



# Firing the last shot: whose terms apply in a battle of the forms?

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Many businesses will be familiar with conducting business through contractual documents such as purchase orders, rather than a signed contract. This allows parties with commercial time constraints to deal with the sale/purchasing process more efficiently. However, if during negotiations both parties try to incorporate their own terms and conditions, it can be very difficult to know when a contract has been formed and what the terms of that contract actually are. This can create what is commonly known as a 'battle of the forms' dispute.

## Battle of the forms

A typical battle of the forms dispute might arise where a purchaser submits a purchase order to a seller with terms and conditions printed on the reverse. The seller might acknowledge the order with reference to its own terms and conditions. No contract is signed. If the goods supplied are defective, the purchaser might want to

bring a claim against the seller. Both parties may then look to their terms and conditions, believing that they have been incorporated into the contract, but whose terms apply?

Generally, if performance follows without further discussion, the battle of the forms is won by the party who fired the “last shot” i.e. the last party to put forward terms and conditions that were not overtly rejected by the recipient, providing that those terms and conditions were reasonably brought to their attention. Particular attention should be drawn to any unusual term.

## Terms and conditions “available on request”

Businesses should be careful when stating that such terms are “available on request”. In the case of *Transformers and Rectifiers Limited v Needs Limited* [2015] EWHC 269, it was held that, unless the terms and conditions are common for a particular industry, such as construction, a party should:

1. Give reasonable notice of the terms to the other party and make it clear that they will intend to rely on those terms.
2. At the very least, refer to those terms on the face of the contractual document (e.g. purchase order) and ideally where they can be found, so it is clear they will govern the contract.
3. Ideally send a copy of the terms to the other party and/or make them available to read, making it clear that they are on the only terms upon which the party is prepared to do business.

In this case, the seller simply stated that its terms were “available on request” but did not provide a copy when acknowledging a purchase order. It was held that this was not enough to bring the terms to the purchaser’s attention. It is therefore important to be clear about any intention to rely on those terms and ideally confirm that the other party has received a copy of them.

## Course of dealings

Businesses may be surprised to learn that the length of a commercial relationship may only be helpful in a battle of the forms dispute if there has been consistency in the supply of terms by one party to the other. If a party is ultimately not aware of the other’s terms and has not had the opportunity to read them, they may not be held to those terms, regardless of how long a commercial relationship has existed.

## Avoiding a battle of the forms

Many businesses will be alert to the possibility of a battle of the forms dispute, so it is often not possible to

guarantee success in every case. There is always a possibility that the other party delivers its own terms before performance or acceptance of the contract, firing the “last shot”. However, in addition to providing reasonable notice of your terms and creating an opportunity to read them, it is possible that careful drafting may help to avoid a dispute. Legal advice should be sought to ensure that terms and conditions are drafted to protect the interests of your business, as far as possible.

## Conclusion

In view of the clear risks, businesses should be mindful of ensuring that their terms and conditions are incorporated into a contract and should try to do so in a way which maintains good relationships. If a dispute does occur, parties should seek legal advice and representation as soon as possible, to protect their position and their business.