Essay Question No. 3

Answer this question in booklet No. 3

Mike Builder is negotiating with Jenna Roofer to purchase custom roofing materials from Roofer for the mansion Builder is constructing. After running into Builder at the grocery store and discussing the project with him, Roofer emails Builder the following:

To: mbuilder@alaskanparadise.com
From: jenna@roofer.com
Re: Preliminary Proposal
Sent: 05/15/2003

Preliminary Proposal

May 15, 2003

Roofer can provide materials for the job in four to six weeks. Cost $20,000. Includes all custom slate blue roofing, subsurface insulation materials and Arctic Watershield® barrier for Builder's mansion. Offer is open for seven days. You must respond in writing.

/signed/ Jenna Roofer

Builder notices that the Proposal doesn't mention the type of subsurface insulation materials (when Builder and Roofer first talked in the grocery store, Builder mentioned that he wanted the subsurface insulation materials to be of high quality). He calls Roofer to ask, but gets her voicemail. Builder leaves a message:

"Hey Roofer, it's me," Builder says. "I got your email. There was something I was going to ask you, but now I can't remember what it was. Anyway, this sounds like a great price. I accept the offer. Talk to you soon." Roofer listens to Builder's message when she returns to the office.

A few days later, Builder is driving by Roofer's office when he remembers that Roofer's email didn't mention the quality of the subsurface insulation materials. He decides to stop in and ask. Roofer's office is closed for the lunch hour, so Builder leaves the following note in Roofer's mailbox:

Mike Builder * 83417 Paradise Place * Anchorage, Alaska 99507

May 22, 2003

Roofer:

I hope you got my message. I received your email and considered your Preliminary Proposal. I accept your offer to provide the roofing (custom natural blue slate) and other materials for $20,000, assuming you agree that the subsurface insulation materials that you're providing will be of the high quality that I mentioned when we first talked about this. We have a deal.

Mike

1. Explain whether the requirements for valid contract formation were met, and discuss the arguments for and against finding an enforceable contract between Builder and Roofer.

2. If Roofer had called Builder the day after sending her e-mail to revoke her proposal, would her revocation be effective? Why or why not?

3. The following facts apply to Question III only. Assume the contract is valid. Roofer delivers the roofing materials to Builder on June 11, 2003. Builder pays for the goods on July 21, 2003. Due to construction delays, Builder does not open the boxes of materials until April 1, 2004 and then realizes that the slate is green instead of blue. Though he feels like a fool, he is angry and calls Roofer to reject the goods. What arguments should Roofer make that Builder's rejection is not effective?

GRADER'S GUIDE

***** QUESTION NO. 3 *****

SUBJECT: CONTRACTS

I. Contract Formation (60%)

Under Alaska law, the following are required to form a valid contract: (1) an offer including all essential terms; (2) an unequivocal acceptance of those terms by the offeree; (3) consideration; and (4) intent to be bound by the contract. Young v. Hobbs, 916 P.2d 485, 488 (Alaska 1996). See also Ford v. Ford, 68 P.3d 1258 (Alaska 2003). Examinees should recognize that this offer is for a sale of goods, and is therefore covered by the UCC as codified by Alaska in AS 45.02.

A. Offer

AS 45.02 does not include a definition of an offer, and therefore, the common law must be consulted to resolve the question. Armco Steel Corp. v. Isaacson Structural Steel Co., 611 P.2d 507 (Alaska 1980). An "offer" is an expression by one party of an assent to certain terms. Government Employees Ins. Co. v. Graham-Gonzalez, 107 P.3d 279, 283 (Alaska 2005). The Restatement defines an offer as "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." Restatement (Second) of Contracts § 24 (1981).

Here, Roofer tells Builder that she will sell him roofing materials in exchange for $20,000. In her proposal, she describes the particular type of roofing and water barrier, and states that the cost of "subsurface insulation materials" are included in her offer price.

An agreement is unenforceable if its terms are not reasonably certain. Davis v. Dykman, 938 P.2d 1002, 1006 (Alaska 1997); Hall v. Add-Ventures, Ltd., 695 P.2d 1081 (Alaska 1985); Restatement (Second) of Contracts § 33 (1981). The facts are unclear concerning what constitutes "subsurface insulation materials" and indicates that there was confusion amongst at least one of the parties (Builder) as to what this item included. Some examinees may argue that the type of roofing, "custom slate blue," was also not reasonably certain.

Examinees may argue that Roofer's proposal was "preliminary," and therefore incapable of being accepted. "When a phrase in an agreement is differently understood by the contracting parties and the disputed phrase is sufficiently ambiguous to reasonably support the different understandings, no contract exists." Krossa v. All Alaskan Seafoods, Inc., 37 P.3d 411, 416 (Alaska 2001) (citations omitted). However, a contract is only ambiguous when, "taken as a whole, it is reasonably subject to differing interpretations." Id. (citing Williams v. Crawford, 982 P.2d 250, 253 (Alaska 1999)). The phrase "Preliminary

Proposal," when read with the rest of the email as a whole, does not indicate ambiguity. The terms of the proposal clearly indicate that it contemplates the possibility of acceptance by Builder. For example, the proposal states a term during which the "offer" will remain open, and specifies the required mode by which acceptance will be achieved.

The facts indicate that the Preliminary Proposal is an offer. However, there is no clear answer as to what the terms of the subsequent agreement would be. Examinees may argue that (a) there is a valid offer (b) whose terms are uncertain, and therefore (c) the resulting agreement is unenforceable. Equally, examinees may argue that (a) there is no valid offer because (b) the terms of the proposal are uncertain, and therefore (c) there is no agreement. Finally, credit should be given to examinees who make reasonable arguments that Builder's note constitutes a counter-offer that would be subject to acceptance by Roofer.

B. Acceptance

In order to form a valid contract in Alaska, a party's acceptance of an offer must be unequivocal and in exact compliance with the terms of the offer. Thrift Shop, Inc. v. Alaska Mut. Sav. Bank, 398 P.2d 657 (Alaska 1965). Under AS 45.02.206(a)(1), "[u]nless otherwise unambiguously indicated by the language or circumstances[,] an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances." When an offer for a sale of goods prescribes the only method of acceptance, acceptance of the offer must be achieved by utilizing that mode. Spenard Plumbing & Heating Co. v. Wright, 370 P.2d 519, 523 (Alaska 1962).

Here, Roofer's offer requires that acceptance be in writing. In response to Roofer's email, Builder calls her and leaves a message accepting the proposal. Builder's voicemail accepting the offer does not constitute valid acceptance. However, the offer was open for a period of seven days. Within that seven day period, Builder arguably accepted the proposal when he left the written and signed note in Roofer's mailbox.

Some examinees may argue that Builder's written response constitutes a rejection and counteroffer because the acceptance was contingent upon the subsurface insulation materials being of a particular quality. Under AS 45.02.207(a), a "written confirmation that 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 made conditional on assent to the additional or different terms." The facts are unclear as to whether the clarification of the type of subsurface insulation materials constitutes a different term or merely clarifies or confirms the existing term. Note that if the examinee concludes that Builder's voicemail constituted a counter-offer, that counter-offer nullifies Roofer's offer. The only fact indicating Roofer accepted a counter-offer from Builder is her delivery of the goods.

Examinees might argue that particular terms are too indefinite to become part of the contract. AS 45.02.204(c) states that "[e]ven though one or more terms are left open, a contract for sale does not fail for indefiniteness if the parties intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."

C. Consideration

Builder's agreement to pay Roofer $20,000 in exchange for Roofer providing certain materials constitutes valid consideration for their agreement.

D. Intent to be Bound

In order to form a valid contract, the parties thereto must objectively manifest an intent to be bound. Brady v. State, 965 P.2d 1, 8 (Alaska 1998); Zeman v. Lufthansa German Airlines, 699 P.2d 1274, 1281 (Alaska 1985); AS 45.02.204(a). Examinees should recognize that both Builder and Roofer manifest an intent to be bound, and should focus their analysis on the offer and acceptance of terms.

E. Statute of Frauds

Examinees may note that this contract falls under the Statute of Frauds. Pursuant to AS 45.02.201(a), a contract for the sale of goods for the price of $500 or more is not enforceable "unless there is a 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...." In Fleckenstein v. Faccio, 619 P.2d 1016 (Alaska 1980), the Court explained that the writing required by the Statute of Frauds need not be formal or complete, and that a "writing may be sufficient even though it is cryptic, abbreviated, and incomplete." Id. at 1020, 1022 n. 18 (citing Corbin, Corbin on Contracts § 498, at 683 (1950)).

Here, if the examinee finds that the terms of the memoranda are reasonably certain (discussed above), the memoranda exchanged between the parties appear to satisfy the Statute of Frauds. AS 45.01.201(40) defines "signed" as "a symbol executed or adopted by a party with a present intention to authenticate a writing," therefore it is likely that Builder's hand-signed note and Roofer's electronic signature are sufficient to satisfy the Statute of Frauds.

F. Parol Evidence

The terms of the Uniform Commercial Code in AS 45.02.202 provide the following direction with regard to the admission of parol evidence:

Terms with respect to which the confirmatory memoranda of the parties agree, or that are otherwise set out in a writing intended by the parties as a final expression of their agreement with respect to the terms included in the writing, may not be contradicted by evidence of a prior agreement or of a contemporaneous oral agreement, but may be explained or supplemented

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(2) by evidence of consistent additional terms unless the court finds the writing

was intended also as a complete and exclusive statement of the terms of the agreement.

Under Alaska law, parol evidence may be introduced to explain or supplement the writing through evidence of consistent additional terms, unless the court finds that the writing was intended as a complete and exclusive expression of the terms of the contract; no finding of ambiguity is necessary in order to permit the introduction of additional testimony. Braund, Inc. v. White, 486 P.2d 50, 55-56 (Alaska 1971).

In order to exclude parol evidence testimony regarding the inclusion of additional terms into the sale agreement, a trial court must make a specific finding either that (a) the parties intended the agreement to be a complete and exclusive statement of the terms of the contract, i.e. the contract is integrated, or (b) as a matter of law, the additional terms asserted are such that, if they had been agreed upon, "they certainly would have been included in the documents of sale." Id. at 56 (citing Uniform Commercial Code § 2-202, Official Cmt. 3; Crispin Co. v. Delaware Steel Co., 283 F.Supp. 574, 575 (E.D.Pa. 1968)).

The Alaska Supreme Court has opined:

> The parol evidence rule is implicated when one party seeks to introduce extrinsic evidence which varies or contradicts an integrated contract. Once the rule is triggered, the parties' reasonable expectations are determined by applying a three-step test. The first step is to determine whether the contract is integrated. The second step is to determine what the contract means. Determining the meaning of a contract is treated as a question of law for the court except where there is conflicting extrinsic evidence on which resolution of the contract's meaning depends.... If the language is susceptible to [two] asserted meanings, then interpreting the contract is a question of fact for the jury. Extrinsic evidence may always be received in resolving these first two inquiries. The third step is to determine whether the prior agreement conflicts with the integrated writing. Whether there is conflicting extrinsic evidence depends on whether the prior agreement is inconsistent with the integration. Inconsistency is defined as "the absence of reasonable harmony in terms of the language and respective obligations of the parties." ... While extrinsic evidence is important, nonetheless after the transaction has been shown in all its length and breadth, the words of an integrated agreement remain the most important evidence of intention. Froines v. Valdez Fisheries Dev. Assoc., Inc., 75 P.3d 83, 87 (Alaska 2003) (citations omitted).

If an examinee finds that the contract is not integrated, (s)he may argue that the conversation between Builder and Roofer at the grocery store constitutes an additional agreement that was made prior to or contemporaneously with the

written contract, and that evidence of additional terms within that conversation which are *consistent* with those contained in the written contract are admissible.

II. Revocation (20%)

Whether or not Roofer returned Builder's call and revoked her offer is of no incident. Roofer is a merchant – one who "deals in goods of the kind or otherwise by occupation holds oneself out as having knowledge or skill peculiar to the practices or goods involved in the transaction…." AS 45.02.104(a). An offer by a merchant to sell goods in a signed writing that by its own terms gives assurance that it will be held open for a period of time is not revocable, for lack of consideration, during the time stated. AS 45.02.205. Therefore, Roofer was unable to revoke her offer during the seven day period. While Builder's telephone call could not constitute a valid acceptance of the offer, his written and signed note was delivered within the seven day period during which the offer was irrevocable under the UCC.

III. Rejection/Acceptance (20%)

Builder's claim is based upon the fact that the goods were nonconforming (green rather than blue). Under AS 45.02.602, rejection of goods must be within a reasonable time after their delivery or tender, and a rejection is ineffective unless the buyer seasonably notifies the seller. Here, Roofer delivered the goods to Builder in June 2003. Builder did not inspect the goods upon delivery, and did not attempt to reject the goods until nearly 10 months later.

Roofer could properly respond that the goods at issue have been accepted by Builder. AS 45.02.606 states:

(a) Acceptance of goods occurs when the buyer,

(1) after a reasonable opportunity to inspect the goods, signifies to the seller that the goods are conforming or that the buyer will take or retain them in spite of the nonconformity;

(2) fails to make an effective rejection (AS 45.02.602), but this acceptance does not occur until the buyer has had a reasonable opportunity to inspect them[.]

In light of the above statute, the arguments are clear. Roofer can argue that Builder's payment signaled that he accepted the goods and considers them to be conforming, or has decided to retain them in spite of the nonconformity, in accordance with AS 45.02.606(a)(1). Alternatively, Roofer can argue that Builder failed to make an effective rejection under AS 45.02.602, and that this failure constituted acceptance of the goods because the 10 month period between delivery and attempted rejection was more than a reasonable period for inspection.