



# HOW TO WRITE YOUR OWN CONTRACTS

You enter into contracts each day. They range from large documents drafted by lawyers to everyday forms, purchase orders, acknowledgments and oral understandings. Each of these agreements is a contract.

It is not realistic for you to hire a lawyer to review all of your contracts. The expense involved and the time it would take makes such a review impractical. So, like all business people, you probably enter into contracts without the benefit of counsel.

Since business people enter into contracts on their own, this special report discusses basic contract law principles and offers practical suggestions for negotiating and drafting general 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.*

## Contracts

You know a contract is an agreement between two or more people creating an obligation to do or not to do one or more things. There must be competent parties, an identified subject matter, legal consideration and mutual agreement.

The key to contract formation is mutual agreement. The parties previously agreed silence

must agree to the same terms and signal their agreement to the other parties. This agreement is usually made by the process of “offer” and “acceptance.”

## Offer

An offer is a proposal by one party to another to do something or pay some amount in exchange for a return promise, act or payment.

The person making the offer must (1) show a present intent to enter into a contract, (2) make a definite offer and (3) communicate the offer to the other parties.

**(1) Intent.** Intent to contract is determined by “objective intent.” That is, would a reasonable person in the same position conclude that the other party had made a commitment? The person’s “actual” intent is not relevant. Intent is determined by the person’s words and actions, not their thoughts.

**(2) Definite Offer.** If the parties intend to make a contract, the terms of that contract must be so definite that the parties’ promises and respective performances are reasonably certain.

The essential terms of an agreement must be spelled out. If there is agreement on most important or “material” terms, “reasonable” terms can sometimes be implied for any missing terms. For example, if no time for performance is stated, a court can require performance within a “reasonable” time. Courts will not will result in a contract.

imply terms, however, when the parties have only “agreed to agree” on an essential term in the future.

**(3) Communication.** Disputes do not generally arise as to whether an offer was communicated to the other party.

## Acceptance

To accept an offer, the person to whom the offer was made communicates their acceptance to the person that made the offer (offeror) in the manner specified by the offeror. For example, an offer can require that it be accepted by certified mail.

If the method of acceptance is not specified, then acceptance can be communicated by any reasonable method. A method of communicating acceptance is reasonable if it is the method the offeror used to communicate the offer or if it is a method customarily used in similar transactions.

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Generally, an offer cannot turn silence into acceptance unless the

If an “acceptance” varies from the terms of the offer, then it generally operates as a counteroffer that rejects the original offer. A conditional or qualified acceptance is also a counteroffer. When there is a counteroffer, the person that made the original offer must accept the counteroffer before there is a contract.

### **Consideration**

A contractual promise must be supported by “consideration” in order to be enforceable. Consideration is the benefit to

be received in exchange for entering into a contract.

Each party obligated under a contract must receive consideration in order for their contractual duties to be enforceable. The consideration received may be money, an act, a promise to refrain from action or some change in a legal relationship.

Modifications to existing contracts must also be supported by new consideration. Lack of consideration problems can occur when (1) an act or

forbearance has already occurred, (2) there is a pre-existing duty to perform a promise, or (3) performance of the promise is optional.

The law looks at the legal sufficiency of the consideration, not its economic inadequacy. However, if there is only token consideration, economic inadequacy can be an indication of fraud, duress or “unconscionability” (so one-sided as to oppress or unfairly surprise).