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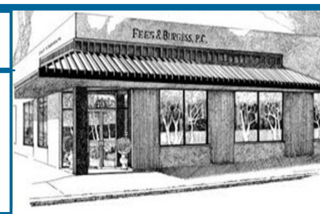
SUPPLY CHAIN MANAGEMENT MEMO



Volume 8, Issue 1 January 2011

Looking Down the Road – Being Mindful of Changes in Freight Costs When Selecting a Delivery Term

When negotiating a contract that calls for the delivery of goods, one aspect of the contracting parties' discussion should be choosing a delivery term to govern the various obligations relating to transport of the goods. For international transactions, contracting parties frequently rely on one of the Incoterms established by the International Chamber of Commerce, such as Ex Works or DDP. Wholly domestic transactions in the United States typically use the delivery terms set forth in the Uniform Commercial Code or one of the Incoterms. These terms dictate things like who will pay freight costs, who will pay for insuring the goods in transit, who will be responsible for making sure the goods clear customs, and who will bear the risk of any loss or damage to the goods until they arrive at a specified location. In negotiations, parties will usually push to use whatever delivery term they believe will limit their costs and potential risks the most, and try to shift those costs and risks to the other side of the table. However, in some instances, a compromise has to be reached in order to get the deal done, and the parties will agree to a delivery term that splits the responsibilities associated with transport of the goods. In all contract negotiations, but particularly those in which you might agree to accept some of the costs and risks associated with delivery of the goods above what you normally would prefer, it is important to consider the long-term implications of the delivery term you agree to use in your contract.

The issue of responsibility for freight costs is probably the most significant area to watch in this regard. The impact on your bottom line of selecting a delivery term where you agree to be responsible for shipping costs can go from minimal to significant over the course of a long-term contract, and, in some instances, even over the span of a short-term contract. For instance, both the U.S. Postal Service and FedEx announced sizeable rate increases this month that seem more directed at commercial shipping, rather than shipping of personal items. Some analysts predict shipping costs could potentially increase as much as 15% to 20% over the next two years, if carrier rate increases and fuel surcharge increases are combined. While those predictions might be extreme, the fact that FedEx has itself stated that some of its rates will be increased by 5.9% on average effective this month suggests that there are factors at play in the carrier industry that warrant companies being mindful of the responsibility they agree to assume for freight costs both at the time a deal is closed and down the road.

Also keep in mind that if you agree to use a delivery term that places responsibility for freight costs on you for a specific transaction, you run the risk of creating an expectation on the part of the other contracting party that you will always use that delivery term for future deals. If that is not your intention, and you are not willing to be stuck with a less than ideal delivery term on all transactions going forward, from a customer-relations or supplier-relations perspective (whichever applies in your case), it may be wise to let the other contracting party know that you negotiate delivery terms on a case-by-case basis. Being locked into paying for freight costs, either due to contractual obligations or out of fear of upsetting a delicate relationship with a customer or supplier, can whittle away at your bottom line. So, before agreeing to compromise and adopt a delivery term that places freight costs on you, rather than the other contracting party, you should make sure you assess your long-term exposure due to major shifts in the shipping industry.

Federal Motor Carrier Safety Administration Proposes New Rule to Limit Hours of Service for Commercial Truck Drivers

In 2003, the U.S. Department of Transportation's Federal Motor Carrier Safety Administration (FMCSA) implemented its first significant change in decades to the hours-of-service (HOS) rule governing how many hours commercial truck drivers could spend on the road within a given period of time. That change is generally viewed as having been very successful in achieving the FMCSA's goal of reducing the number of traffic accidents involving commercial trucks, without having an adverse economic impact on the trucking industry.

In December of 2010, the FMSCA proposed a new HOS rule that would, among other things, reduce the maximum period of time a commercial truck driver can be on the road in a day from 11 hours to 10 hours. If a driver violates the rule, he or she would face civil penalties of up to $2,750 for each offense. Trucking companies that allow their drivers to violate the proposed rule's driving limits would face penalties of up to $11,000 for each offense.

The proposed rule has already met with bi-partisan opposition in Washington. The proposed reduction in driving time is premised on the idea that reducing the number of hours a driver is on the road will necessarily make the trucking industry safer. A number of trucking industry authorities argue that there is no scientific research to support the idea that a 10-hour driving window would be safer than an 11-hour window. Critics also point out that the distribution network in the United States is largely based on the use of a series of regional distribution centers that primarily operate within an area that allows for deliveries to be made by truck within one day. These critics fear that reducing the daily driving window by an hour would make it impossible to complete many of those deliveries in a single day, which would increase costs and reduce efficiency.

The FMSCA has left keeping the 11-hour driving window on the table as an option for its final rule, but has stated its current preference is to implement the change to the 10-hour window. If the change is implemented, it might lead to some initial disruptions and delays for companies that rely on commercial trucking as part of their operations, while the trucking industry adjusts. In the long run, it could also mean less efficient shipping.

Calendar of Events

April 14, 2011, Las Vegas, NV (In conjunction with IPC APEX EXPO)
Special Session: Contracting with the Customer: What the EMS Executive Needs to Know
This unique workshop presented by Jeffrey L. Roth and Allen L. Anderson of Fees & Burgess, P.C., addresses the specific issues EMS companies face while contracting. Participants will be led through the contracting lifecycle between an electronic manufacturing services (EMS) provider and its customer, starting with the initial engagement and signing of a nondisclosure agreement, through the bid process and formal contract negotiation, to resolution of disputes under the applicable contract(s).

If you would like more information , on these and additional seminars, please go to www.feesburgess.com

Seminars

FEES & BURGESS, P.C., is proud to offer Seminars/Webinars on the following topics. If you would like more information, on these and additional seminars, please contact us at

Seminars@feesburgess.com

A Recession Era Guide to Collecting on Construction Contracts

Conducting Effective Workplace Investigations

Construction Contracting

Contingent Employees and Labor Outsourcing

Diversity Training

Elements of an Electrical Manufacturing Services Contract

Employment Law Survival Training for Managers

Family Medical Leave Act

Hiring and Firing

Immigration Compliance

Incoterms ® 2010

Indemnity and Limitation of Liability Contract Clauses

International Contracting

Limiting Liability for Sexual Harassment

Managing Gender identity Issues in the Workplace

Negotiation and Resolution of Federal Contract Claims

Privacy in the Workplace

Reducing Employee Benefits Costs for Alabama Businesses

Reducing Risk in Purchasing Terms and Conditions

Reduction in Workforce Strategies

Retaliation and Whistleblowers

Uniform Commercial Code: Primer to Articles 1, 2, and 2A

Violence in the Workplace

Wage and Hour Issues/Fair Labor Standards Act

Americans with Disabilities Act

Managing Employee Use of Internet and E-mail in the Workplace

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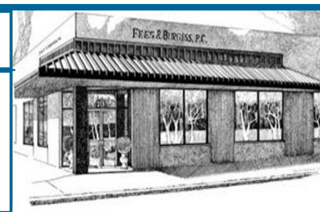

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FEES & BURGESS, P.C., provides speakers, training programs, seminars, and webcasts for various trade associations; business groups; and clients. For information regarding a program, please contact us at seminars@feesburgess.com.

NEWSLETTERS

FEES & BURGESS, P.C., also publishes *F&B Quarterly Bytes* focusing on multiple practice areas and *F&B HR Corner* focusing on human resource issues. To receive any of these e-newsletters, please e-mail us at newsletters@feesburgess.com with your contact information.

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