Counteroffer with Care

Too much negotiating can cost you the contract.

BY STEVEN NUDELMAN

Now and then, courts decide unexciting, predictable cases that illustrate fundamental concepts of black-letter, "hornbook" law. These cases are not novel, earthshattering or groundbreaking. Rather, they demonstrate basic legal principles that a law student learns (or at least was taught) during the first year of law school. Lawyers often need reminding about these principles, and in cases involving commercial contract law, businesspeople should know about them as well.

This month we learn about contract formation and the dangers of over-negotiating a contract with the pitfalls of counteroffers. All this fun stuff is rolled up into the case of Skyrise Construction Group, LLC v. Annex Construction, LLC, No. 18-CV-381, 2019 WL 699964 (E.D. Wis. Feb. 20, 2019), appeal docketed, No. 19-1461 (7th Cir. March 15, 2019).

Background

Plaintiff Skyrise Construction Group ("Skyrise") is a subcontractor providing construction services for the commercial building industry. Defendant Annex Construction ("Annex") is a general contractor that develops student housing near universities. In the summer of 2017, Annex sought bids for a 140-unit student housing project. Skyrise prepared an estimate for rough framing and window installation and on July 7, 2017, submitted a bid to Annex for $970,000.

On July 19, Skyrise modified its bid to $950,000. Neither the bid nor the modified bid was signed by Skyrise or Annex. After Annex received the modified Skyrise bid, Annex emailed Skyrise a letter of intent.

The letter said it was "the intention of Annex Construction, LLC, to enter into a contract with Skyrise Construction Group, LLC, for rough carpentry work associated with the Annex 71 project …. [We] look forward to working with you on the project. We will work on getting you contract documents in the near future." Skyrise, 2019 WL 699964, at *1.

After it received the emailed letter of intent, Skyrise added the project to its fall work schedule. On Aug. 2, Annex emailed a proposed contract to Skyrise. On Sept. 6, Annex again emailed Skyrise the proposed contract. The next day Skyrise sent Annex an email saying that

Skyrise was still reviewing the contract and should have it back to Annex in a day. Six days later, Skyrise followed up by email, asking Annex to sign the revised Skyrise bid proposal and return it to Skyrise.

On Sept. 22, Annex signed Skyrise's modified bid proposal and emailed a copy back to Skyrise. Notably, Annex wrote "Contract Exhibit A" on top of the signed proposal. Skyrise, 2019 WL 699964, at *2.

On Oct. 11, Annex's authorized representative received an internal email from a colleague at Annex including a revised, proposed contract with handwritten edits by Skyrise's authorized representative. This document was signed by Skyrise's authorized representative; it was not signed by Annex.

Negotiations continue?

Throughout October 2017, Skyrise and Annex continued to negotiate an expanded scope of work for the project. Skyrise gave Annex a proposal for an expanded scope of work on Oct. 3. Skyrise provided Annex with a second proposal for an expanded scope of work on Oct. 31.

On Nov. 2, Annex emailed Skyrise, stating: "We are going to go ahead and pass on this, guys. I appreciate the hard work; however, I am going to bring in a large framing company we have a very good relationship with and can meet our timeframe and schedule at a much lower cost. I will have our council [sic] get you a letter on the original contract that you signed in the near future." Skyrise, 2019 WL 699964, at *2.

The next day, Annex's counsel sent Skyrise a letter stating: "This letter shall serve as written notice to Subcontractor that Contractor does not accept your revised proposal dated October 31, 2017. In addition, Contractor will not be accepting and countersigning the Agreement as marked-up by Subcontractor and is therefore null and void." Skyrise, 2019 WL 699964, at *2.

The fallout

Skyrise subsequently sued Annex in federal district court in Wisconsin for damages, alleging breach of contract, promissory estoppel, negligent misrepresentation and violations of the Wisconsin and Illinois Deceptive Trade Practices Acts. Both parties moved for summary judgment. Skyrise argued that the parties had a contract and Annex breached it. Also, Skyrise argued it was entitled to relief on its other claims.

Annex, on the other hand, argued it did not have a contract with Skyrise; at most, it had protracted negotiations. Annex also argued that Skyrise's other claims (which are not addressed in this article) were legally deficient.

After the dust settled, the court found in favor of Annex and dismissed the Complaint. It is instructive for prospective parties to commercial construction contracts to understand precisely how the court arrived at its decision.

The court began its analysis to "determine whether a valid contract exists, whether a party has violated its terms, and whether any such violation is material such that it has resulted in damages." Skyrise, 2019 WL 699964, at *3. In this case, Skyrise and Annex disputed whether a contract exists.

Elements of a contract

To have an enforceable contract, there must be an offer, an acceptance of the offer, consideration, mutual expressions of assent and an intent to be bound. Skyrise, 2019 WL 699964, at *3; see also Kowalchuk v. Stroup, 61 A.D.3d 118, 121, 873 N.Y.S.2d 43, 46 (1st Dep't 2009). "An offer and acceptance occur if a definitive offer is made and if there is an 'unequivocal' acceptance of that offer." In re Westinghouse Elec. Co. LLC, 588 B.R. 347, 354 (Bankr. S.D.N.Y. 2018) (citation omitted).

"An acceptance that varies the terms of the offer constitutes a rejection and a counteroffer," which extinguishes the original offer. Skyrise, 2019 WL 699964, at *3; see also Thor Props., LLC v. Willspring Holdings LLC, 118 A.D.3d 505, 507, 988 N.Y.S.2d 47, 49 (1st Dep't 2014). "There is no contract formed until the counteroffer is accepted." Skyrise, 2019 WL 699964, at *3.

Stated differently, if a response to an offer is conditioned on additional or different terms, then it is not an acceptance of an offer. See Robinson v. Sweeney, 301 A.D.2d 815, 818, 753 N.Y.S.2d 583, 586 (3d Dep't 2003).

Furthermore, agreements to agree are not enforceable contracts. Skyrise, 2019 WL 699964, at *3. The parties' intent governs whether they have a binding agreement. Wisconsin, like New York, takes an objective view of intent, looking at the parties' words and actions. As the New York Court of Appeals explained:

"[I]t is necessary to look ... to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds. In doing so, disproportionate emphasis is not to be put on any single act, phrase or other expression, but, instead, on the totality of all of these, given the attendant circumstances, the situation of the parties, and the objectives they were striving to attain."

Brown Bros. Elec. Contractors v. Beam Constr. Corp., 41 N.Y.2d 397, 399-400, 393 N.Y.S.2d 350, 352 (1977) (citations omitted). Also, Wisconsin does not require the parties' signature on a document to create a valid contract. Skyrise, 2019 WL 699964, at *3. Again, intent is paramount and courts will examine the evidence to see if there is an intent by the parties to be bound.

Applying the facts in Skyrise to the above principles of law, the court found that the parties did not enter into an enforceable agreement. Skyrise's July 7, 2017, bid constituted an initial offer. Annex did not accept the offer; instead, Annex's responsive e-mail with a letter of intent constituted a rejection and counteroffer. Throughout August and September, the parties continued negotiating.

They disagreed on the significance of the Sept. 22 exchange. Skyrise argued that Annex entered into a contract when it signed the modified bid proposal; Annex claimed that a binding contract was never formed. The court agreed with Annex, finding that while the parties may have agreed on the contents of "Exhibit A" to their contract (based on Annex's annotation), they were still negotiating the remainder of the terms. The parties ultimately never reached a deal and Annex broke off negotiations on Nov. 2.

Remember that contract formation requires more than an offer, acceptance and consideration (e.g., bargained-for exchange). It also requires a mutual assent to be bound; a so-called "meeting of the minds" on the material terms. Courts look at objective manifestations of mutual assent — typically words and actions —to determine whether the parties have an agreement.

Notably, when parties vary the terms of an agreement through back and forth negotiations, they need to remember that each proposed contract modification is a rejection of the current offer and a counteroffer. Only when the counteroffer is accepted is there a contract between the parties. Absent that acceptance, the only thing left on the table is a rejection. ●

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