ARTICLE 2 OF THE UNIFORM COMMERCIAL CODE:

A Primer for Government Contractors

Joseph P. Hornyak

Holland & Knight LLP
1600 Tysons Boulevard, Suite 700
Tysons Corner, VA 22102
(703) 720-8052
Email: joseph.hornyak@hklaw.com

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TODAY’S OUTLINE

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• How does the UCC differ from the Federal Acquisition Regulation (FAR)?
  – Commercial Items
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What is the Uniform Commercial Code?

- The UCC is a uniform set of laws designed to harmonize the terms of commercial transactions in all states.
- Article 2 of the UCC governs the purchase and sale of "goods" – defined as “all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale....”
- Article 2 has been adopted in substantially the same form by almost all states. (See Chapter 106, Massachusetts General Laws)
- Article 2 provides the terms and conditions of a transaction – or “fills in the gaps” -- in the absence of written contract terms.
- Article 2 does not apply to the purchase and sale of services, real estate or lending.
- Article 2 may apply to the purchase and sale of software in certain instances.
What do government contractors need to know about the UCC?

• Article 2 does not apply to government prime contracts.

• Article 2 may apply to the purchase of “goods” by government contractors from suppliers and subcontractors, whether or not the goods are “commercial items.”

• The gap-fillers in Article 2 are similar to the FAR in several respects.

• The gap-fillers in Article 2 are different from the FAR in several respects.
What are the UCC’s “gap fillers”?
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• The “gap fillers” area the default terms and conditions that become part of the parties’ contract “unless otherwise agreed” to by the parties.

• Examples:
  – No specified price or payment terms by the parties
  – No specified time place for delivery by the parties
  – No specified time for delivery by the parties
  – Warranties
  – Inspection and acceptance
  – Remedies for breach or non-performance
  – Defined terms (e.g., “F.O.B.” or “as-is”)
“(1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if

(a) nothing is said as to price; or

(b) the price is left to be agreed by the parties and they fail to agree; or

(c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

(2) A price to be fixed by the seller or by the buyer means a price for [the seller] to fix in good faith.
Example: Section 2-305 - Open Price Term (Con’t.)

(3) When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may at his option treat the contract as cancelled or [itself] fix a reasonable price.

(4) Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract. In such a case the buyer must return any goods already received or if unable so to do must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.”
Example: Section 2-308 - Absence of Specified Place for Delivery

“Unless otherwise agreed

(a) the place for delivery of goods is the seller’s place of business or if [the seller] has none [its] residence; but

(b) in a contract for sale of identified goods which to the knowledge of the parties at the time of contracting are in some other place, that place is the place for their delivery; and

(c) documents of title may be delivered through customary banking channels.”
Example: Section 2-309 - Absence of Specific Time Provisions; Notice of Termination

“(1) The time for shipment or delivery or any other action under a contract if not provided in this Article or agreed upon shall be a reasonable time.

(2) Where the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party.

(3) Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable.”
“Unless otherwise agreed

(a) payment is due at the **time and place at which the buyer is to receive the goods** even though the place of shipment is the place of delivery; and

(b) if the seller is authorized to send the goods he may ship them under reservation, and may tender the documents of title, but the buyer may inspect the goods after their arrival before payment is due unless such inspection is inconsistent with the terms of the contract (section 2-513); ....”
“(1) Subject to subsection (2) there is in a contract for sale a warranty by the seller that

(a) the title conveyed shall be good, and its transfer rightful; and

(b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

(2) A warranty under subsection (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.
(3) Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications.

(4) Unless otherwise agreed a seller makes no warranty under subsection (3) with respect to any claim for which the exclusive remedy of the claimant is by action against the United States in the Court of Claims or in the district courts of the United States.”
“(1) Unless excluded or modified by section 2-316, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must at least be such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and
Example: Section 2-314 - Implied Warranty: Merchantability; Usage of Trade (Con’t.)

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified by section 2-316, other implied warranties may arise from course of dealing or usage of trade.”

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“Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.”
(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for Example, that ‘There are no warranties which extend beyond the description on the face hereof.’
Example: Section 2-316 - Exclusion or Modification of Warranties (Con’t.)

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like ‘as is,’ ‘with all faults’ or other language which in common understanding calls the buyer’s attention to the exclusion of warranties and makes plain that there is no implied warranty; and,

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.”

...
Example: Section 2-316A - Limitation on Exclusion or Modification of Warranties

“...

(4) Any language, oral or written, used by a seller or manufacturer of goods and services, which attempts to exclude or modify any implied warranties of merchantability and fitness for a particular purpose or to exclude or modify remedies for breach of those warranties, shall be unenforceable with respect to injury to the person. This subsection does not affect the validity under other law of an agreement between a seller or manufacturer of goods and services and a buyer that is an organization (see Section 1-201(28)), allocating, as between them, the risk of damages from or providing indemnity for breaches of those warranties with respect to injury to the person.”

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Example: Section 2-513- Buyer’s Right to Inspection of Goods

“(1) Unless otherwise agreed and subject to subsection (3), where goods are tendered or delivered or identified to the contract for sale, the buyer has a right before payment or acceptance to inspect them at any reasonable place and time and in any reasonable manner. When the seller is required or authorized to send the goods to the buyer, the inspection may be after their arrival.

(2) Expenses of inspection must be borne by the buyer but may be recovered from the seller if the goods do not conform and are rejected.

...”
Example: Section 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) Except as otherwise provided in Section 9-405, 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.”
“Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract (section 2-612), then also with respect to the whole undelivered balance, the aggrieved seller may

(a) withhold delivery of such goods;
(b) stop delivery by any bailee as hereafter provided (section 2-705);
(c) proceed under the next section respecting goods still unidentified to the contract;
(d) resell and recover damages as hereafter provided (section 2-706);
(e) recover damages for non-acceptance (section 2-708) or in a proper case the price (section 2-709);
(f) cancel.”

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“(1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (section 2-612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid

(a) ‘cover’ and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or

(b) recover damages for non-delivery as provided in this Article (section 2-713).
Example: Section 2-711Buyer’s Remedies in General; 
Buyer’s Security Interest in Rejected Goods (Con’t.)

(2) Where the seller fails to deliver or repudiates the buyer may also

(a) if the goods have been identified recover them as provided in this Article (section 2-502); or

(b) in a proper case obtain specific performance or replevy the goods as provided in this Article (section 2-716).

(3) On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller (section 2-706).”
Example: Section 2-719 - Contractual Modification or Limitation of Remedy

“(1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer’s remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.
(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this chapter.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.”
How does the UCC resolve the "battle of forms"?

• Traditional contracts law - Formation of a Contract:
  – There must be a “meeting of the minds” between the parties.
  – There must be an offer and acceptance.
  – The “mirror image” rule: acceptance must match the offer in every detail.

• Article 2 of the UCC – Formation of a Contract:
  – “Mirror image” not required: If the parties exchange writings, differences in proposed terms will not prevent the formation of a contract.
  – The second writing acts as an acceptance, rather than as a counter offer, even when it contains different or additional terms.
What is the “Knock-Out” rule?
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• When the exchanged forms contain conflicting terms, those terms are knocked out of the contract and replaced by the “gap-filler” provisions of Article 2 of the UCC.

• Common examples:
  – Conflicting indemnification provisions
  – Conflicting dispute-resolution provisions
  – Conflicting payment terms
  – Conflicting limitations on remedies
  – Conflicting disputes provisions
“(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 conforming or non-conforming goods, but such a shipment of non-conforming 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.”

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Section 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 or different 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.
Section 2-207- Additional Terms in Acceptance or Confirmation (Con’t.)

(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 chapter.”
How does the UCC differ from the Federal Acquisition Regulation (FAR)?

• The UCC attempts to balance the interests of buyers and sellers.

• The traditional FAR (i.e., non-commercial item provisions) reflects statutory and regulatory requirements unique to government acquisitions and the government’s significant buying power.

• The FAR’s “commercial Items” provisions (Part 12 and 52.212-XX) reflect a middle ground between the traditional FAR and the commercial marketplace (i.e., UCC).

• A “commercial item” is an item customarily used by non-governmental entities for other than governmental purposes that has been sold, leased or licensed (or offered) to the general public; it can include minor modifications to meet government requirements. FAR 2.101.
FAR Commercial Items vs. the UCC

- FAR 52.212-4 - Contract Terms and Conditions—Commercial Items (Feb 2012)

- Some terms of 52.212-4 similar to Article 2 of the UCC:
  - Inspection and acceptance
  - Patent indemnity
  - Risk of loss
  - Termination for cause/default
  - Title
  - Warranties
  - Limitation of liability
• Some terms of 52.212-4 **different** from Article 2 of the UCC:
  – Assignment
  – Changes
  – Excusable delays
  –Payments (interest)
  – Termination for convenience
  – Compliance with laws unique to Government contracts
• FAR 52.244-6 – Subcontracts for Commercial Items (Dec 2010) – Mandatory flow-downs for commercial items subcontracts:
  
  (i) 52.203-13, Contractor Code of Business Ethics and Conduct (Apr 2010)


  (iii) 52.219-8, Utilization of Small Business Concerns (Dec 2010) (15 U.S.C. 637(d)(2) and (3)), if the subcontract offers further subcontracting opportunities. If the subcontract (except subcontracts to small business concerns) exceeds $650,000 ($1.5 million for construction of any public facility), the subcontractor must include 52.219-8 in lower tier subcontracts that offer subcontracting opportunities.

  (iv) 52.222-26, Equal Opportunity (Mar 2007)

  (v) 52.222-35, Equal Opportunity for Veterans (Sep 2010)

  (vi) 52.222-36, Affirmative Action for Workers with Disabilities (Oct 2010)

  (vii) 52.222-40, Notification of Employee Rights Under the National Labor Relations Act (Dec 2010), if flow down is required in accordance with paragraph (f) of FAR clause 52.222-40.

  (viii) 52.222-50, Combating Trafficking in Persons (Feb 2009)

  (ix) 52.247-64, Preference for Privately Owned U.S.-Flag Commercial Vessels (Feb 2006), if flow down is required in accordance with paragraph (d) of FAR clause 52.247-64.)
FAR Commercial Items vs. the UCC (Con’t.)
FAR Non-Commercial Items vs. UCC

- Inspection and acceptance – FAR 52.246-XX
- Assignment – FAR 52.232-XX
- Changes – FAR 52.243-6
- Excusable delays – FAR 52.219-14
- Patent indemnity – FAR 52.227-13
- Payments (interest) – FAR 52.232-XX
- Risk of loss – FAR 52.246-16
- Termination for convenience – FAR 52.249-2
- Termination for cause/default – FAR 52.249-8
- Title – FAR 52.246-16
- Warranties – FAR 52.246-XX
- Limitation of liability – FAR 52.246-22 -- -24
- Cost or pricing data – FAR 52.215-10 -- -14
- Audit rights – FAR 52.215-2