

1990

Herm Hughes & Sons, INC v. Quintek : Brief of Appellee

Utah Court of Appeals

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

D. David Lambert; Danielle M. Ferron; Howard, Lewis & Petersen; Attorneys for Appellee.

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UTAH COUNTY
BRIEF

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50 IN THE UTAH COURT OF APPEALS

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900529-CA

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

BRIEF OF APPELLEE

ON APPEAL FROM THE FOURTH CIRCUIT COURT,
UTAH COUNTY, OREM DEPARTMENT
HONORABLE ROBERT J. SUMSION
Circuit Judge

D. David Lambert and
Danielle M. Ferron, for:
HOWARD, LEWIS & PETERSEN
120 East 300 North
Provo, Utah 84601

ATTORNEYS FOR Appellee

Clark B. Fetzer
HOWELL, FETZER & HENDRICKSON
700 Walker Center
175 South Main Street
Salt Lake City, UT 84111

ATTORNEYS FOR Appellant

FILED

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COURT OF APPEALS

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700 Walker Center
175 South Main Street
Salt Lake City, UT 84111

ATTORNEYS FOR Appellant

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JURISDICTION

The judgment appealed was a final judgment of the Fourth Circuit Court for Utah County, Orem Department, dated January 3, 1991. This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(d) (Supp. 1990).

ISSUES PRESENTED AND STANDARD OF REVIEW

1. Did the appellant waive the right to raise the issues concerning formation of a contract under the provisions of Utah Code Ann. § 70A-2-207 (1990), by conceding in the lower court that it was not suing on a written agreement and by limiting its argument in the lower court to issues relating to partial performance? This issue was not raised in the lower court and no standard of review is applicable. Mascaro v. Davis, 741 P.2d 938, 945 (Utah 1987); Franklin Financial v. New Empire Develop. Co., 659 P.2d 1040, 1045 (Utah 1983).

2. Has the appellant failed to marshal the evidence and demonstrate that there is insufficient evidence to sustain the lower court's finding that appellee did not waive the ten-day time

limit for acceptance of its "Cost Estimate?" The standard of review is whether there is competent evidence to sustain the lower court's findings. Rees v. Intermountain Health Care, Inc., 808 P.2d 1069 (Utah 1991).

3. Does the Uniform Commercial Code in any way restrict the right of a contracting party to specifically limit the time within which acceptance of an offer must occur? This issue is subject to review for correctness. Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co., 744 P.2d 1376 (Utah 1987).

4. Does Utah Code Ann. § 70A-2-207 (1990) apply where a contract has not been admitted? This issue is subject to review for correctness. Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co., 744 P.2d 1376 (Utah 1987).

5. Where the lower court made no findings concerning breach of a contract or damages because no contract was found to exist, should the case be referred back to the trial court in the event the appellate court finds that a contract was formed? Fossell v. Department of Commerce, 165 Utah Adv. Rep. 23, 26 (Ct. App. 1991).

6. Is the appellee entitled to an award of costs and fees pursuant to Rule 33(a) of the Utah Rules of Appellate Procedure? Porco v. Porco, 752 P.2d 365 (Utah Ct. App. 1988); Maughn v. Maughn, 770 P.2d 156 (Utah Ct. App. 1989).

DETERMINATIVE STATUTES AND RULES

The determinative statutes in this case are as follows:

Utah Code Ann. § 70A-2-201 (1990).

Utah Code Ann. § 70A-2-204 (1990).

Utah Code Ann. § 70A-2-205 (1990).

Utah Code Ann. § 70A-2-206 (1990).

Utah Code Ann. § 70A-2-207 (1990).

Copies are attached in Appendix "G" to this brief.

STATEMENT OF CASE

A. Nature of the Case.

This is a civil case involving a dispute over formation of a contract to supply building components to an elementary school. This case touches a sore spot with suppliers and subcontractors: general contractors who shop bids and who do not give timely notice of bid acceptance so costs can be fixed.

B. Course of Proceedings and Disposition Below.

On or about June 5, 1984, the plaintiff filed a complaint in the Second District Court for Weber County alleging a single cause of action for breach of contract against the defendant. Plaintiff claimed that there was a contract for the defendant to supply roof trusses to an elementary school in Weber County at a specified price and terms. (R. 17-19.) The defendant filed a motion for a change of venue to Utah County. (R. 4-12.) The plaintiff stipulated to the change of venue. (R. 1-2). The defendant thereafter filed an answer denying the existence of a contract and alleging, among other defenses, that the plaintiff's claims were barred by the statute of frauds, that plaintiff was estopped from asserting a contract and that plaintiff had failed to mitigate its damages. (R. 22-25)

Substantial initial discovery occurred at the outset of the case. (R. 27, 30 and 31.) The case thereafter languished and Quintek filed two separate motions to dismiss for failure to prosecute, on October 3, 1986 (R. 41) and again on March 14, 1990. (R. 69.) Both of these motions were denied and the case went to trial on August 13, 1990.

The court below issued its ruling dated September 10, 1990, in favor of the defendant Quintek. (R. 151-152, Appendix "D.") Defendant had, prior to the lower court's ruling, submitted its proposed findings of fact and conclusions of law. (R. 158-162.) On October 10, 1990, the appellant, Herm Hughes, through its new counsel, filed a notice of appeal, even though no judgment had yet been entered. (R. 167.) On October 31, 1990, Herm Hughes filed its objections to the findings of fact and conclusions of law proposed by Quintek. (R. 188-203.) On December 5, 1990, the lower court received oral arguments from counsel on the findings of fact and conclusions of law and on January 3, 1990, the lower entered its Findings of Fact and Conclusions of Law (R. 228-232, Appendix "E") and its Judgment (R. 221-222, Appendix "F"). Herm Hughes has since pursued its appeal pursuant to the previously filed notice.

STATEMENT OF THE FACTS

Herm Hughes & Sons, Inc. (Herm Hughes) is a general contractor. (R. 231.) Quintek is a manufacturer of wooden roof trusses. Quintek does not install the trusses or do work on the job site; it just sells trusses and delivers them to the project. (R. 231.)

In October, 1983, Herm Hughes bid on the Midland Elementary School in Roy, Utah, for the Weber County School District. (R. 231.) A bid service operated by the Intermountain Contractor (a trade publication) advertised the project, and Herm Hughes received bids from several truss suppliers to furnish the roof trusses. (R. 231.) One of the bids was from Quintek. (R. 231.)

Quintek's bid proposal for the Midland Elementary School was verbally communicated to Herm Hughes on October 25, 1983, by telephone. Quintek then followed up the telephone call with a written bid proposal titled as "Cost Estimate." (R. 231, Exh. 6, Exh. 27.) The "Cost Estimate" (Appendix "A" hereto) specifically required acceptance thereof within ten days. Quintek's offer was not accepted within the ten-day period and was never signed and returned to Quintek. (R. 231, T. 87-88). Quintek expected notice of acceptance of their bid on the day the bids were opened or shortly thereafter. (T. 134-135)

While Quintek did not receive any notice or communication from Herm Hughes following the bid opening, Quintek did hear from Mr. Larry Gilson, an engineer for one of their competitors, Oscar E. Chytraus Company. Mr. Gilson related that a week or two after the bid opening on the project in question, Herm Hughes invited him to come to its office to talk about the Chytraus bid. (T. 117-123.) The Chytraus Company's bid was the low bid on the dollar amount, but it included a discount of only five percent. (T. 122.) Mr. Gilson interpreted Herm Hughes' inquiries as bid shopping and told

Quintek about it. (R. 230.) Mr. Gilson declined to alter the Chytraus bid.

On or about November 30, 1983, Quintek received from Herm Hughes a "Supplier Agreement." (Exhibit "11" and Appendix "B" hereto.) The "Supplier Agreement" was sent to Quintek on November 29, 1983. (R. 231, T. 87-88, Exh. 9, Exh. 20.) Herm Hughes made it clear to Mr. Boyd Jacobson, president of Quintek, that Quintek had to agree to the terms of the Supplier Agreement if it was going to get the job. (T. 128).

A more detailed agreement was expected to follow acceptance of Quintek's offer ("Cost Estimate") Quintek expected both a timely acceptance of the bid proposal and a "purchase order." (T. 141.) After receiving the Supplier Agreement, Mr. Jacobson, president of Quintek, rejected the same on the basis that he could not agree with the additional terms contained therein. (T. 129-131.) In particular, Mr. Jacobson objected to the part of Section 1 that obligated Quintek to Herm Hughes for the obligations Herm Hughes owed to the owner. (T. 145-146.) He objected to the part of Section 3 that allowed Herm Hughes to keep a ten percent retainage and to other payment terms. (T. 147.) He also objected to the liquidated damages provision of Section 4. (T. 129.) Mr. Jacobson voiced these objections to the "Supplier Agreement" to Todd Walker and told Mr. Walker he wouldn't sign the supplier agreement. (T. 130-131.) The "Supplier Agreement" was never signed by Quintek. (T. 38, 57, 130-131.) Quintek acted promptly and reasonably in rejecting the supplier agreement. (R. 229)

Quintek made no lumber purchases for the job in question. (T. 132.) Quintek never began fabrication of any trusses for the job in question. (T. 132-133.) Quintek never sent a bill to Herm Hughes and was never paid any money by Herm Hughes. (T. 133)

Lumber is a commodity and the price of lumber is variable. (T. 133.) The cost of lumber constituted 50% - 60% of the total bid price for the trusses. (T. 133-134)

During the period December 1, 1983 to approximately February 8-9, 1984, the parties continued discussions about a possible contract and continued to negotiate over the terms under which Quintek would be willing to supply the trusses. This winter period was a slow time for Quintek and it wanted to conclude an agreement for the job in question. (T. 135.) During this period Quintek submitted a single shop drawing to Herm Hughes on or about December 15, 1983. (Exh. 13.) The purpose in doing so was specifically stated by Mr. Boyd in his testimony:

Q (By Mr. Lambert) Mr. Jacobsen [sic], let me ask you, given the background that you've just told us concerning this contract, what was the purpose of preparing shop drawings during the period of negotiation?

A Todd [Herm Hughes' project supervisor] had asked me if we would begin preparing drawings because I had -- I had told Todd that in order for us to perform on the contract in a time [sic] manner that they were asking for, that the shop drawings would have to be processed during the time of negotiations.

Later in February, Quintek prepared its own version of a supplier agreement. (Exh. 19, Appendix "C.") This proposal was submitted to Herm Hughes on or about February 22, 1984, and

contained a statement of reasons why the proposal presented thereby stated an increased cost term. (T. 73, Exh. 19.) This proposal was rejected by Herm Hughes. (T. 75.) This proposal, with the discount, was lower than the bid ultimately accepted by Herm Hughes to supply the truss in question. (Exh. 24)

Herm Hughes commenced an action against Quintek for breach of contract on June 5, 1984. (R. 17-19.) At the trial, which commenced on August 13, 1990, counsel for the plaintiff conceded that it was not suing on a written agreement, but argued that the issue to be decided was whether there was part performance which would remove the case from the ambit of the statute of frauds. (T. 106-112)

SUMMARY OF THE ARGUMENTS

Point I. Plaintiff failed to raise the issues presented by Utah Code Ann. § 70A-2-207 (1990) at trial and is therefore now precluded from raising these issues for the first time on appeal.

Point II. The court correctly found that there was no agreement formed between the parties and therefore no contract. The trial court did not articulate the specific standard of law it applied in entering its judgment; however, it is not apparent nor can it be shown that the court applied the "mirror image rule" from the common law of contracts to the issues of offer and acceptance. The trial court's decision is sustainable under the Uniform Commercial Code. The trial court found that there was no agreement between the parties under the Uniform Commercial Code. The trial court found that the alleged contract did not meet the prere-

quisites of the Uniform Commercial Code's statute of frauds and was therefore not enforceable. This court should affirm the decision of the lower court where the findings of the court are not clearly erroneous and the conclusions are sustainable under a legal ground apparent on the record even when such law is not specifically articulated by the trial court as the basis for its decision. Because the trial court's decision is sustainable under the Uniform Commercial Code, the trial court's decision should be affirmed.

Point III. The trial court correctly found, as a matter of law, that the supplier agreement was untimely because it came after the 10-day acceptance period set forth in Quintek's bid proposal. The court's decision is sustainable under the Uniform Commercial Code which states that acceptance will be cut off by the deadline stated in the offer. Plaintiff has not shown that the evidence was insufficient to support trial court's finding of fact that Quintek did not waive the 10-day acceptance requirement of his offer. The court was correct in finding that there was not a waiver of the deadline.

Point IV. The trial court correctly found that the conduct of the parties did not form an agreement or contract. The findings of fact adequately support a determination that the conduct did not rise to such a level.

Point V. Inequities would result if an offeror was to be held to prices quoted under an expired offer where quotes were based upon underlying quotes for material costs that had also expired.

Point VI. Appellee should be awarded fees and costs because the appeal is without merit and was taken without a reasonable likelihood of success.

ARGUMENT

POINT I

HERM HUGHES FAILED TO ARGUE THE PROVISIONS OF
UTAH CODE ANN. § 70A-2-207 IN THE LOWER COURT
AND FAILED TO ARGUE WAIVER AND CANNOT NOW
RAISE THESE ARGUMENTS ON APPEAL.

At trial Quintek raised as a defense that Herm Hughes's claims were barred by the statute of frauds contained in the Uniform Commercial Code enacted as Utah Code Ann. (R. 8, 9, 12.) Herm Hughes did not argue any aspects of the Uniform Commercial Code and, during arguments about the admissibility of certain exhibits, the attorney for Herm Hughes stated:

MR. WEEKS: I think Mr. Lambert has -- has tried to focus on the fact the we've got to have a written agreement here or we can't have an agreement. There is nothing in the statute of frauds that says you can't have an oral agreement and show us in part performance, the very exception to the statute of frauds, to get it out of the statute of frauds. We didn't just sue on a written contract, we sued for contract. And -- and it would be very nice to be able to say, let's pin down the exact moment which a contract occurred.

T. 107.

* * * *

I think it's an exception to the statute of frauds, I don't think there's any question about it, I think we have, in the course --

THE COURT: On the basis of part performance, is that what you're claiming --

MR. WEEKS: That's correct.

THE COURT: That's the exception?

MR. WEEKS: . . . And even absent the written contract, we haven't sued on a written contract, we've sued for contract, and we believe that all of these exhibits show that that contract existed.

I can't pin down the day the contract existed. . .

T. 108-109. (Emphasis added.)

Based on these comments and the absence of any reference at trial by Herm Hughes to the Uniform Commercial Code, the court, during closing argument by counsel for Herm Hughes, made the following comments inviting Herm Hughes's counsel to address the Commercial Code issues:

THE COURT: . . . 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.

T. 177.

Despite this general reference to the UCC and the invitation to address the issues, Herm Hughes' counsel continued to argue the part performance exception and never addressed the issues relating to § 70A-2-207 or waiver.

It is well established that failure to raise an issue at trial precludes raising the issue on appeal. As the Supreme Court of Utah stated in Mascaro v. Davis, 741 P.2d 938 (Utah 1987), "We have held that matters not raised at the trial court level will not be considered by this Court on appeal, particularly when the problem

could have been resolved below." Id. at 945. See also Franklin Financial v. New Empire Develop. Co., 659 P.2d 1040, 1045 (Utah 1983).

As more particularly set forth in Point II herein, Quintek believes that the trial court did consider all the pertinent sections of the Commercial Code and that it correctly found under the facts presented that no contract was ever formed and that no waiver of the time requirements for acceptance accrued; however, the court need not even consider these issues in light of the failure on the part of Herm Hughes to even raise the issues at trial.

POINT II

THE TRIAL COURT CORRECTLY CONCLUDED THAT THERE WAS NO AGREEMENT FORMED BETWEEN THE PARTIES. THE TRIAL COURT'S DECISION SHOULD BE AFFIRMED BECAUSE IT IS SUSTAINABLE UNDER THE APPLICABLE PROVISIONS OF THE UNIFORM COMMERCIAL CODE.

A. The courts' findings should be affirmed where they are sustainable under any proper legal ground apparent from the record.

The court in Edwards v. Iron County, 531 P.2d 476, 477 (Utah 1975) (citing Goodsell v. Department of Business Regulation, 523 P.2d 1230 (Utah 1974)), held in footnote number 3 that the judgment under review should be affirmed if it is sustainable upon any proper legal ground apparent from the record. In Goodsell the trial court had directed the Department of Business Regulation to issue a certificate to a journeyman plumber holding that the statute applied in denying the license was unconstitutional. Although the Supreme Court of Utah found that the trial court had

erred in holding the statute unconstitutional, they affirmed the decision of the trial court on the grounds that the action of the defendant was arbitrary, capricious and without foundation in fact or law. In Goodsell the court held in citing 5 C.J.S. Appeal and Error § 1461(1):

The appellate court will affirm the judgment, order, or decree appealed from if it is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the trial court to be the basis of its ruling or action, and this is true even though such ground or theory is not urged or argued on appeal by appellee, was not raised in the lower court, and was not considered or passed on by the lower court.

Id. at 1232. See also Branch v. Western Petroleum, Inc., 657 P.2d 267, 276 (Utah 1982).

In the present case, it is clear that the ruling of the lower court is sustainable under the Uniform Commercial Code legal theory that there is not a contract where there was no "agreement." The facts would support the court's ruling that there was no agreement. Therefore, this court should affirm the lower court's holding where it is sustainable upon a proper legal ground apparent from the record.

It is the burden of the appellant, Herm Hughes, to marshal the evidence which supports the court's findings and to demonstrate why that evidence is insufficient to support the findings of fact made by the court. As stated in General Glass Corp. v. Mast Construction Co., 766 P.2d 429, 433 (Utah Ct. App. 1988) (citations omitted):

As we have said on numerous occasions, in order to challenge a finding of fact, it is an

appellant's burden to marshal all the evidence that supports the court's finding and then demonstrate, why, even viewing it in the light most favorable to the court below, it is insufficient to support the finding made . . . Only then can we consider whether these findings are "clearly erroneous" under Rule 52(a) of the Utah Rules of Civil Procedure.

In the present case, the appellant has utterly failed to even attempt to meet this requirement. The appellant has erroneously characterized this appeal as simply being one where the conclusions of law are to be reviewed for correctness. Appellant's whole argument hinges upon a position, not asserted at the trial level, that appellee Quintek waived the ten-day acceptance requirement stated in its "Cost Estimate". Conduct rising to the level of waiver is inherently a fact question, not a question of law. Rees v. Intermountain Health Care, Inc., 808 P.2d 1069 (Utah 1991) Such a question is not to be reviewed for correctness, but is to be reviewed under the standard as set forth in the above-cited General Glass Corp. decision. Herm Hughes' appeal, therefore, must fail for having failed to meet this basic requirement concerning the findings of the court below. The mere fact that on the same evidence an appellate court might have reached a different result does not justify it in setting aside the finding as a finding is "erroneous only if it is without evidentiary support." State v. Walker, 743 P.2d 191, 193 (Utah 1987) (citing Wright & Miller, Federal Practice and Procedure § 2585 (1971)). As stated in Sampson v. Richins, 770 P.2d 998 (Utah Ct. App. 1989), "Therefore, our review is strictly limited to whether the trial court's findings of fact support its conclusions of law and judgment."

The court below certainly had evidence to find that while Quintek desired to contract with Herm Hughes and engaged in negotiations, the discussions and conduct on the part of Quintek were in the nature of negotiations for a potential contract and did not constitute a waiver of the time within which Herm Hughes was required to accept the "Cost Estimate". On this basis alone, the appeal of Herm Hughes must fail.

B. Herm Hughes has not shown that the lower court applied an erroneous standard of law on the issue of contract formation.

Quintek agrees that the Uniform Commercial Code sections that refer to the sale of goods would be applicable in the present case had Herm Hughes raised them in the lower court. Quintek contends that Herm Hughes has not shown that the court did not apply the pertinent sections of the Uniform Commercial Code. The court does not specifically state in its findings what theories of law it applied in reaching its decision. It does not state that it was applying the common law of contracts in reaching its decision. It does not mention the term "meeting of the minds" or any other term that would indicate it was applying the common law doctrine. Herm Hughes has not shown that the court applied an incorrect legal standard.

Contrary to Herm Hughes's claim it is apparent that the trial court did apply the Uniform Commercial Code. The trial court in closing arguments specifically stated he believed that the UCC was applicable. (T. 177.) The trial court, in its findings, used the term "agreement" in indicating that there was no agreement between

the parties. The term "agreement" is a defined term in the Uniform Commercial Code. Utah Code Ann. § 70A-2-204(1) provides in pertinent part: "A contract for sale of goods may be made in any manner sufficient to show agreement, . . . " Under this section an agreement is required to be found in order for a contract to be formed. It is apparent from the record that the court was applying the Uniform Commercial Code in finding that there was no agreement between the parties, and therefore did not err.

C. The courts' finding that no agreement was formed is sustainable under the Uniform Commercial Code.

1. The lower courts' finding that no agreement was formed is sustainable under Utah Code Ann. § 70A-2-204.

The Uniform Commercial Code, Utah Code Ann. § 70A-2-204, states that "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." The court below found that there was no agreement between the parties, and therefore no contract.

Under the facts of the present case, Quintek submitted the "Cost Estimate" to Herm Hughes & Sons, Inc. with the condition that it be accepted within 10 days from the date of the estimate/bid. The date of receipt of the "Cost Estimate" was October 27, 1983, and therefore the cut-off date would have been November 5, 1983. The court found that Herm Hughes did not in any manner accept Quintek's "Cost Estimate" by November 5, 1983. The findings of fact of the court show that Herm Hughes never signed the "Cost

Estimate" of Quintek and did not even communicate with Quintek until late November, 1983. Under the findings of fact No. 9 it has been determined that the document which Herm Hughes now attempts to characterize as an acceptance was received by Quintek on or about November 30, 1983.

Although Utah Code Ann. § 70A-2-204 does not require an offer and acceptance in order to show agreement, Herm Hughes now claims on appeal that this was the manner in which an agreement was made and that there was an offer and an acceptance sufficient to show agreement between the parties in the present case. Herm Hughes now claims on appeal that he accepted Quintek's offer by sending Quintek a supplier agreement. Herm Hughes claims that the "Supplier Agreement" constituted a seasonable expression of an acceptance and relies upon Utah Code Ann. § 70A-2-207(1) which states:

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.

The court in the present case found the alleged acceptance on the part of Herm Hughes to be untimely because it was received after the offer expired. Where the offer in this case clearly expired ten days after being submitted according to its terms and there was no acceptance within that time period, there could not have been a valid acceptance because the offer was no longer valid.

Utah Code Ann. § 70A-2-205 states that: "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 revokable for lack of consideration during the time stated, or if no time is stated for a reasonable time." The Uniform Commercial Code section cited above clearly indicates that an offer remains open for a "reasonable time" only if a time period is not specified in the offer. The above section does not require that an offer be held open beyond the time stated. In the present case, the offer was automatically revoked after ten days according to its terms there was no longer an offer open for Herm Hughes to accept. Freedom of contract is an express principle of the Uniform Commercial Code. See Official Code Comment 2 to Uniform Commercial Code § 1-102. It is axiomatic that parties are free to contract on their own terms. Bekins Bar V Ranch v. Huth, 664 P.2d 455 (Utah 1983). Nothing in the Uniform Commercial Code has any effect to prevent a party from limiting the time for acceptance of an offer. The court's finding that there was no agreement formed between the parties, and therefore, no contract is sustainable under the Uniform Commercial Code.

Herm Hughes virtually ignores the conclusion of the trial court that the "Supplier Agreement" was untimely and instead focuses its argument on the effect of the differing terms of the "Supplier Agreement" and the original offer document. Where there was not even an agreement formed for all the reasons stated in this brief, the issue of differing terms never arises. The issue in the present case is whether the supplier agreement constituted an acceptance where it came after the expiration of acceptance period.

Further, Herm Hughes incorrectly applies Utah Code Ann. § 70A-2-207(1). The official comments to § 2-207 provide in part: "1. This section is intended to deal with two typical situations. The one is the written confirmation, . . . The other situation is offer and acceptance, . . . Often the seller's form contains terms different from or additional to those set forth in the buyer's form. Nevertheless the parties proceed with the transaction." In the present case there was not an offer and an acceptance, and the parties did not proceed with the transaction. This section of the Uniform Commercial Code was intended to clarify what terms apply where the parties have proceeded and are arguing over the terms of their agreement. In the present case there was not a valid acceptance, neither was there performance. The parties were merely in the process of negotiating. Quintek denies that a contract was ever formed. This section does not apply in the present case, because it was only intended to apply where both parties have admitted a contract. This section is based on the assumption that it is admitted that there is a contract and the controversy is only as to its terms. See Marlene Industries Corp. v. Carnac Textiles, Inc., 408 N.Y.S.2d 410, 380 N.E.2d 239 (1978). The court in U.S. Industries, Inc. v. Semco Mfg., Inc., 562 F.2d 1061, 1067 (1979) (citing R. Duesenberg & L. King Bender's Uniform Commercial Code Service § 3.05, at 3-51 (1977); Duval & Co. v. Malcom, 233 Ga. 784, 214 S.E.2d 356 (1975)) stated that "an 'acceptance' is a prerequisite to the application of § 2-207 and that only where all the traditional criteria of intent are met

should Section 2-207 be applied; only then should the prescription of Section 2-207 as to additional terms become relevant." Utah Code Ann. § 70A-2-207 does not apply in the present case.

2. The alleged contract in the present case is not enforceable because it does not meet the requirements of the statute of frauds applicable to the sale of goods under the Uniform Commercial Code.

Utah Code Ann. § 70A-2-201(1) states in pertinent part:

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.

The alleged contract in the present case must meet the requirements of the above statute of frauds. The alleged contract would have involved the sale of goods with a price in excess of \$500.00. However, there was no writing in the present case sufficient to indicate that a contract for sale had been made between the parties. The original offer document was not signed by Herm Hughes and therefore did not constitute a sufficient writing. The document sent by Herm Hughes to Quintek was not signed by Quintek nor did it indicate that a contract for sale had been made. Herm Hughes does not allege that there were any other documents that constituted a contract. Therefore, there is no writing sufficient to indicate that a contract for sale has been made between the parties and signed by Quintek.

Herm Hughes's whole argument at trial was that partial performance would substitute for the requirements of subsection (1) which requires a signed writing; however, Utah Code Ann. § 70A-2-201(3) outlines the only conditions upon which partial performance may substitute for a signed writing as follows:

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 specifically 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 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.)

None of the requirements of Subsection (3) have been met by Herm Hughes or Quintek sufficient to make the alleged contract enforceable as against the signed writing requirement. Quintek, which would have manufactured the goods under the alleged contract, is not alleging that it substantially began the manufacture of the goods or commitments for their procurement, nor does it admit that a contract for sale was made. Neither did Herm Hughes make any payments, and no goods were delivered to Herm Hughes.

The writings in the present case do not constitute a sufficient writing under the statute of frauds. In order for a writing to be sufficient to bind under the Uniform Commercial Code § 2-201(2), the writing must indicate that there is a completed transaction as to goods and state the quantity of goods. See W. H. Barber Co. v. MacNamera-Vivant Contracting Co., 293 N.W.2d 351 (Minn. 1979); Rockland Industries, Inc. v. Frank Kasmir Associates, 470 F. Supp. 1176 (N.D. Tex. 1979). An original offer document was submitted to Herm Hughes; however, a writing which is merely an offer is not a sufficient writing under the statute of frauds, as it does not indicate that there has been a completed transaction. See Ellis v. Robbett Manufacturing Co., 328 F. Supp. 1377 (N.D. Ga.), aff'd, 445 F.2d 316 (5th Cir. 1970.) Neither does a purchase order of a buyer satisfy the statute of frauds as it does not show that a contract has been made. See Nations Enterprises, Inc. v. Process Equipment Co., 40 Colo. App. 390, 579 P.2d 655 (1970). None of the writings in the present case indicated that there was a completed transaction.

Where the requirements of the statute of frauds are not met, the alleged contract is not enforceable by way of action or defense. Cox v. Cox, 292 Ala. 106, 289 So. 2d 609 (1974); Jurek v. Thompson, 308 Minn. 191, 241 N.W. 2d 788 (1976).

3. The lower court's finding concerning bid shopping by Herm Hughes justifies a conclusion that Quintek's original offer was rejected and that Herm Hughes's "Supplier Agreement" was a new offer which was rejected by Quintek.

The trial court made specific findings concerning bid shopping. (Findings of Fact No. 8) The court further found that Quintek was advised of Herm Hughes's efforts to "shop" its bid. These facts alone would have allowed the court to correctly conclude that Quintek's bid was rejected and that, "viewing all of the evidence together, this court is unable to conclude that plaintiff has established its case by a preponderance. . . ." (R. 151)

POINT III

**THE COURT CORRECTLY FOUND THAT THE SUPPLIER AGREEMENT
WAS UNTIMELY AS AN ACCEPTANCE BECAUSE IT CAME AFTER
THE 10-DAY ACCEPTANCE PERIOD IN
QUINTEK'S "COST ESTIMATE".**

"An offer for the sale of goods must be accepted within the time specified by the offeror, . . . If acceptance is not timely made, there is by hypothesis no contract of sale." 67 Am. Jur. 2d Sales § 85. When an offer is made for a specified period of time, it cannot be accepted after the lapse of that time." Gilbert & Bennett Mfg. Co. v. Westinghouse Electric Corp., 445 F. Supp. 537 (1977). There is nothing in the Uniform Commercial Code regulating offers as such and, therefore, prior principles of contract law continue in force because not displaced. See § 1-103; 2 R. Anderson, Uniform Commercial Code, § 2-206, at 258 (3rd Ed. 1982).

The trial court held that Herm Hughes had not accepted the offer of Quintek within the time specified by Quintek in his offer and, therefore, there was no contract. Herm Hughes does not argue that Quintek was not justified in including in his offer the acceptance period or that Herm Hughes accepted within the time period allotted. The court was correct in holding that there was no contract formed.

The trial court specifically concluded from the facts presented that there had been no waiver on the part of Quintek by its continued efforts to pursue an agreement with Herm Hughes. (Conclusions of Law No.7) (R. 228)

Herm Hughes, however, claims that Quintek waived the acceptance period under the original offer and that the court erred in holding that acceptance of the offer was untimely. Herm Hughes cites Swisher v. Clark, 209 P.2d 880 (Okla. 1949) in asserting that Quintek had waived the ten-day acceptance period. In Swisher the buyer presented a written offer to the seller to purchase land. The offer expired by its terms at a certain time on a certain date. The seller did not accept the offer by the expiration date. The buyer then approached the seller after the expiration date, presented the original offer document and requested that the seller sign the original offer document. The seller signed the original offer document but later failed to convey the subject land. The buyer sued for specific performance. The seller argued that because the expiration date in the original offer document had passed neither party was bound by the signed document. The court

in Swisher noted that the expiration date was put into the offer document to protect the buyer and that the buyer had knowingly waived the provision by her conduct. There are glaring differences between the fact pattern in Swisher and the fact pattern in the present case. In the present case Quintek did not approach Herm Hughes with the original offer document and request that Herm Hughes sign it, and no documents were ever signed between the parties as had been done in Swisher. The findings of the court in the present case only show that Quintek received the "Supplier Agreement," which was not the original offer document, from Herm Hughes which Quintek subsequently refused to sign.

Second, the holding of the court in Swisher supports Quintek's case rather than Herm Hughes's case. The court held that where the offer specifies a time of acceptance, acceptance after that time will be nugatory as an acceptance, unless the offerer assents thereto with full knowledge that it was not made within the period named. 209 P.2d at 885. Quintek in the present case has not assented to an acceptance of the original offer document and therefore has not waived the acceptance period. In Swisher the party who presented the offer acknowledged his waiver contrary to the present case. Swisher is therefore distinguishable from the present case and does not present support for Herm Hughes in alleging that Quintek waived the offer acceptance period.

Herm Hughes also cites B.R. Woodward Marketing, Inc. v. Collins Food Service, Inc., 754 P.2d 99 (Utah App. 1988) which stated:

Waiver is the "intentional relinquishment of a known right." Barnes v. Wood, 750 P.2d at 1230. To waive a right there must be an existing right, benefit, or advantage; knowledge of its existence; and an intention to relinquish it. Id. The party's actions or conduct must unequivocally evince an intent to waive or must at least be inconsistent with any other intent. Id.

In the present case there was no intention on the part of Quintek to relinquish its right to revoke its offer which expired automatically after the ten-day acceptance period, nor was its conduct inconsistent with any other intent. Indeed, Quintek's conduct is consistent with its intent to try to reach an agreement with Herm Hughes regarding the trusses even though the original offer had expired. Quintek did not renew its original offer in any manner or waive the ten-day acceptance period in any way.

Further, in the present case, if Quintek did approach Herm Hughes to request a contract, it merely shows that Quintek was willing to form a contract if the parties could reach an agreement with terms that were satisfactory. Even though Herm Hughes had let the offer lapse, Quintek was still willing to try to reach an agreement with Herm Hughes until it became apparent that an agreement would not be reached.

Quintek was further justified in believing no agreement had been reached in light of the facts which reveal that Herm Hughes requested another company to lower its bid after the bids were opened. Herm Hughes did not notify Quintek if its bid had been or would be accepted. Herm Hughes gave Quintek no indication whatsoever that it even possibly planned to contract with Quintek.

Quintek had no way of knowing that Herm Hughes was even considering contracting with Quintek. Quintek had previously been informed by another bidder that Herm Hughes had requested Oscar E. Chytraus Co. to lower its bid and thought that Herm Hughes was bid shopping. The findings do not show that Quintek presented its offer again or requested Herm Hughes to sign the original offer document or that Quintek even discussed the terms of the original offer. They do not show any behavior on the part of Quintek that would indicate that it had waived the acceptance period on the original offer.

Further, Herm Hughes attempts to cloud the issue by citing certain cases from other jurisdictions which hold that a document is an acceptance even though it contains terms different from the terms in the offer. Herm Hughes ignores the fact that none of the cases it cites are cases where the offer had already expired and therefore acceptance was invalid as in the present case. The cases cited are cases with fact patterns where the parties are arguing over the terms of the contracts admittedly formed. Specifically, Herm Hughes cites Boese-Hilburn Co. v. Dean Machinery Co., 616 S.W. 2d 520 (Mo. App. 1981); Chicopee Concrete Service, Inc. v. Hart Engineering Co., 479 N.E. 2d 748 (Mass. App. 1985); J. Baranello & Sons v. Hausmann Industries, Inc., 571 F. Supp. 333 (E.D.N.Y. 1983). In Boese-Hilburn Co., *supra*, the parties were arguing over inconsistencies between the purchase order and the quotation which constituted the offer and acceptance in that case, not over whether an offer had expired or an acceptance period had been waived. The court's holdings are irrelevant to the present case. In Chicopee,

both parties added additional terms to the documents and signed and delivered all documents. Again the issue was not whether an offer had expired but rather whether the differing terms of the documents prevented a contract from being formed. In the present case, the parties signed no documents and came to no agreements. In Baranello, the court found that the documents exchanged demonstrated an agreement on the essential terms of the parties' bargain, but again the issue did not involve an expired offer acceptance period. None of the cases cited by Herm Hughes are pertinent to the particular facts in the instant case, but rather address in general terms the effect of differing terms between offers and acceptances.

The trial court was correct in holding there was no agreement and the acceptance period had not been waived and therefore expired according to its term on November 5, 1983. The trial court was correct in holding that the "Supplier Agreement" received by Quintek in late November of 1983 did not constitute an acceptance because it was untimely. The trial court's decision should be upheld where it is not incorrect. Brigham v. Moon Lake Elec. Ass'n., 470 P.2d 393 (Utah 1970).

POINT IV

THE COURT DID NOT ERR IN FINDING THAT THE CONDUCT OF THE PARTIES DID NOT FORM AN AGREEMENT.

The conduct required to form a contract under Utah Code Ann. § 70A-2-204 is conduct which "recognizes the existence of such contract." Id. The conduct of Quintek and Herm Hughes in the

present case did not recognize the existence of a contract or an agreement. According to Finding of Fact 13 Quintek never began fabrication of the trusses in question. After the "Cost Estimate" was submitted to Herm Hughes by Quintek, Larry Gilson of Oscar E. Chytraus Co., who had also submitted a "Cost Estimate" to Herm - Hughes, contacted Boyd Jacobson of Quintek and advised him that he had been contacted by Herm Hughes and had been requested to reduce his bid, and in the opinion of Larry Gilson, Herm Hughes was bid shopping. (Finding of Fact No. 8.) Herm Hughes, after contacting Larry Gilson, did not sign a contract with either Quintek or Larry Gilson, and the expected procedure was not followed in signing the "Cost Estimate" of Quintek by the ten-day offer period.

Further, although the findings of the court indicate that a supplier agreement was sent to Quintek, it was not received until November 30, 1983, after the offer of Quintek had expired. Even after Quintek received the "Supplier Agreement," Quintek refused to sign it.

Under the Findings of Fact, it is readily apparent that the offer which was originally made by Quintek was never accepted in any manner and that there was never an agreement formed between the parties that Quintek would provide trusses. There was no contract formed between the parties during that ten-day period, nor were there any actions taken by either party during the ten-day period to indicate performance in any manner under the offer. The facts show that a drawing was sent to Herm Hughes and various discussions occurred relative to a possible contract for Quintek to fabricate

the trusses in question. However, none of the conduct of the parties indicated that any agreement had been reached or that any terms had been decided upon. Quintek was aware that Herm Hughes needed trusses. Herm Hughes was aware from the "Cost Estimate" that Quintek could provide trusses, but Quintek never agreed by its conduct or otherwise that it would provide trusses for Herm Hughes. The parties were merely in the process of trying to agree. The conduct of the parties did not rise to the level of recognizing the existence of a contract. The court was not incorrect in holding that the conduct of the parties did not form an agreement.

POINT V

PUBLIC POLICY WOULD DISCOURAGE THE COURT FROM FINDING THAT A CONTRACT HAD BEEN FORMED BETWEEN THE PARTIES UNDER THE CIRCUMSTANCES OF THE PRESENT CASE.

In the present case the conclusion that Herm Hughes controverts most is that its alleged acceptance was untimely because it came after the expiration of the 10-day acceptance period. If the court were to determine that Quintek was to be held to the prices quoted in his original offer document although the offer expired according to its terms after 10 days and where Quintek never intended to waive the acceptance period, it would have the effect of invalidating written acceptance periods where the subject of the contract dictates that a limited time for acceptance is necessary, i.e., commodities. The purpose of the acceptance period in a "Cost Estimate" to construct certain goods is for the protection of the bidder. The bidder will quote a price that is based upon his cost. In the present case, the bid was based upon the

cost of the materials necessary for the construction of the product. The bidders' estimate of the cost of materials is often based upon a quote that is also available for a certain time period. The cost of the lumber and other commodities in a supply and demand economy may vary in a short time period. A bidder would take a substantial loss if he were to be held to an offer price based upon a low material price that had risen before he could contract for the materials because he was waiting for an acceptance of his offer. The acceptance period in a contract is usually the same period for which the producer believes he can obtain the underlying materials at a given price. Suppliers may have other legitimate reasons for limiting the period for acceptance of a "Cost Estimate", i.e., the need to know whether contract commitments will exceed production capacity within time requirements.

Had Herm Hughes wanted to form a contract with Quintek or be assured it could obtain the price quoted in the original offer document it very easily could have followed the expected procedure of signing the "Cost Estimate" of Quintek within the 10-day acceptance period or even presenting the supplier agreement within the 10-day acceptance period or indicated in any other manner that he accepted the offer so that Quintek could obtain the underlying materials at its expected price. Even after the ten-day acceptance period had Herm Hughes wanted to accept Quintek's offer, Herm Hughes could have established its intent to accept the original terms by indicating to Quintek that it wished to do so or signed a contract with Quintek and perhaps Quintek would have considered

waiving the ten-day acceptance period and formed a contract if it could still obtain the materials at expected cost. Rather it appears that Herm Hughes still hoped to form an agreement more favorable than the terms of the offer it had originally received, and it did not form an agreement with Quintek to provide the trusses.

Further, if Quintek in the present case were to be held to have formed a contract even though no agreement was ever reached or no contract of any kind ever signed, the message to the public would be that once an offer is made you can be held accountable for the terms of that offer even if it is not accepted and even if the acceptance period has expired. A producer could not be sure that he would not take a loss once he had made an offer with a quoted price based on the underlying market cost of materials. If Quintek were to be held to the prices originally offered without the assurance that the underlying material prices would remain fixed at the level relied on by Quintek in making the offer, it would be entirely inequitable to Quintek. Further, buyers under the "Cost Estimate" system would be free to bid shop and take advantage of offers that had been made during a time when materials could be obtained at a low price while they also waited to see if prices would fall and perhaps receive a lower bid from another party. Herm Hughes in this case did not have clean hands as evidenced by its bid shopping. For the court to now hold Quintek to prices quoted in the original offer document would be to encourage others to deal in such a manner.

The intended purpose of the sections of the Uniform Commercial Code cited was to clarify terms of contracts where the terms of the offer and acceptance differed but where the parties had proceeded with the performance of the contract anyway. The intended purpose of the sections was not to imply a contract between parties where no agreement was actually reached by the parties.

POINT VI

QUINTEK IS ENTITLED TO ATTORNEYS FEES PURSUANT TO RULE 33(a), UTAH RULES OF APPELLATE PROCEDURE.

In the present case, the critical issues are those concerning waiver and course of conduct allegedly creating a contract, which are fact questions subject to review for sufficiency of evidence. The appellant, Herm Hughes, did not even acknowledge this standard of review for these fact questions. Instead, the appellant devoted the bulk of its brief to discussion of Utah Code Ann. § 70A-2-207, a statute which appellant never cited or argued at trial. Appellee respectfully submits that the appeal herein is frivolous and subject to an award of attorneys fees pursuant to Utah R. App. P. 33(a). As this court has stated, sanctions should be imposed when an appeal is obviously without any merit and has been taken without reasonable likelihood of prevailing. Porco v. Porco, 752 P.2d 365 (Utah Ct. App. 1988); Maughn v. Maughn, 770 P.2d 156 (Utah Ct. App. 1989).

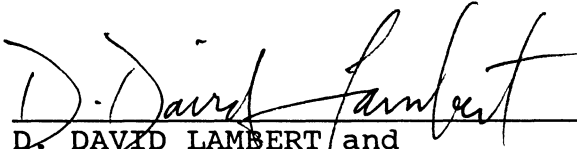
CONCLUSION

The trial court correctly found that there is no agreement formed between the parties and therefore no contract. The trial

court correctly determined that the "Supplier Agreement" sent by the plaintiff was untimely because it came after the 10 day acceptance period as set forth in Quintek's "Cost Estimate," that this 10 day acceptance period was not waived by Quintek, and that thereafter the conduct of the parties did not form an agreement or a contract.

The alleged contract in the present case was for the sale of goods and the Uniform Commercial Code presents guidance for this case. The Court's decision below is sustainable under the Uniform Commercial Code and therefore should be affirmed.

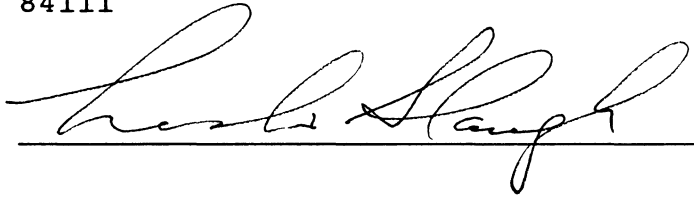
Respectfully submitted this 7th day of August, 1991.


D. DAVID LAMBERT and
DANIELLE M. FERRON, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Appellee Quintek

MAILING CERTIFICATE

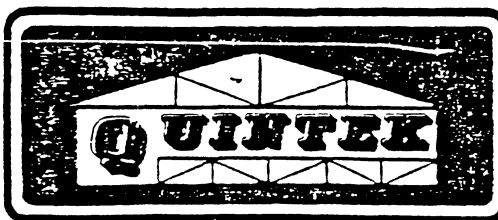
I hereby certify that four true and correct copies of the foregoing were mailed to the following, postage prepaid, this 7th day of August, 1991.

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

A handwritten signature in cursive script, appearing to read "Clark B. Fetzner", is written over a horizontal line.

APPENDIX "A"

Cost Estimate



#27

[illegible]

APPENDIX "B"

Supplier Agreement



HERM HUGHES & SONS INC.

GENERAL CONTRACTORS

P.O. Box 256
Phone (801) 292-1411

1650 West 500 South
West Bountiful, Utah 84087

November 21, 1983

Plf Exhibit

Quintek
P. O. Box 76
Provo, Utah 84601

883-4

RE: MIDLAND ELEMENTARY SCHOOL / Roy, Utah

Gentlemen:

We are enclosing two copies of the agreement for the above project. Please sign and return one copy to our office as soon as possible.

Please prepare your monthly estimates as follows:

1. Submit invoices to our office no later than the 15th of the month.
2. Contract amount:
 % work completed to date
 less 10% retainage _____
 Amount earned to date _____
 Less previous payments _____
 Net due this estimate _____
3. Shop drawings and/or color samples must be in our office within two weeks of the date of this letter so that we can forward them to the Architect for approval.

Sincerely,

HERM HUGHES & SONS, INC.

Todd Walker
Project Manager



This AGREEMENT made this 15th day of November in the year of Nineteen Hundred and Eighty Three by and between HERM HUGHES & SONS, INC. hereinafter called the Contractor and QUINTEK hereinafter called the Supplier for the construction of MIDLAND ELEMENTARY SCHOOL for WEBER SCHOOL DISTRICT hereinafter called the Owner.

WITNESSETH, that the Supplier and Contractor for consideration hereinafter named agree as follows:

SECTION 1. It is agreed that the Supplier shall be bound to the Contractor by the terms of the General Contract, the General Conditions, Special Conditions, Drawings, Addendum 1 and Specifications for MIDLAND ELEMENTARY. He shall assume toward the Contractor all obligations and responsibilities that the Contractor, by these documents, assumes toward the Owner, although the aforementioned Contract Documents are not attached hereto, they shall become a part of this Agreement. It is assumed, that the Supplier is familiar with the terms and requirements set forth therein.

SECTION 2. It is agreed that the materials to be furnished FOB jobsite are:

As set forth in the General Conditions and General Requirements, Division 1 and Division 6, WOOD & PLASTIC, Section 6010-Lumber & related items as it pertains to wood trusses along with Addendum 1 of the specifications and as indicated on the drawings of JOHN L. PIERS AIA. Including but not limited to:

1. All prefabricated metal plate wood trusses manufactured in an I.C.B.O. approved shop.
2. Submit six (6) copies shop drawings with registered structural engineer stamp to our office within two (2) weeks.

FOB jobsite address as follows: 4800 South 3100 West / Roy, Utah

SECTION 3. It is agreed that the Contractor shall pay to the Supplier for the satisfactory completion of all materials furnished the sum of FORTY TWO THOUSAND FIVE HUNDRED EIGHTEEN DOLLARS AND NO CENTS (\$42,518.00) including all state and local sales and use taxes in monthly payments of 90% of the materials furnished in any preceding month, in accordance with estimates prepared by the Supplier and as approved by the Contractor, HERM HUGHES & SONS, INC, the architect and Owner; such payments to be made as payments are received by the Contractor from the Owner covering the monthly estimates of the Contractor, including the approved portion of the Supplier's monthly estimate as outlined in the General Conditions of the contract. Final payment to be made as such payment is received by the Contractor from the Owner. Supplier shall provide appropriate lien releases as required by the contractor.

SECTION 4. The Supplier agrees to reimburse the Contractor for any and all liquidated damages that may be assessed against and collected from the Contractor by the Owner, which are attributable to or caused by the Supplier's failure to furnish the materials and perform the work required by this agreement within the time fixed in the manner provided for herein. The Supplier also agrees to pay to the Contractor such other or additional damages as the Contractor may sustain by reason of such delay by the Supplier. The payment of such damages shall not release the Supplier from his obligation to otherwise fully perform this Supplier Agreement. In the event of a dispute or delay, Contractor has the right to provide the material and adjust the contract price accordingly. Supplier shall also pay reasonable legal fees necessary for the enforcement of this agreement.

SECTION 5. It is agreed that the Supplier shall be responsible to prepare and to obtain approval of all necessary shop drawings as to not cause delay in the progress of construction of the subject project.

SECTION 6. It is agreed that the Supplier shall be responsible for the accuracy of their shop drawings to coincide with the Architect's drawings.

SECTION 7. In lieu of retainage required by the Contractor, Supplier agrees to allow a discount of 8% ten days to the Contractor.

IN WITNESS WHEREOF the parties hereto have executed this Agreement, the day and year first above written.

CONTRACTOR:

HERM HUGHES & SONS, INC.
1650 West 500 South
W. Bountiful, Utah 84087

By: 
W. B. Smith, Vice President

By: 
C. V. Smith, Secretary/Treasurer

SUPPLIER:

QUINTEK
P. O. Box 76
Provo, Utah 84601

By: _____

APPENDIX "C"

Proposed Supplier Agreement



P.O.Box 76, Provo, Utah, 84601

PROPOSAL
SUPPLIER AGREEMENT

Pit Exhibit

19

883 -4

This AGREEMENT made this 22nd day of February 1984 by and between Herm Hughes & Sons, Inc. hereinafter called the owner and Quintex Inc. hereinafter called the Supplier.

Witnesseth, that the supplier and the contractor for consideration hereinafter named agree as follows:

Section 1. It is agreed that the materials to be furnished FOB jobsite on the truck.

As set forth in the general conditions and general requirements, Divisions 1 and Division 6, WOOD & PLASTIC, Section 6010-lumber & related items as it pertains to wood trusses along with the specifications and as indicated on the drawings of John L. Piers AIA.

1. all prefabricated metal plate wood trusses manufactured in an I.B.C.O. approved shop.

2. submit six (6) copies shop drawing with a registered civil engineer stamp to Herm Hughes & Sons within two (2) weeks of receipt of supplier agreement.

FOB JOBSITE ADDRESS AS FOLLOWS: 4800 South 3100 West Roy, Utah

Section 2. It is agreed that the contractor shall pay to the supplier for the satisfactory completion of all materials furnished the sum of Forty Eight Thousand and no cents (48,000.00), tax not included FOB jobsite on the truck. Supplier agree to allow a discount of eight (8) percent, net ten (10) days, from invoice date. The date of invoice shall be the completion date of fabrication.

The creation of a new supplier's agreement is made necessary for the following reasons: (1) Bid date was October 25, 1983. Unforeseen delays to both the contractor and all the suppliers have made accepted the bid prices untenable.

(2) Materials cost have risen dramatically from the bid date of four months ago.

(3) Production scheduling for fabrication is becoming questionable.

Approaching the busiest production time period of the entire year will necessitate increased production costs for a project which should have already been fabricated and delivered.

(4) Contractor also agrees to condition of sale clause on the Quintek invoice.

CONTRACTOR:

By _____

SUPPLIER:

QUINTEK INC.

By: _____

2-22-84

APPENDIX "D"

Ruling

HERB HUGHES & SONS, INC.,
A Utah Corporation

VS

QUINTEK, A Utah Corporation

Case No. 8830000004

The written documents submitted as evidence, mostly generated by the plaintiff, can be viewed as supporting plaintiff's position; but much of the oral testimony received by the court tends to offer plausible explanations for the course of dealing between the parties. Obviously, the passage of over six years since these events took place causes additional problems. The one fact that comes through this haze is that the original cost estimate had no acceptance endorsed on it within the ten days required by its terms, and there is no document showing acceptance ~~written~~ ^{within} that period of time. Certainly plaintiff could ~~be~~ ^{have} easily met the conditions requested and avoided all the problems which have ensued.

Viewing all of the evidence together, this court is unable to conclude that plaintiff has established its case by a preponderance thereof. Accordingly, the court concludes that plaintiffs claim should be dismissed.

Dated: September 10, 1990

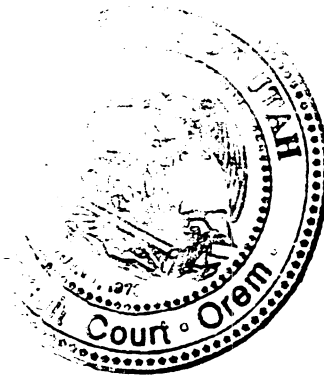


Robert J. Sumsion
Circuit Court Judge

I hereby certify that a true and correct copies of the foregoing Ruling ws mailed, postage prepaid, on this 14th day of September, 1990 to the following parties.

E. Nordell Weeks, Esq, Attorney for the Plaintiff, 320 Kearns Building, 136 South Main Street, Salt Lake City, UT 84101

David Lambert, Attorney for the Defense, P O BOX 778, Provo, UT 84603



Kristine Christianson
Circuit Court Clerk

APPENDIX "E"

Findings of Fact and Conclusions of Law

D. DAVID LAMBERT (1872), for:
HOWARD, LEWIS & PETERSEN
ATTORNEYS AND COUNSELORS AT LAW
120 East 300 North Street
P.O. Box 778
Provo, Utah 84603
Telephone: (801) 373-6345
Facsimile: (801) 377-4991

P:quin-fof.lo
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}, 1990¹.


BY THE COURT:


ROBERT T. 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

APPENDIX "F"

Judgment

FILED JAN - 3 1991

D. DAVID LAMBERT (1872), for:
HOWARD, LEWIS & PETERSEN
ATTORNEYS AND COUNSELORS AT LAW
120 East 300 North Street
P.O. Box 778
Provo, Utah 84603
Telephone: (801) 373-6345
Facsimile: (801) 377-4991

P:quinjud.jh
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,	:	JUDGMENT
	:	
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 having received the evidence of the parties, having considered the arguments of counsel, together with the legal authorities presented, and having previously made and entered its Findings of Fact and Conclusions of Law,


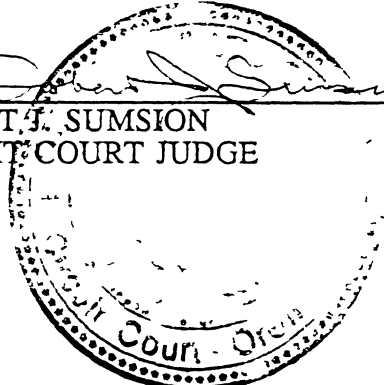
IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. There was never any meeting of the minds or agreement between the parties.
2. The plaintiff's case is dismissed with prejudice.

3. Defendant is awarded costs in the sum of \$125.60.

DATED this 3 day of ^{January} ~~December~~, 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 10 day of December, 1990.

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


SECRETARY

APPENDIX "G"

Determinative Statutes

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

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 at 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