

Drafting the Contract

Contracts usually include a variety of terms and conditions often referred to as 'boilerplate' or 'standard' terms and conditions. While many contracts produced by agencies include similar terms and conditions, historically there have been no generally accepted terms and conditions for use by all state agencies. This chapter of the Guide provides generally accepted terms and conditions for use by all state agencies. Agencies should keep in mind that these are recommended terms and conditions and unless otherwise specified, may be modified to meet the agency's need.

A particular business entity or agency that repetitively contracts for the same or similar goods or services may develop a contract with terms that are standard for a specific transaction. These standard terms are usually the product of years of experience and are typically designed to favor the party drafting the contract.

Except for contract terms that are contrary to public policy that may be void, voidable or severable from a contract, the types of contract terms that may be included in a contract are only limited by the creativity of the drafter. The appropriate terms to include in a contract are the terms that fully describe the actual agreement of the parties. There are types of provisions that are typically included in contracts, including but not limited to:

1. Administrative provisions;
2. Financial provisions;
3. Provisions that allocate risk;
4. The statement of work;
5. Provisions relating to the contract term, termination and dispute resolution; and
6. Provisions that relate to rights and ownership of work product and intellectual property.

Planning for the Contract

Just like other contract management processes, an agency should plan for drafting the contract. A common practice is to include a draft of the standard agency contract in the solicitation document. This allows a potential contractor to make an offer with knowledge of the proposed contractual terms and conditions. As a practical matter, during the RFP process, it may be difficult to prepare a draft contract with a detailed statement of work due to the potential for negotiation. Be sure to plan for adequate time to prepare the final contract.

The planning effort could begin by collecting and reviewing similar contracts used by other agencies. Do not automatically adopt terms and conditions from another contract without a thorough and independent review of how the terms and condition relate to the current procurement. Studying risks, contracting objectives, assumptions and constraints in other contracts may be helpful. Another method to plan for a contract is to prepare an outline containing headings for the major terms, conditions and provisions. This makes it easier to

group related terms and conditions. An outline will also illustrate gaps in the structure of the contract. Finally, allow adequate time for an attorney to address potential legal issues.

Form of the Contract

Evidence of an agreement or a contract can be documented in different formats, including but not limited to a “four-corner contract”, a purchase order, or an exchange of correspondence. The term “four-corner” contract is used to describe a single document that includes all of the terms and conditions within the four-corners of a single document. Purchase orders can also be considered a contract. The contractor delivers an offer, in a form requested by the agency, and the agency indicates acceptance of the offer by issuing a purchase order. The documents that comprise the offer and acceptance are the evidence of the agreement.

Each of the forms of contracts described herein has advantages and disadvantages. The determination of which format is appropriate should be based on an assessment of the risks involving contract construction or interpretation.

A ‘four-corner’ contract offers the greatest opportunity to avoid conflicting provisions, because all of the provisions are contained in one document. Contract management is sometimes easier when all of the provisions regarding the duties, obligations and responsibilities of each party can be logically organized and easily found. On the other hand, ‘four-corner’ contracts require more time to plan and prepare. Notwithstanding the additional time requirement in a major or complex transaction, a ‘four-corner’ contract is the best format to clearly document an agreement.

A purchase order uses a layered approach, i.e., the purchase order usually relies on a number of documents that in combination, comprise the contract. An agency may publish a solicitation document that includes product specifications, contractor qualifications and other terms and conditions. The contractor’s response may condition the offer on terms and conditions that are different from or in conflict with the solicitation document. When the agency uses a purchase order, the contractor’s terms and conditions should not become the basis of the agreement.^{xlvi}

Despite the potential for conflicting or additional terms, when used properly, a purchase order is quick, efficient and rarely has problems. When using a purchase order as evidence of a contract, an agency should insure the inclusion of terms the agency wants rather than blindly accepting terms the contractor proposes. All final terms and conditions that vary from either the offer or the acceptance must be contained in a written document signed by both parties.

ⁱ Texas Business & Commerce Code §2.2.07 Sales, may be applicable in certain types of transaction.

§2.207. Additional Terms in Acceptance or Confirmation

- (a) A definite and seasonable expression of acceptance or a written confirmation which 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 expressly made conditional on assent to the additional or different terms.
- (b) The additional terms are to be construed as proposal for addition to the contract. Between merchants such terms become part of the contract unless:
 - a. The offer expressly limits acceptance to the terms of the offer;
 - b. They materially alter it; or
 - c. Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

- (c) Conduct by both parties which recognized the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case, the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provision of this title.