



19 PRACTICAL TIPS FOR NEGOTIATING & DRAFTING CONTRACTS

This report contains practical tips for you to consider when negotiating and documenting contracts. For basic information on contract law (offer, acceptance and consideration), look at my special report *How to Write Your Own Contracts*. For more information on drafting contracts, look at my special report *13 Standard Provisions to Include in Your Contracts*.

Caution: *You should seek legal counsel on all contracts that you consider to be large, complicated or important to your business. You may also want to employ a lawyer to draft forms for contracts you frequently make, such as purchase orders, sales documents, employment contracts, etc.*

Offer

Use confirming letters

This helps to avoid questions as to whether there has been an offer and acceptance. This is an opportunity to document your conditions and understandings with other parties. You can put the items you discussed in written terms most favorable to your position. Confirming letters can eliminate questions as to offer and acceptance and can identify any misunderstandings between the parties at an early stage.

Be aware that the requirements for an offer are imprecise

You can form a contract merely by

communicating a proposal in a business situation. If the proposal is accepted by the other party, it could create a binding legal obligation.

Requests for bids are not offers

Requests for bids are solicitations of offers that can be accepted by the requesting party.

Know when contract is binding

When you negotiate an agreement, make clear from the beginning when you intend that the contract be binding. You can wait until a formal document is signed or you can plan to agree at that time and then memorialize the agreement in writing later.

Consider each material term

Since courts can supply missing terms in a dispute, it is important that you consider each material term of your contracts so that you can properly negotiate and document those terms.

Specify the length of offers

When you make offers, you can specify the length of time the offer is valid if you desire.

Specify the manner of acceptance

When you make offers, you can also specify the method by which the other party must communicate acceptance if that is important to you.

Revoke offers in writing

If you revoke an offer, it is best to

use a letter, fax or email confirming revocation of the offer in order to eliminate any ambiguity.

Acceptance

Transmit acceptances carefully

When you are in doubt as to how to properly communicate an acceptance to an offeror, use the same means of transmittal as used by the offeror.

Acceptance must match offer

If you receive a favorable offer which you are afraid of possibly losing, your acceptance should not vary the terms in any way. Any variation may turn your acceptance into a counteroffer which will give the original offeror an opportunity to reject and cause you to lose the contract.



Alan Thayer is an Oregon business attorney with over 20 years experience representing businesses huge and small. He welcomes your questions and comments. Call 541-345-2325 or email Alan at athayer@ptlaw.com.

Consideration

Document the consideration

State the consideration to each party in your written contracts and confirming letters. Statements of consideration in contracts create a rebuttable presumption that consideration exists.

No consideration if right to cancel

Lack of consideration problems can occur when one party has an absolute right to cancel the agreement.

No consideration if performance is optional

Another consideration problem is when one party's duty is subject to a condition which is within that party's control. The party's performance then becomes optional and a court can invalidate the agreement.

Beware of alternate consideration

If one of the parties to an agreement reserves a choice of alternative performances, the contract can be deemed to be illusory. Each of the alternative performances must be sufficient consideration if that performance alone had been bargained for.

Basic Terms

Always commit agreements to writing

Put your contracts in writing to clearly establish the agreement between the parties.

Address important terms

Consider the following terms when discussing, negotiating and documenting contracts:

- Parties.

- Subject matter.
- Consideration - price or performance.
- Payment terms.
- Conditions which trigger performance.
- Performance standards.
- Security for performance.
- Any special obligations or responsibilities of the parties.
- Representations & warranties.
- Duration of the agreement.
- Required documentation.
- What constitutes breach.
- Remedies for breach.
- Allocation of risk of loss.
- Responsibility for insurance.
- Appropriate "boilerplate" provisions (see the *13 Standard Provisions to Include in Your Contracts* special report).

Statute of Frauds

Some contracts must be in writing

Most states have adopted statutes requiring that certain types of contracts be in writing. Lawmakers decided there is a possibility of fraud and perjury if certain contracts are not in writing. These statutes are typically called the "Statute of Frauds."

Oral agreements may not be enforceable

Failure to comply with the Statute of Frauds creates obligations that are void or voidable. The other party does not have to perform the agreement if they do not want to.

Know the agreements that must be in writing

Contracts that are commonly required to be in writing include:

- (1) Agreements that will take longer than one year to be performed.
- (2) Suretyship agreements (a promise to guaranty the debt of another).
- (3) Promises by a personal representative to personally pay estate debts.
- (4) Promises made in consideration of marriage.
- (5) Contracts affecting real property.
- (6) Agreements employing an agent or broker to sell or purchase real property.
- (7) Agreements to lend money, forbear from collecting a debt, modify loan terms or release a guarantor or co-signer.
- (8) Community property agreements (community property states such as CA or WA - not OR).
- (9) Contracts for the sale of goods over \$500.
- (10) Contracts for the sale of securities.
- (11) Contracts for the sale of personal property over \$5,000, with certain exceptions.
- (12) Agreements modifying contracts covered by the statute.

Don't take a chance when you are unsure whether a particular contract is within the Statute of Frauds. Put the contract in writing.