for insecurity and may without prejudice to his rights against the assignor demand assurances from the assignee (Section 70A-2-609). 1965

PART 3

GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT

70A-2-301. General obligations of parties.

The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract. 1965

70A-2-302. Unconscionable contract or clause.

(1) If the court as a matter of law finds the contract

ADDENDUM B

TRANSCRIPT OF TRIAL EXCERPTS

there's part performance. I don't think that because they have led us to believe that they're performing, now they can stand back and say there's no written agreement. That just does not seem to be the facts in this case. We have an oral contract here, they don't have to imply anything.

It's clear that the parties had reached an agreement, the terms are clearly defined. Each of the documents that have received so much emphasis, Plaintiff's Exhibit 6 and Plaintiff's Exhibit 11, both of them contain the same terms. There are no material new terms in Exhibit 11.

Any time anybody bids, when they submit that bid, they admit that they're bidding in accordance with plans and specifications. They have to provide, as we required in the plans and specifications, they have to be an ICBO approved truss shop. They have to prove--provide six shop drawings, and right on down the line, each of the provisions that are in the supplier agreement are really just implying to the contract, there's nothing there that is any substantial modification.

And they even picked up the language, and I won't try to jerk that for you, as Mr. Lambert has, I think you can read that paragraph that talks about what the discount is for, and I think the discount was granted in accordance with their wish. They just didn't deliver the trusses so

THE COURT: Well, I intend to examine all of them.

MR. WEEKS: I know you will. And anyway, it's clear, your Honor, that Mr. Jacobsen said that he would not have been surprised to have a written contract presented to him, and in fact, a written supplier agreement was presented to him.

THE COURT: Although he was expecting a purchase order, that was his statement.

MR. WEEKS: That's--

THE COURT: That's what he thought he was going to get, but he didn't, and so he--then we turn our attention to the other document.

MR. WEEKS: And we believe, your Honor, that contrary to Counsel's argument that the--the differences in the Exhibit No. 11 are de minimus as to the items that have been added to the performance.

Exhibit 6 says--

THE COURT: They may very well be, Mr. Weeks. I hate to keep interrupting you here, but I think that the UCC is going to come into play much more than either of you have indicated to the Court before this is through.

MR. WEEKS: Well, but even the Code, your Honor, requires that the--the counter-offers be--

THE COURT: Yeah, but it handles a lot of the

other problems that have arisen in this particular case. And that's what I'm--all I'm saying is that there are a lot of problems that the Code treats directly by one or other--or another section in sales relating to matters of this nature that I think we're going to have to give some consideration to, that's both with respect to what Mr. Lambert is claiming and with respect to what you're claiming.

In fact, I glanced at it during our recess and it is replete with sections that bear directly on the problem that you're presenting to me, and I'm not asking you to refer to them and expound on them at this time. I just want you to know that I know that there's a lot of law there that I'm going to have to take a hard look at and try and see if it will help me resolve the factual issues, some of which may be important and some may not.

MR. WEEKS: And indeed, your Honor, that's the reason why we're here.

I think, your Honor, you must give consideration to the fact that we have here documents on both sides which indicate that for some period of 60 to 90 days, these parties were progressing down the road to building trusses to be placed in the school, and--and for the defense to claim that all this time, they were waiting for some clarification of their authority, Mr. Jacobsen has testified

There's some reason, your Honor, that all of a sudden, in February, some three months later, that the defendant had decided they would not perform. And never, until this point, was there any indication that they would not perform the contract.

And we can speculate about the necessity for a writing. We can speculate on the question of whether the parties reached a contract agreement on a given day--

THE COURT: Well, we've got almost 30 exhibits. There's lots of writing in this situation.

MR. WEEKS: And I believe, your Honor, that the writing on both sides is corroborative. It indicates that the parties were heading in the direction where there was going to be the performance that was expected, in both instances by both parties. On the dollar amount, and the only thing they had not agreed was on the terms regarding the time of delivery. And those are the matters that are shown in the documents when they were talking about exchanging plans and setting verification dates, and the other elements of the contract that were, of course, not included in either of the proposals.

We think, your Honor, that the test ought to be whether the parties reached an agreement. We think they did. We think there were minor matters that may be taken care of by the Code, and we think there are minor matters

that are de minimus that did not affect the ability of the parties to reach an agreement.

The objections that were had to the plans and specifications being included in the supplier agreement, right on their Exhibit 6, they wrote being in accordance with plans and specifications. That seemed to be one of the big problems.

And those plans and specifications require every bidder to assume the obligations of the contract in connection with their subcontract, not the overall interpretation, and if Mr. Jacobsen thought he was somehow stepping into the shoes of Herm Hughes & Sons as a general contractor, that's just a mistaken notion.

And the sub--the supplier agreement did not incorporate substantially or materially different form of agreement than that which they had submitted; in fact, it was materially the same.

We believe, your Honor, that we're entitled to judgment. We believe that we're entitled to judgment for the additional costs that were required over and above the bid amount, including that amount for which the discount would have included, and the reason being that it would seem that we didn't give the plaintiffs an opportunity to see whether they would have earned the discount, because the defendants gave notice in February they wouldn't

ADDENDUM C

DEFENDANT'S AMENDED PROPOSED FINDINGS OF FACT AND CONCLUSION OF LAW

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Attorneys for Defendant

IN THE FOURTH CIRCUIT COURT OF UTAH COUNTY

STATE OF UTAH, OREM DEPARTMENT

HERM HUGHES & SONS, INC., a Utah corporation,	:	
Plaintiff,	:	DEFENDANT'S AMENDED PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
vs.	:	
QUINTEK, a Utah corporation,	:	Civil No. 883000004
Defendant.	:	

The above-captioned matter came on for its regularly scheduled trial on the 13th day of August, 1990, before the Hon. Robert J. Sumsion, Circuit Judge. Plaintiff's president, Glen Hughes, was present and plaintiff was represented by its counsel, E. Nordell Weeks. Defendant's president, Boyd Jacobson, was present and defendant was represented by its attorney, D. David Lambert. The Court received the evidence of the parties and has considered the arguments of counsel, together with the legal authorities presented, and now makes the following:

FINDINGS OF FACT

1. The plaintiff corporation is a general contractor doing business within the State of Utah.

2. The defendant is a Utah corporation in the business of manufacturing roof trusses and other building components which are supplied as finished products without doing work on the job site.

3. In late October, 1983, the defendant became aware of the possibility of bidding on the Midland Elementary School to be constructed in Roy, Utah. This information came through the Intermountain Contractor bidding service, and an agent of the defendant corporation reviewed the materials available in the form of plans showing the design criteria. Defendant prepared preliminary drawings and otherwise acted to prepare an estimate of its cost to provide roof trusses for the school in question.

4. On October 25, 1983, defendant communicated to plaintiff by telephone a bid proposal which had been reduced to writing and which was mailed to plaintiff the same day that the verbal communication took place.

5. Plaintiff received the defendant's written bid proposal on October 27, 1983, as indicated by its date stamp placed thereon. Said document was received by the Court as Exhibit 6.

6. Defendant's written bid proposal, (Exhibit 6) specified that the offer was to be accepted within ten days and provided a space at the bottom of the written document for plaintiff to sign in acceptance.

7. Plaintiff never signed the bid proposal of the defendant.

8. Plaintiff used defendant's bid in an effort to convince Larry Gilson of Oscar E. Chytraus Co. to reduce his bid proposal. Larry Gilson contacted defendant's president, Boyd Jacobson, and advised him of plaintiff's bid shopping.

9. The only written response of the plaintiff which directly addressed the terms of the bid proposal was made under cover letter dated November 21, 1983, and was in the form of a Supplier Agreement. The cover letter and Supplier Agreement were received by the Court as Exhibit 11. Exhibit ____, containing the notes of Don Brown, an employee of the defendant, gives reason to believe that Exhibit 11 was received by the defendant on or about November 30, 1983.

10. Defendant refused to sign the Supplier Agreement (Exhibit 11) and defendant's president, Boyd Jacobson, had discussions with employees of the plaintiff stating his refusal to sign the Supplier Agreement.

11. The Supplier Agreement (Exhibit 11) contains various terms which are different than the defendant's bid proposal (Exhibit 6), including the following terms:

a. Specific terms concerning indemnification and assuming an obligation directly to the owner.

b. Language allowing the contractor to retain 10% of the purchase price until completion of the project.

c. Provisions concerning liquidated damages.

12. Certain shop drawings were done preliminary to defendant's submission of the bid proposal to the plaintiff. It is unclear which drawings were later submitted to plaintiff, but certain drawings were sent and discussions occurred relative to possible performance by defendant in fabricating the trusses in question.

13. Defendant never began fabrication of the trusses and never produced any of the trusses for the school in question.

14. Plaintiff admitted that the date or time when its alleged agreement came into existence cannot be ascertained.

The Court having made the above Findings of Fact, now makes and enters the following:

CONCLUSIONS OF LAW

1. There was never a meeting of minds of the parties on the essential terms of an agreement.

2. Plaintiff rejected defendant's bid by attempting to shop the bid to the next lowest bidder.

2. Any agreement between the parties was required to be in writing pursuant to Utah Code Ann. § 70A-2-201, unless excused by one of the exclusions stated therein. None of the exclusions stated therein apply for the following reasons: a) the defendant is the only party, as the seller or supplier, who could make a claim as to specially manufactured goods; b) defendant has never admitted the existence of a contract; and c) plaintiff made no payment for any goods or work of the defendant.

3. No partial performance occurred in that no aspect of the final product to be supplied was ever fabricated, no step of fabrication, except preliminary drawings, was ever commenced and plaintiff never accepted or received any goods and plaintiff paid no monies to defendant.

4. Plaintiff alleged only a cause of action for breach of contract and no estoppel or reliance claims were pleaded or proven.

5. Plaintiff's claims should be dismissed with prejudice costs to defendant.

DATED this ____ day of August, 1990.

BY THE COURT:

ROBERT J. SUMSION
CIRCUIT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 29 day of August, 1990.

E. Nordell Weeks, Esq.
136 South Main Street #320
Salt Lake City, UT 84101

SECRETARY

ADDENDUM D

OBJECTIONS TO DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSION OF LAW AND JUDGMENT

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FOURTH CIRCUIT COURT, STATE OF UTAH
UTAH COUNTY, OREM DEPARTMENT

HERM HUGHES & SONS, INC., A Utah Corporation,	:	OBJECTIONS TO DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT Case No. 883000004
Plaintiff and Appellant,	:	
vs.	:	
QUINTEK, a Utah Corporation,	:	
Defendant and Appellee.	:	

Plaintiff and appellant, Herm Hughes & Sons, Inc., through its counsel, Howell, Fetzer & Hendrickson, hereby objects to Defendant's Amended Proposed Findings of Fact and Conclusions of Law served on E. Nordell Weeks on August 29, 1990 (the "August findings"), and objects to Findings of Fact and Conclusions of Law and Judgment proposed by defendant's counsel and served on E. Nordell Weeks, counsel for plaintiff, on October 8, 1990 (the "October findings"). For simplicity, plaintiff will refer only to the August findings, hereafter referred to as "defendant's Proposed Findings and Conclusions." By stipulation of counsel, the time for submitting these objections has been extended to this date.

OBJECTIONS TO PROPOSED FINDINGS OF FACT

1. Plaintiff objects to the portion of finding no. 3, in the second sentence, that reads: "in the form of plans showing the design criteria," and the portion of the third sentence in finding no. 3 that reads "defendant prepared preliminary drawings." Stan Jacobson testified that he "would assume" that the materials available for the bid were in the form of plans. The person who prepared the bid, Don Brown, did not testify. The statement that defendant prepared preliminary drawings in preparation of its estimate is not supported by the record. Again, Stan Jacobson testified that he "would assume" that computer generated drawings were produced. He did not testify when those drawings were produced.

2. Plaintiff objects to finding no. 8 in its entirety. The first sentence of finding no. 8 is counsel's characterization of the testimony of Mr. Gillson. Mr. Gillson referred to plaintiff's actions as "bid shopping" but that was the conclusion drawn by Mr. Gillson. There is no foundation for Mr. Gillson's opinion and the evidence does not support his characterization. Plaintiff further objects to finding no. 8 on the ground that it is irrelevant, immaterial and unnecessary to a decision of the case. Defendant's counsel did not even refer to this evidence in closing arguments. The finding is also highly prejudicial.

3. Plaintiff objects to finding no. 9 because the letter and supply agreement were not the only written response of plaintiff that directly addressed the terms of the bid proposal of defendant. One of the terms of the bid proposal was to supply roof trusses in accordance with plans and specifications. Those plans and specifications require Quintek to provide shop drawings. Plaintiff exchaned written correspondence with defendant regarding the shop drawings.

4. Plaintiff objects to finding no. 10. Boyd Jacobson had discussions with Todd Walker, an employee of plaintiff. Mr. Jacobson's testimony did not refer to discussions with any other employee of plaintiff in which Mr. Jacobson stated his refusal to sign the supplier agreement.

5. Plaintiff objects to finding no. 11(a) because some of the additional terms in the supplier agreement are not different from defendant's bid proposal. Defendant's bid proposal included an undertaking to prepare roof trusses "per plans and specifications." Plaintiff had the same obligations to the owner. Therefore, under defendant's bid proposal, defendant had some of the same obligations to plaintiff that plaintiff had to the owner.

6. Plaintiff objects to finding no. 12 because there was no evidence that, for this specific project, shop drawings were done preliminary to defendant's submission of the bid proposal to plaintiff. Further, it is not unclear which

drawings were submitted to plaintiff. The drawings that were submitted are shown in Exhibits 8, 13, 14 and 15.

7. Plaintiff objects to finding no. 13 because the phrase "never began fabrication" is overly broad, conclusory, and does not reflect the evidence that shows various activities of the defendant related to the fabrication of the trusses.

8. Plaintiff objects to finding no. 14. It is true that counsel for plaintiff admitted in his opening statement that the exact time when the agreement came into existence cannot be determined, but counsel's statement is not an admission by plaintiff and is not evidence. It is therefore inappropriate to base a finding of fact on counsel's statement.

9. Plaintiff objects to the findings generally in that they are incomplete and omit critical facts.

PLAINTIFF'S PROPOSED FINDINGS OF FACT

Plaintiff accordingly further requests the court to make the following specific findings of fact:

1. Plaintiff, a corporation, is a general contractor engaged in the construction business in Utah.

2. Defendant is a Utah corporation in the business of manufacturing roof trusses and other building components which are supplied as finish products without doing work on the jobsite.

3. This action arose out of a project for the construction of the Midland Elementary School in Roy, Utah (the "project"), for the Weber School District, owner, for which plaintiff was the general contractor.

4. The project was to be constructed pursuant to plans and specifications prepared by John L. Piers, the architect for the project.

5. The portion of the plans and specifications for the project dealing with the wood trusses was set forth in the General Conditions and General Requirements, Division 1 and Division 6, WOOD & PLASTIC, Section 6010--lumber and related items, along with Addendum 1 of the specifications, and the drawings of John L. Piers.

6. In late October, 1983, defendant became aware of the possibility of bidding on the project. This information came through the Intermountain Contractor bidding service. Defendant prepared an estimate of its cost to provide roof trusses for the project.

7. On October 25, 1983, defendant communicated to plaintiff by telephone a bid proposal which had been reduced to writing and which was mailed to plaintiff the same day that the verbal communication took place.

8. Various other suppliers of wood trusses submitted bids to plaintiff for the wood trusses required on the project.

9. Plaintiff used defendant's bid for the trusses in plaintiff's bid to the owner on the project (Exhibit 7).

10. Plaintiff received defendant's written bid proposal on October 27, 1983, as indicated by plaintiff's date-stamp placed thereon. Said document was received by the Court as Exhibit 6.

11. Defendant's written bid proposal (Exhibit 6) proposed to supply the roof trusses for the project, f.o.b. jobsite, per plans and specifications, for a price of $42,518.00, less an eight percent discount of $3,401.44, if taken in ten days for a net proposal of $39,116.56.

12. Defendant's written bid proposal (Exhibit 6) specified that the estimate was to be accepted within ten days from October 25, 1983, and provided a space at the bottom of the written bid proposal for plaintiff to sign in acceptance.

13. Defendant's written bid proposal (Exhibit 6) was signed by defendant.

14. Plaintiff never signed the bid proposal of the defendant.

15. Defendant assumed that, if plaintiff had signed defendant's bid proposal (Exhibit 6), a contract would be forthcoming from plaintiff.

16. In about the middle of November, 1983, Boyd Jacobson, then President of defendant, spoke by telephone with Todd Walker, an employee of plaintiff, and inquired why

defendant had not yet received a supply contract for the supply of the trusses.

17. At the time that Boyd Jacobson spoke with Todd Walker in mid-November 1983, plaintiff had not yet received a contract from the owner for construction of the project.

18. A few days after the telephone conversation between Boyd Jacobson and Todd Walker in mid-November, 1983, Boyd Jacobson went to the offices of plaintiff to ask for a supply contract and to pick up a set of plans for the manufacture of the trusses.

19. Plaintiff sent a Supplier Agreement to defendant under cover of plaintiff's letter dated November 21, 1983. These documents were received by the court as Exhibit 11.

20. The supplier agreement enclosed with plaintiff's letter of November 21, 1983 (Exhibit 11) included the following terms: defendant was to supply trusses to plaintiff, f.o b. jobsite, according to the plans and specifications for the project, at a price of $42,518, with a discount of eight percent, ten days.

21. The supplier agreement (Exhibit 11) contained some terms that were additional to or different from the terms stated in defendant's bid proposal (Exhibit 6).

22. Defendant refused to sign the supplier agreement (Exhibit 11) and defendant's president, Boyd Jacobson, had discussions with Todd Walker, an employee of plaintiff, regarding his objections to the supplier agreement.

23. Defendant did not provide written notice of its objection to the supplier agreement (Exhibit 11) within ten days after defendant received it.

24. The plans and specifications for the project called for specific characteristics of the wood trusses, including specific design loads for the plates (Exhibits 8, 13, 14, and 15).

25. Defendant sent shop drawings for the project to plaintiff, under cover of a letter dated December 13, 1983 (Exhibit 8).

26. On December 14, 1983, Todd Walker, an employee of plaintiff, spoke with a person at defendant's office in Provo regarding his objections to sending the shop drawings to Mr. Walker. (Exhibit 12).

27. On December 15, 1983, plaintiff received the shop drawings sent by defendant (Exhibits 8 and 13).

28. Also on December 15, 1983, plaintiff sent defendant's shop drawings to E. W. Allen & Associates, the engineer for the project, for the engineer's review (Exhibit 14).

29. On December 20, 1983, Todd Walker spoke with Don at Quintek regarding the shop drawings (Exhibit 12).

30. On December 30, 1983, Todd Walker spoke with Don at Quintek regarding starting fabrication of the trusses (Exhibit 12).

31. On January 3 or January 4, 1984, Todd Walker spoke with Don at Quintek regarding the design load for the plates of the trusses (Exhibit 12).

32. On January 5, 1984, plaintiff received from John L. Pierce, copies of the shop drawings prepared by defendant, containing a notation regarding "load factor for plate design 1.33 x design load." (Exhibit 16).

33. On or about January 6, 1984, Todd Walker sent to Quintek shop drawings "approved as noted" with the request to begin fabrication and to submit the remaining shop drawings (Exhibit 17).

34. Defendant maintained a record of the project, including a record of its contacts with plaintiff regarding the project. A portion of this record was admitted as Exhibit 20.

35. In January 1984, plaintiff notified defendant that the engineer and/or the architect who had reviewed defendant's shop drawings had indicated a load factor for the plate design of 1.33 x design load.

36. On or about February 8, 1984, defendant informed Dale Higgs, an employee of plaintiff, that defendant would not be supplying the roof trusses for the project.

37. In late February 1984 plaintiff received a proposal from defendant to supply the trusses for the project for $48,000. Defendant's proposal was presented to Glenn C. Hughes, president of plaintiff, by Bill Norris, an employee of

defendant, and was reduced to a written proposal dated February 22, 1984, which was admitted as Exhibit 19.

38. Defendant never supplied any of the trusses for the project.

39. By their conduct and by their writings, plaintiff and defendant made a contract for the sale of the roof trusses by defendant to plaintiff on the following terms: defendant would supply roof trusses to plaintiff per plans and specifications, f.o.b. jobsite, at a price of $42,518.00, less an 8 percent discount, if taken in 10 days, of $3,401.44, for a net amount of $39,116.56.

40. Due to defendant's failure to supply the roof trusses for the agreed price, plaintiff was required to obtain the roof trusses from another supplier.

41. Plaintiff attempted to mitigate its costs of having the roof trusses supplied by others, by contacting the next lowest bidders among the roof truss suppliers on the project, but these suppliers could not supply the roof trusses.

42. The cost to plaintiff of obtaining the roof trusses for the project from another supplier is $8,695.44. (Exhibits 22 and 24).

43. Plaintiff has been damaged in the amount of $8,695.44 as a result of defendant's breach of the agreement to supply the trusses at the agreed price (Exhibits 22 and 24).

44. Plaintiff has incurred costs in this action, and has requested in its complaint that it be awarded its costs.

Plaintiff objects to defendant's proposed Conclusions of Law as follows:

1. Plaintiff objects to Conclusion no. 1. There was a meeting of the minds of the parties on the essential terms of an agreement for the supply of roof trusses, which essential terms were: defendant would supply roof trusses according to plans and specifications for the project, f.o.b. jobsite, at a price of $42,518.00, less an 8% discount, 10 days, of $3,401.44, for a net amount of $39,116.56.

2. Plaintiff objects to Conclusion no. 2 because it is a characterization by an unqualified witness (see plaintiff's objection no. 2 to defendant's proposed findings of fact, above) and because it is irrelevant, immaterial, and unnecessary to the court's determination. It is also highly prejudicial.

3. Plaintiff objects to the second sentence of the second Conclusion no. 2 (there are two conclusions number 2 in the August conclusions) for the following reasons:

(a) Any party, plaintiff or defendant, can claim the benefit of Utah Code Ann. §70A-2-201(3)(a) (regarding specially manufactured goods); otherwise the statute violates the principle of mutuality of contracts; the evidence supports the conclusion that the trusses were to be specially manufactured for the project; and

(b) The evidence presented in court demonstrates that defendant recognized the existence of a contract by its conduct and the writings of the parties.

4. Plaintiff objects to Conclusion no. 3. The conduct of defendant listed in plaintiff's proposed findings shows a substantial beginning of the manufacture of the roof trusses by defendant. Under the terms of the contract established by the conduct and the writings of the parties, it was not necessary that plaintiff pay defendant before receiving goods.

5. Plaintiff objects to Conclusion No. 4. Plaintiff's Complaint alleges in paragraph 6 that plaintiff used defendant's bid in computing its general contract bid to the Weber County School District. Defendant cannot show prejudice for alleging estoppel or reliance. Defendant had available to it the critical documents and information that would disclose the conduct and the writings of the parties that resulted in an agreement. Moreover, defendant prepared a trial brief in April 1990 that addresses the issue of promissory estoppel.

6. Plaintiff objects to Conclusion No. 5, because on the basis of the foregoing proposed findings, the Court can and should find that plaintiff should recover its damages from defendant. No pleading of defendant or ruling of the court calls for an award of costs to defendant.

PLAINTIFF'S PROPOSED CONCLUSIONS OF LAW

Plaintiff requests the court make the following specific conclusions of law:

1. The Utah Uniform Commercial Code, Article 2, Utah Code Ann. §§70A-2-101 et seq., applies to this action.

2. Both plaintiff and defendant are merchants for purposes of §70A-2-104(1) and (3) and other sections of Article 2.

3. The transaction that is the subject of this action, i.e. the sale of roof trusses by defendant to plaintiff, is a transaction "between merchants" for purposes of §70A-2-104(3) and other sections of Article 2.

4. Plaintiff and defendant reached an agreement for the supply by defendant and the purchase by plaintiff of roof trusses for the project on the following terms: defendant was to supply wooden roof trusses, f.o.b. jobsite, according to the plans and specifications on the project, for the price of $42,518.00, less an 8% discount, 10 days, of $3,401.44, for a net price of $39,116.56.

5. The conduct of both plaintiff and defendant, including the conduct referred to in plaintiff's proposed findings of fact set forth above, recognizes the existence of the contract.

6. An agreement sufficient to constitute a contract for the sale of the roof trusses may be found even though the moment of its making is undetermined.

7. Even though one or more terms of the supplier agreement (Exhibit 11) were left open, the contract between the parties for the sale of the roof trusses does not fail for

indefiniteness, because the parties intended to make a contract and there is a reasonably certain basis for giving plaintiff a remedy. That basis is the terms of Exhibit 6 and Exhibit 11 on which the parties agreed.

8. Plaintiff's supplier agreement (Exhibit 11) was a definite and seasonable expression of acceptance or a written confirmation of defendant's bid proposal, was sent within a reasonable time, and operated as an acceptance, even though it stated terms additional to or different from those contained in defendant's bid proposal.

9. Conduct by both defendant and plaintiff, particularly the conduct set forth in plaintiff's proposed findings, recognizes the existence of a contract and was sufficient to establish a contract between plaintiff and defendant for sale of the roof trusses, even though defendant's bid proposal was not signed by plaintiff.

10. By requesting a supply contact and a set of plans in mid-November 1983, and by its subsequent conduct described in plaintiff's proposed findings, defendant waived the requirement that its bid proposal be accepted within ten days of October 25, 1983.

11. Plaintiff's letter of November 21, 1983, and the supplier agreement (Exhibit 11) satisfies the requirements of the Statute of Frauds §70A-2-201(1) and (2), against defendant.

12. If the agreement between plaintiff and defendant for the sale of roof trusses was oral, it is nevertheless enforceable under the Statute of Frauds, §70A-2-201(3), because the goods were to be specially manufactured for plaintiff for use on the project, and defendant made a substantial beginning of the manufacture of the trusses as set forth in plaintiff's proposed findings of fact.

13. Plaintiff and defendant have an enforceable contract for the sale of roof trusses for the project, pursuant to Utah Code Ann. §70A-2-204 and/or §70A-2-207.

14. Defendant breached the contract for the sale of roof trusses by refusing to supply trusses at the agreed price.

15. Plaintiff was damaged by defendant's breach in the amount of $8,695.44.

16. Plaintiff properly mitigated its damages.

17. Plaintiff is entitled to recover from defendant the sum of $8,695.44 for breach of contract.

18. Plaintiff is entitled to recover its costs incurred herein.

OBJECTIONS TO PROPOSED JUDGMENT

Plaintiff objects to the proposed Judgment for the reasons set forth in its objections to defendant's proposed Findings of Fact and Conclusions of Law. Plaintiff specifically objects to Item #3 of the proposed Judgment awarding costs to defendant in the sum of $125.60. The court

has made no ruling nor received any evidence regarding defendant's costs. Moreover, defendant's answer does not request costs.

PLAINTIFF'S PROPOSED JUDGMENT

Plaintiff requests that the court enter the following judgment:

1. Plaintiff shall and does hereby have judgment against defendant for the sum of $8,695.44.

2. Plaintiff shall recover from defendant plaintiff's costs incurred herein.

DATED this 29th day of October, 1990.

HOWELL, FETZER & HENDRICKSON

Clark B. Fetzer

Clark B. Fetzer
Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing OBJECTIONS TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND PROPOSED JUDGMENT was mailed, postage prepaid, this 29th day of October 1990, to the following:

D. David Lambert
Attorney for the Defendant/Appellee
P.O. Box 778
120 East 300 North
Provo, Utah 84603

C. J. Archuleta

wcfb4-24

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ADDENDUM E

TRANSCRIPT OF HEARING OF DECEMBER 5, 1990, EXCERPTS

take. Of course, Herm Hughes objects to the form of the ruling and the final order prepared by Mr. Lambert because it feels that there are some issues that have not been addressed and that's what I'd like to address some of my comments to.

As I said, I wasn't at the hearing,but as I read the transcript, at the point of closing argument, it was apparent that the Court, that your Honor, was referring and had studied some portions of the Uniform Commercial Code, which your Honor felt, at least as I read the transcript--and am paraphrasing, as I understand it, that your Honor felt that those provisions of the Uniform Commercial Code governed the transaction, the negotiations, the occurrences that were the subject of this lawsuit. And I wholeheartedly support that determination by your Honor and would simply point out with regards to some proposed findings and conclusions that we've made, and these don't come out in the proposed findings and conclusions by Quintek, by Mr. Lambert, that there are some specific provisions of the Uniform Commercial Code that seem to apply just very helpfully in this case. They offer some guidance that I think is very useful. I happen to think they make a difference in the outcome.

In any event, I believe they're applicable and wanted to pursue that in this hearing. It's very simply put,

Herm Hughes could characterize this case as a contract formation kind of a case that's governed by Section 2-204 and 2-207 of the Utah Uniform Commercial Code.

Exhibit 6 produced at trial which was the Quintek proposal, contained some specifics, the quantity, the--per plans and specifications reference, the price, the F.O.B., I believe it was shipping point, but the F.O.B. terms and other elements of that offer. And Exhibit 11, which was the supplier agreement, which was the method by which Herm Hughes responded to the offer, was the acceptance.

And the conduct of the parties, particularly the submittal of the shop drawings, which was called for by the contract and by the correspondence of the parties, also indicates that the parties believed that there was a contract and they proceeded in that manner. And this seems to me to be almost a law school examination type of question addressed to 2-204 and 2-207.

And 2-207 comes into play because there were some provisions in that supplier agreement that Herm Hughes admits were different from the proposal made by Quintek. But under 2-207, those become part of the agreement unless they're objected to or unless they materially alter, and I'm paraphrasing, and that Code Section defines more clearly than I am by my paraphrasing, what the effect of those additional provisions are, but let's assume that those

additional provisions, such as liquidated damages, indemnification and so on, are not part of the agreement, we still have an overlapping of the critical terms. The nature of the trusses, the plans and specifications, the price, the quantity, the shipping; those are the critical terms to form a contract.

Your Honor was right, as I read the transcript, in saying that you thought that the U.C.C. had modified the mirror image rule of contract formation. The commentary, as I understand it, and the cases that deal with that issue confirm your Honor's understanding that the mirror image rule, for purposes of contracts subject to the Uniform Commercial Code, is no longer governing and that an acceptance that includes additional terms can nevertheless form a contract under the provisions, or subject to the provisions of Article 2, Section 207, 2-207.

Your Honor's ruling seemed to be concerned with the fact that Herm Hughes didn't sign Quintek's bid proposal. It could have done that and could have obviated all this difficulty by simply signing the bid proposal, and there's no question that they did not sign it.

There--I have two responses to that, your Honor. One is that Quintek waived that requirement. More than ten days after that written bid proposal had been submitted, and there was a ten-day--they requested that within ten days

this bid proposal be accepted by signing on the bottom of the bid proposal, the bottom paragraph of Exhibit 6. More than ten days after that was submitted, Boyd Jacobson talked with Todd Walker of Herm Hughes and said, have you got a supplier agreement for me? And then he said a few days after that, he put that in mid-November, and then a few days after that, whatever mid-November was, he said--and with your Honor's permission, I'll quote from the transcript, it's at Page 127, Line 2. "I went up to their office to ask for a contract and pick up a set of plans that was up there." So, he asked for a contract.

Your Honor, he waived any ten-day requirement and he re-opened the offer, if you will, the offer was still open, he was still looking for a contract. And in response to that request for a contract, Herm Hughes submitted this supplier agreement. And the supplier agreement and the bid proposal of Quintek overlap on the critical terms, and I believe we've got a--I believe under the Uniform Commercial Code, we've got a contract.

There's a case that I could refer your Honor to that was similar in situation to that, it's the case of David J. Tuerney, Jr., Inc. vs. T. Wellington Carpets, Inc., which is a Massachusetts Appellate Court case reported at 392 N.E. 2d 1066. I brought copies for your honor and for counsel, I'll share those with you, but that involved--

discount, it made Chytraus' bid the low bid.

MR. LAMBERT: Correct.

THE COURT: Now, does the record reveal that?

MR. FETZER: I believe so, your Honor.

THE COURT: That's the way I remember it.

MR. LAMBERT: Exactly.

THE COURT: And anyway, Mr. Gilson interpreted the approach to him as bid shopping, that's the word he used as I remember.

MR. LAMBERT: Yes, and that's--

THE COURT: Came down and says, do you know those guys are bid shopping with your bid. Now, I don't put any particular stock in the fact that they used the term bid shopping or anything else. Whether it was true or it wasn't true, I think there's an explanation for it. I think there was a question on the bids as to which one was low because of the discount quoted, and they were trying to find out which one would give them the best deal.

Now, the testimony in the record as I remember it with respect to the discount is that Quintek didn't like this retainage situation it had generally utilized and they were willing to offer that ten percent discount if they could get paid and get out of this thing after they'd performed the job.

MR. LAMBERT: Exactly.

THE COURT: And these other people at the time, I got the impression from somewhere--I dream about these things at night after I hear them--they really hadn't made a decision as to whether they wanted to take the ten percent or whether they wanted to go with the other bid. And that's what they were looking around for, which I think anybody in business would do, but the problem that it poses in this particular situation, is that you've got Gilson coming down and telling your people that they're bid shopping with the bid.

Now, the most that can be said about it was that the information was relayed to him.

MR. LAMBERT: That's all it's in there for.

THE COURT: And it got your people squirmish. I don't think there's any question about that. Those are the reactions that were observable and--

MR. FETZER: Well--

THE COURT: --so what we're not--what we're doing here, we're not trying to reach conclusions that the plaintiff was bid shopping, but I think the--the relevant thing about that episode is that Quintek was told that and had some concerns about what was going on. And that's the only thing that it conveyed to the Court.

MR. LAMBERT: And that's why it's there.

THE COURT: And I think it's important that it go

in there, but I don't know how you particularly want to word it, but I don't think it ought to be worded so strong as to accuse them of bid shopping.

MR. LAMBERT: Well, why don't we change that and say that--

THE COURT: But I do think that the testimony, and it should be there in the record, was that Larry Gilson contacted Jacobson and said that the plaintiffs were bid shopping his bid.

MR. FETZER: Your Honor, that's--

THE COURT: Now, what does it say in there? That's my recollection of it. You've got the record.

MR. LAMBERT: He used those terms and I think that you--essentially said that, in your--

MR. FETZER: I think--

THE COURT: I mean, if someone comes to me and I was in your client's position and they said that they're up there using your bid to bid shop, I'd get a little excited about it. Anybody would, if they're normal.

MR. FETZER: But this--

THE COURT: But that--that's the most that can be said about that.

MR. LAMBERT: His objection says Mr. Gilson referred to plaintiff's actions as, quote, "bid shopping", close quote. I'm assuming he got that from listening to

ten days went by, that there was nonetheless a contract formed.

MR. FETZER: Your Honor, may I just--

THE COURT: Well, no. I'm just giving you my impressions, I'm not trying to argue one way or the other.

And as we've listened to the explanations as to why they sent this and why they did that and everything else, there was a definite impression made on the Court that if they could have got together and got this thing firmed up, I can't fix a date on it, they would have still gone ahead with it.

Now, you've talked about waiver and maybe the Appellate Court will look at this thing and say, well, by doing this and doing that, they waived the right to declare the contract--that there was no binding contract. I don't know; but the thing that impressed me at the trial is that everything that Herm Hughes came up with, these other people seemed to have a reasonable and a logical explanation for it apart from the fact that they were intending to go forward with the contract. They were accommodating, and that may be their downfall.

And then it got down to the nitty-gritty and the sticky part of it towards the end of the year, and I guess, when was it, it was clear into February, was it, before they finally said we've had enough and we're not going to do it.

my court and I've got to do something with it, and if I don't do anything with it, the Court may end up saying you've got a contract.

MR. FETZER: I may--

MR. LAMBERT: Well, it--

MR. FETZER: I may have misspoken myself there in that my reading of the Code, and this is where I would really appreciate being set right, if I'm wrong.

THE COURT: Well, I don't know.

MR. LAMBERT: Let me see if I can set you right. I've got a copy of the Code right here.

THE COURT: You people know more than I do.

MR. FETZER: I think the Code says that if you've got a counter-proposal that under--under non-U.C.C. contract law would normally kill the offer, but that proposal essentially meets the terms of the--excuse me, that counter-offer essentially meets the terms of the proposal, you've got a contract on--

MR. LAMBERT: Well--

MR. FETZER: --on those points where it meets, and you don't have it on the other ones if they're material, but as between merchants, you do if there--the additional terms are to be construed as proposals for addition to the contract--this is on the counter-proposal. Between merchants, such terms become part of the contract unless,

and then it lists some--unless the offer expressly limits acceptance to the terms of the offer or they materially alter it, or notification or objection to them as already been given, or is given within a reasonable time after notice of that is received.

And I think Boyd Jacobson gave those timely, that no, we're not going to agree to A, B, C, and D, but I don't think A, B, C, and D included the essential terms of the agreement.

MR. LAMBERT: Well--

MR. FETZER: That's--that's my view of the case and if I'm up in the night, I want to know it.

THE COURT: Well, my problem is, I have some difficulty with maybe even the Code in a circumstance such as that. I don't think that a bidder ought to be put in the position of having in every case to establish a contract with the person to whom he submitted that bid if that person hasn't done something to confirm it, and I don't think these Herm Hughes people did. They were--

MR. FETZER: Now--

THE COURT: They were too busy--

MR. FETZER: I'm going to, at the risk of--

THE COURT: --to pay attention to that thing. That's an impression I got.

MR. FETZER: What about the--

THE COURT: It's not going to go in the findings, that's just between us girls.

MR. FETZER: What about that supplier agreement, your Honor? Is--didn't that--

THE COURT: That was a Johnny-come-lately thing that gives me some problems, but I don't think that it's the type of thing that is going to make a contract in this case. You may convince the Appellate Court to the contrary, but I gave you my impressions, and after I sat through this thing, I couldn't, in good conscience, find sufficient evidence, as far as I was concerned, to find in favor of your party.

MR. LAMBERT: And I am supposed to be back at my office at 4:00 o'clock. I thought that two hours would be plenty.

THE COURT: We're going to let you go.

Should have been.

MR. LAMBERT: I have some thoughts on the subject that I'd like to talk to you about--

MR. FETZER: I'd welcome that, thank you.

MR. LAMBERT: --that, because I, obviously, would like to try to convince you that there's some questions in my mind about your application of this statute to the facts of this case. And I think, you know, the Judge has given you his feelings on that, and I think I can--

the Court is unable to ascertain from the evidence the date or time when an agreement came into existence, but I don't know as that's necessary. I just--I'm finding that there was no agreement--

MR. LAMBERT: Right. I'll just--

THE COURT: --that ever came into existence.

MR. LAMBERT: That's fine. I'll just--

THE COURT: So, why do we need to--

MR. LAMBERT: --delete that.

THE COURT: Why do we need something that says that we can't ascertain it. I--

MR. LAMBERT: I'll delete it.

MR. FETZER: Delete all of 14?

THE COURT: I don't know, I just--

MR. FETZER: I had an objections to the conclusions of law, number one, that we won't resolve here today and number two, your Honor, I guess I have to defer to you on that. I sense that you have a question whether that was a bid shopping.

THE COURT: Well, I didn't make a finding that there was any bid shopping. All I concluded from it is that Mr. Lambert's clients had reason to be suspicious of what was going on, then when they didn't get any kind of an acceptance in a timely period of time, they had further reason to wonder what was going on. I don't find any

communication from your clients to his clients that, in so many words, says, you guys have got the contract, let's get ready to--the trusses going. A lot of little things and some of the people on the job kept--they'd used the figure and kept thinking these people had it, but I think what's missing here is--is something that comes out and says you guys have got the contract.

MR. FETZER: Okay.

MR. LAMBERT: I'm going to--I'll revise that.

THE COURT: So, I don't know about this meeting of the minds business. There just wasn't a contract here.

MR. LAMBERT: Okay.

THE COURT: And the evidence, as far as I was concerned, wasn't sufficient to convince me to the contrary, and that basically says it all. They had the burden of proving, and if I'm misconstrued the law and ignored basic facts, then there's lot of remedies that can be applied to that.

I don't know about the Number Three, your conclusion there, any agreement was required to be in writing pursuant to that section of the Code.

MR. FETZER: Is that Number Three in the--

THE COURT: That's dealing with the Uniform Commercial Code. Yeah, I didn't look at it to make that conclusion.

MR. LAMBERT: Okay.

THE COURT: But it may be, may be true.

MR. LAMBERT: That was not a--as far as you were concerned, that wasn't a particular point, the statute of frauds?

THE COURT: No, I--I think basically what I'm saying is I just didn't find that the evidence was sufficient to convince me that there was a contract between the parties and Quintek was bound.

MR. LAMBERT: Okay. I think I'm getting a pretty good idea of what I need to do here.

THE COURT: There was no acceptance endorsed on the--and I found no document showing acceptance and there's a couple of errors here in that ruling, it's typed in--written, there was no document showing acceptance within that period of time, that's referring to the ten days. And then I do comment that plaintiff could have--not could be, but could have easily met the conditions requested. That was--that's a conclusion that probably isn't necessary.

It showed my--it shows my frustration.

MR. LAMBERT: That came through, your Honor, and with justification.

THE COURT: And what happened is they brought in their--who was it, the foreman on the job and all the rest of them, and kept testifying. The impression I got that

ADDENDUM F

FINDINGS OF FACT AND CONCLUSION OF LAW

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Our File No. 15,669

Attorneys for Defendant

IN THE FOURTH CIRCUIT COURT OF UTAH COUNTY

STATE OF UTAH, OREM DEPARTMENT

HERM HUGHES & SONS, INC., a Utah corporation,	:	
Plaintiff,	:	**FINDINGS OF FACT AND CONCLUSIONS OF LAW**
vs.	:	
QUINTEK, a Utah corporation,	:	Civil No. 883000004
Defendant.	:	

The above-captioned matter came on for its regularly scheduled trial on the 13th day of August, 1990, before the Hon. Robert J. Sumsion, Circuit Judge. Plaintiff's president, Glen Hughes, was present and plaintiff was represented by its counsel, E. Nordell Weeks. Defendant's president, Boyd Jacobson, was present and defendant was represented by its attorney, D. David Lambert. The Court received the evidence of the parties and has considered the arguments of counsel, together with the legal authorities presented, and now makes the following:

FINDINGS OF FACT

1. The plaintiff corporation is a general contractor doing business within the State of Utah.

2. The defendant is a Utah corporation in the business of manufacturing roof trusses and other building components which are supplied as finished products without doing work on the job site.

3. In late October, 1983, the defendant became aware of the possibility of bidding on the Midland Elementary School to be constructed in Roy, Utah. This information came through the Intermountain Contractor bidding service, and an agent of the defendant corporation reviewed the materials available through the service. Defendant prepared an estimate of its cost to provide roof trusses for the school in question.

4. On October 25, 1983, defendant communicated to plaintiff by telephone a bid proposal which had been reduced to writing and which was mailed to plaintiff the same day that the verbal communication took place.

5. Plaintiff received the defendant's written bid proposal on October 27, 1983, as indicated by its date stamp placed thereon. Said document was received by the Court as Exhibit 6.

6. Defendant's written bid proposal, (Exhibit 6) specified that the offer was to be accepted within ten days and provided a space at the bottom of the written document for plaintiff to sign in acceptance.

7. Plaintiff never signed the bid proposal of the defendant and did not communicate with defendant until late November, 1983.

8. Larry Gilson, of Oscar E. Chytraus Co., prepared and submitted to plaintiff a bid for the trusses which are the subject of the plaintiff's claims. After the bid openings he was asked by plaintiff to meet and Mr. Gilson attended a meeting at the plaintiff's office. During that meeting Mr. Gilson was asked by plaintiff to reduce his bid proposal. After the meeting, Larry Gilson contacted defendant's president, Boyd Jacobson, and advised Mr. Jacobson that in his opinion plaintiff was bid shopping the Quintek bid.

9. The only written response of the plaintiff which directly addressed the terms of the bid proposal was made under cover letter dated November 21, 1983, and was in the form of a Supplier Agreement. The cover letter and Supplier Agreement were received by the Court as Exhibit 11. Exhibit 20, containing the notes of Don Brown, an employee of the defendant, gives reason to believe that Exhibit 11 was received by the defendant on or about November 30, 1983.

10. Defendant refused to sign the Supplier Agreement (Exhibit 11) and shortly after receiving the supplier agreement, defendant's president, Boyd Jacobson, had discussions with Todd Walker, an employee of the plaintiff, stating his refusal to sign the Supplier Agreement.

11. The Supplier Agreement (Exhibit 11) contains various terms which are different than the defendant's bid proposal (Exhibit 6), including the following terms:

a. Specific terms concerning indemnification;

b. Specific terms about assuming direct obligations to the owner;

c. Language allowing the contractor to retain 10% of the purchase price until completion of the project; and

d. Provisions concerning liquidated damages.

12. Certain shop drawings were done preliminary to defendant's submission of the bid proposal to the plaintiff. It is unclear if those same drawings were later submitted to plaintiff, but a drawing (Exhibit 13) was sent and discussions occurred relative to possible performance by defendant in fabricating the trusses in question.

13. Defendant never began fabrication of the trusses and never produced any of the trusses for the school in question.

The Court having made the above Findings of Fact, now makes and enters the following:

CONCLUSIONS OF LAW

1. Plaintiff failed to carry its burden to establish that there was an agreement between the parties.

2. Plaintiff's Supplier Agreement was belated and untimely and did not create a contract.

3. Plaintiff's conduct concerning the Oscar Chytraus bid was communicated to the defendant and made the defendant justifiably suspicious about the plaintiff's intentions. This fact, coupled with the failure of the plaintiff to act in a timely manner to confirm an agreement convinced the court that an agreement between the parties was never concluded.

4. Defendant acted promptly and reasonably to notify the plaintiff that it rejected the terms proposed in the supplier agreement.

5. No partial performance occurred in that no aspect of the final product to be supplied was ever fabricated, no step of fabrication, except a preliminary drawing, was ever commenced, plaintiff never accepted or received any goods and plaintiff paid no monies to defendant.

6. The supplier agreement sent to defendant by the plaintiff, in addition to being untimely, was materially different than defendant's original proposal.

7. Defendant's efforts to pursue an agreement with the plaintiff after its offer expired does not constitute a waiver or otherwise convince the court that an agreement was ever reached.

8. Plaintiff alleged only a cause of action for breach of contract and no estoppel or reliance claims were pleaded or proven.

9. Plaintiff's claims should be dismissed with prejudice with costs to defendant.

DATED this 3RD day of ~~December~~ JANUARY, 1991.

BY THE COURT:

ROBERT J. SUMSION
CIRCUIT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 10 day of December, 1990.

Clark B.Fetzer, Esq.
Howell, Fetzer & Hendrickson
175 South Main Street
700 Walker Center
Salt Lake City, UT 84111

SECRETARY