

MIRROR IMAGE DOCTRINE

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What happens when a response to an offer does not match the terms offered? In common law this mismatch between offer and acceptances negated contractual liability. *First Comm. Corp. v. United States*, 335 F.3d 1373, 1381 (Fed. Cir. 2003), citing *Iselin v. United States*, 271 U.S. 136, 139 (1926). Under the modern theory of offer and acceptance, which is embraced by the Uniform Commercial Code (“UCC”), A timely definite expression of acceptance operates as an acceptance “even if it states terms additional to or different from those offered or agreed upon and [t]he additional terms are to be construed as proposals for addition to the contract.” UCC § 2-207. The operation of the modern principle is demonstrated by *Two Rivers Corp. Center v. United States*, (Fed. Cl. No. 20-1811C, June 7, 2021).

Two Rivers leased the Department of Veterans Affairs (“VA”) 4,914 sq. feet of office space in Nashville, TN. Box 26 of the Proposed Lease Terms and Conditions was titled “Commissions” and the handwritten notation “6%” and an adjoining box provided that commission payments would be made “50% at lease award” and 50% at lease occupancy. Box 26 did not identify the party responsible for payment of the commission, and furthermore the box required that a “Commission Agreement” be attached, but no such agreement was included with the lease proposal. The lease itself, which was executed two months later, included no language regarding the payment of a brokerage commission except incorporation of the Lease Proposal. The VA did not pay a commission, and Two Rivers filed a claim for the commission, which it said the VA had failed to pay and thereby breached the lease.

Both parties agreed that a lease contract existed, and in all respects except one, the parties agreed that the Lease agreement was fulfilled. At issue was simply whether the VA had a duty to pay the brokerage commission. The Court noted that there was a requirement in the Lease proposal that if a commission was applicable, the parties were required to attach a “Commission Agreement.” The parties did not do so. The court held that it was not the role of the court to add additional language to support a conclusion urged by a disappointed party to an otherwise effective contract. The court held that under the “mirror image” rule, the failure of the parties to execute the required Commission Agreement or otherwise incorporate a provision for payment of a commission unequivocally established the lack of mutuality regarding this proposed term—there were no facts within the Complaint or the exhibits which manifested the VA’s agreement to reimburse or pay a brokerage commission. Applying the “mirror image rule” the Court determined that the commission was not incorporated into the resulting lease contract. Where a response to an offer did not match the terms offered, there was no acceptance and no formation of a contract *as to that term*. Two Rivers was out of luck, and got nothing.

Takeaway: Because Two Rivers’ complaint failed to identify a VA obligation to pay a commission, the Court dismissed the case. Don’t ever assume that all terms and conditions in your proposal were accepted by the government unless they are (1) explicitly accepted and reproduced in the final contract for your signature; or (2) there is a statement that “all terms and conditions in the proposal of X dated Y are accepted by the government in this contract.”

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