

Wireless Communications Provider Defeats Vendor's Claim for \$1 Million Arising From Blanket Purchase Order

By John J. D'Attomo

A federal appeals court in Chicago has ruled in favor of Nextel Communications, Inc. (Nextel) and rejected a vendor's claim that a "blanket purchase order" entitled the vendor to \$1 million in work from Nextel. The appellate decision provides useful guidance for wireless communication providers and other businesses that purchase goods or services using a blanket purchase order or similar contractual arrangement.

The Falcon Project

From 1997 to 2003, Nextel purchased marketing and product design services from Keck Garret & Associates, Inc. (KGA). In 2002, KGA provided product design services to Nextel in connection with its Condor Project. Nextel was interested in obtaining similar services for a new project slated for 2003, the Falcon Project. In late 2002, Nextel discussed the Falcon Project with KGA and advised KGA that Nextel "might" assign the project to KGA.

In early 2003, Nextel representatives again discussed the Falcon Project with KGA and e-mailed confidential information to KGA concerning the requirements for the anticipated project. In mid-January 2003, Nextel representatives advised KGA that another company was performing the industrial design work for the Falcon Project but that Nextel intended to use KGA for the creative packaging work on the Project. In late January 2003, Nextel issued a "blanket purchase order" to KGA in the amount of \$1 million for packaging work Nextel anticipated that KGA would perform in 2003. Ultimately, however, Nextel engaged another vendor to perform the packaging services and KGA received none of the work on the Falcon Project. Nextel made its purchasing decision based on business considerations and not issues related to KGA's performance.

KGA Files Suit Against Nextel

KGA filed suit against Nextel seeking to recover \$1 million for breach of contract contending that Nextel breached the blanket purchase order. According to KGA, the blanket

purchase order was Nextel's commitment to purchase \$1 million in services from KGA during 2003 and that Nextel failed to honor its commitment.

In response, Nextel argued that the blanket purchase order did not guarantee any amount of work to KGA. Rather, Nextel asserted that the \$1 million figure was merely an estimate of the dollar value of the packaging work Nextel expected to place with KGA during 2003. Nextel further asserted that the blanket purchase order set forth the terms that would govern any purchases Nextel made from KGA, but did not impose a duty to purchase from KGA.

The Court Rules In Favor Of Nextel

The court rejected KGA's claim, finding that no term or provision of the blanket purchase order guaranteed any amount of work to KGA. Likewise, the court found that no term or provision of the blanket purchase order required that KGA accept any work assignments from Nextel; KGA was free to accept work on other projects including projects for competitors of Nextel. To the extent Nextel assigned work to KGA during 2003 and to the extent KGA accepted that work assignment, KGA was required to conform its work to the terms of the blanket purchase order. The terms of the blanket purchase order also governed how KGA would be paid for the work performed. Thus, the court rejected the suggestion that the contract was lacking in enforceable duties or obligations such that the contract might be deemed "illusory."

The Use Of Blanket Purchase Orders And Similar Contractual Arrangements

Blanket purchase orders are often used to prequalify vendors and to expedite payment to vendors by eliminating the need to issue a purchase order for each individual project performed by the vendor. In the *Nextel* case, the blanket purchase order authorized Nextel representatives to assign work to KGA up to a total of \$1 million during the course of 2003 without having to seek internal authorization for additional purchase orders. KGA was thus prequalified to perform work for Nextel, although it was not promised any work from Nextel. In other litigated cases, the term "buyer's option contract" has been used to describe such a contractual arrangement where the purchaser has the option, but not the obligation, to purchase goods or services from a pre-qualified vendor.

A purchaser may seek to use a buyer's option contract or blanket purchase order where the purchaser requires flexibility with respect to the volume of goods or services it will purchase from a particular vendor. For example, a manufacturer may use a buyer's option contract where the manufacturer's demand for component parts from a vendor fluctuates based on factors outside the manufacturer's control. By using a buyer's option contract or blanket purchase order, the purchaser seeks to ensure a supply of the identified goods or services at specified prices without committing to purchase any fixed quantity of the goods or services.

Potential Legal Claims

In the *Nextel* case, KGA premised its claim for breach of contract on a purported breach of the express terms of the blanket purchase order. Even where the seller cannot demonstrate a breach of any express term of the contract documents, the seller might nonetheless assert a claim for breach of the duty of good faith and fair dealing. In such a case, the court must determine whether the parties exercised their discretion under the contract reasonably and in a manner consistent with the reasonable expectations of the parties. Where a claim for breach of the covenant of good faith and fair dealing is asserted, courts have found no breach where the purchaser presented legitimate business reasons for refusing to place orders with the vendor. The *Nextel* court did not appear to require any such showing noting only that Nextel's decision was based on business considerations. Although the *Nextel* case was decided under Delaware law, the court's analysis of the blanket purchase order was consistent with its analysis of similar contractual arrangements in other cases involving Illinois law¹ and could serve as precedent in still other jurisdictions as well.

For more information about the *Nextel* case, please contact John D'Attomo at (312) 569-1359 or John.Dattomo@dbr.com.

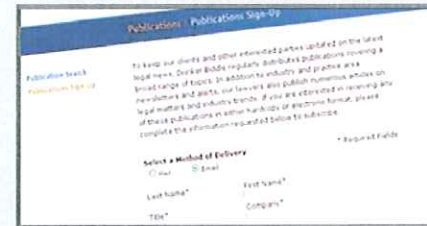
¹ See *Brooklyn Bagel Boys, Inc. v. Earthgrains Refrigerated Dough Products, Inc.*, 212 F.3d 373 (7th Cir. 2000); *In re Modern Dairy of Champaign, Inc.*, 171 F.3d 1106 (7th Cir. 1999).

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