

Strafford

---

*Presenting a live 90-minute webinar with interactive Q&A*

# Drafting Standard Forms for the Purchase of Goods From Suppliers: RFQs, Quotes, Purchase Orders, Long-Term Agreements

Minimizing Disputes Between Buyers and Suppliers With Carefully Drafted Terms and Conditions of Purchase

---

TUESDAY, JUNE 20, 2017

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

---

Today's faculty features:

Edward J. Momkus, Member, **Momkus McCluskey**, Lisle, Ill.

Darrell W. Pierce, Member, **Dykema Gossett**, Ann Arbor, Mich.

---

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 10.**

## SAMPLE CONTRACT LANGUAGE FROM THE AUTOMOTIVE INDUSTRY

*The following sample language is typical in the industry if not optimal for all situations. It is not provided as legal advice, or as a sample of best practices, which can vary by company and product.*

### **I. Contract Formation; Battle of the Forms; Supercession of Prior Agreements**

Sample 1: Each purchase order or purchase order revision issued by Buyer (“**Order**”) is an offer to the seller identified on the Order (the “**Seller**”) for the purchase of goods and/or services (collectively, “**Supplies**”) and includes and is governed by these Terms and Conditions of Purchase, together with any applicable Country Supplement (collectively, “**Terms**”). When accepted, the Order supersedes all prior agreements, purchase orders, quotations, proposals and other communications regarding the Supplies covered by the Order, except that a prior agreement signed by an authorized representative of Buyer (an “**Agreement**”, such as an award letter, Statement of Work or Non-Disclosure Agreement (but not prior purchase orders for the same parts and vehicle program)) will continue to apply. Seller accepts the Order, including these Terms, and forms a contract by doing any of the following: (a) commencing any work under the Order; (b) accepting the Order in writing; or (c) any other conduct that recognizes the existence of a contract with respect to the subject matter of the Order. The Order is limited to and conditional upon Seller’s acceptance of these Terms exclusively. The Order does not constitute an acceptance of any offer or proposal made by Seller. Any reference in the Order to any offer or proposal made by Seller is solely to incorporate the description or specifications of Supplies in the prior proposal, but only to the extent that the description or specifications do not conflict with the description and specifications in the Order. Any additional or different terms proposed by Seller, whether in Seller’s quotation, acknowledgement, invoice or otherwise, are unacceptable to Buyer, are expressly rejected by Buyer, and will not become part of the Order, but shall not operate as a rejection of this Order if Seller accepts Buyer’s offer by commencement of work, shipment of the Supplies, or by other means acceptable to Buyer, in which case this Order shall be deemed accepted by Seller without any additional or different terms or variations whatsoever. Any modification of these Terms must be expressly stated in the Order.

Unless otherwise expressly stated in the Order or an Agreement, if no other quantity is stated on the face of the Order or if the quantity is blank or states the quantity as zero, “blanket,” “see release,” “as scheduled,” “as directed,” “subject to Buyer’s production releases” or similar terms, then Seller will supply Buyer’s requirements for Supplies in such quantities as identified by Buyer as firm orders in material authorization releases, manifests, broadcasts or similar releases (“**Material Releases**”) that are transmitted to Seller during the term of the Order, and Seller will supply all such Supplies on such dates and times, at the price and on the other terms specified in the Order.

Sample 2: Supplier agrees to sell and deliver to Buyer the goods or perform services described on a purchase order issued by Buyer (the “**Order**”) in accordance with these Terms,

and when applicable, any written requirements, specifications and standards for materials, equipment, systems, workmanship, and services made applicable to the Order by Buyer ("*Specifications*"). The Order, these Terms and, if applicable, the Specifications, taken together, cancel and supersede all prior or contemporaneous negotiations, agreements, and information provided with respect to the goods or services to be provided pursuant to the Order, including prior purchase orders, quotations, and proposals. The Specifications (if applicable), these Terms and the Order shall be referred to collectively as the "*Contract Documents*". The Order constitutes Buyer's offer to Supplier and is not binding on Buyer until accepted by Supplier. Supplier shall have accepted the Order upon the earlier to occur of (a) Supplier's acknowledgement in writing of the Order which shall include any electronic communication, or (b) the acceptance by Supplier of any initial payment or deposit associated with the Order, or (c) Supplier performs any work or provides any services under the Order, or (d) any other conduct of Supplier that recognizes the existence of a contract with respect to the subject matter of the Order. UNDER NO CIRCUMSTANCES SHALL THE SPECIFICATIONS OR ORDER INCLUDE ANY TERMS AND CONDITIONS PROPOSED BY SUPPLIER ("*SUPPLIER TERMS*"), whether included on a Supplier invoice, written acceptance of an order, response to a proposal, request or otherwise, whether tendered before or after the Specifications or Order, and whether Supplier terms contain any terms additional to, or different from the Terms. ANY AND ALL SUPPLIER TERMS ARE HEREBY REJECTED AND WILL NOT BECOME PART OF THE AGREEMENT BETWEEN THE PARTIES.

## II. Change Procedure

Sample 1: Except as described in Section 1, the Order, together with the attachments, exhibits, supplements or other terms of Buyer specifically referenced therein, constitutes the entire agreement between Seller and Buyer with respect to the matters contained in the Order. The Order may only be modified (1) by a written amendment executed by authorized representatives of each party or, (2) for changes within the scope of Section 9, by a purchase order amendment issued by Buyer. (b) Buyer may modify purchase order terms and conditions from time to time by posting revised purchase order terms and conditions to Buyer's internet website (or such other website as may be directed through links available on such website) as specified on the face of this Order ("Buyer's Website") at http: \_\_\_\_\_, prior to the date when any modified terms and conditions become effective. Such revised purchase order terms and conditions shall apply to all purchase order revisions/amendments and new Orders issued on or after the effective date thereof. Seller shall be responsible to review Buyer's Website periodically.

Sample 2: Buyer may propose changes to the Terms by providing Supplier thirty (30) days' prior notice of the proposed change(s), which notice may be given by posting such proposed change(s) to Buyer's Website ("*Website Notices*"). Supplier agrees that it will monitor Buyer's Website for Website Notices. Change(s) proposed by Buyer will become effective, and the Parties agree to be bound by such changes, on the date identified in Website Notices unless Buyer's vice president of purchasing receives Supplier's written objection to the proposed

change(s) prior to effectiveness which specifies in detail the reason for the objection to the proposed change(s).

Sample 3: See Award Letter below.

### **III. Award Letter Incorporating Website Terms, Contract Formation and Change Procedure**

Dear Prospective Supplier:

Thank you for your interest in becoming a XXX supplier. XXX's goal is to have a mutually beneficial relationship with our suppliers; and we have found that clear communication is critical to achieving that goal. Accordingly, this letter will inform you of the commitments you must make in order to become a XXX supplier and, if you choose to proceed, will confirm your understanding of, and agreement to, such commitments.

General performance requirements and standards are applicable to all of our suppliers while other requirements and standards are applicable only to a specific category of our suppliers. Your category is identified above on the subject line. You are required to follow our standard terms and conditions and to meet our Supplier General Performance Requirements and plant specific objectives for your category.

Supplier information can be found on the XXX web site: [www.XXX.com](http://www.XXX.com). All XXX suppliers are required to read, understand and follow each and every term, condition, requirement and standard applicable to them or their products, including those set forth on our website ("**Terms**"). All XXX suppliers are required to be bound by our standard Terms and Conditions (the "**Standard T&C**"). In addition, you are required to be bound by the XXX Supplier General Performance Requirements applicable to your Category (set forth above) that are also found on such website. Please carefully review these materials.

[insert links]

**YOUR EXECUTION AND RETURN OF A COUNTERPART OF THIS LETTER CONSTITUTES YOUR AGREEMENT TO SUCH TERMS**, as set forth on our website at our opening of business immediately preceding such execution. Any proposed addition or change to such Terms is hereby rejected and you agree it cannot and will not be a part of our contract.

To the extent that any of such Terms may conflict with one another, Terms set forth in this letter shall prevail over all others, and Terms applicable to your Category shall prevail over inconsistent Terms of general applicability.

In order to be approved as a XXX supplier, please return the following documents (included as attachments to this letter) along with an executed counterpart to this letter:

[insert list]

Upon our receipt and approval of the foregoing, we will select the products or services for which you will serve as a supplier and will notify you of such approval and selection. Upon such notification we will have a binding agreement consisting of the Terms found in this letter, in our Standard T&C, in the XXX Supplier General Performance Requirements applicable to your Category and in any purchase orders and releases issued thereunder. Such Terms include all elements of our agreement with respect to such products or services, and will remain in full force and effect unless and until modified by a writing signed by the undersigned, XXX's President or any XXX Vice President (a "**XXX Authorized Person**"), or until changed in accordance with the following procedure: XXX may propose changes to Terms by providing you with thirty (30) days' prior notice of the proposed change(s), which notice may be given by posting such proposed change(s) to XXX's website (you agree to monitor the website for such notices), and such proposed change(s) will become effective as and when provided in the notice unless a XXX Authorized Person receives your prior written objection to the proposed change(s). If you so object, the proposed change(s) will not become part of our contract, but if and to the extent the rejected proposed change(s) are imposed by XXX's customer and XXX is required to accept such change(s) in order to remain in compliance under its contract with such customer, XXX may terminate its contract(s) with you that would have been affected by the proposed change(s) upon [reasonable / \_\_\_ days' notice].

#### Alternate #1

Our agreement will remain in effect for an indefinite period of time. While XXX is not bound to order or to buy any products or services from you unless, and then only to the extent, it issues a purchase order to you, and you are not bound to produce or sell until you accept such order, we mutually agree that each and every such purchase order and the contract resulting therefrom will be subject to the Terms. [Once such a purchase order is issued and accepted, you agree to accept future purchase orders for the same products (and services, if applicable) at the same price(s) in quantities not to exceed the lesser of the quantities ordered since the date hereof and the quantities ordered in the [six (6)] months preceding the receipt by a XXX Responsible Person of your written notice that you will not continue to accept purchase orders for such products (or services) on then-current terms.]

Generally, suppliers should receive hard copy purchase orders from XXX for authorization to perform services or goods. Purchase order must be specifically identified as such and are not to be implied notwithstanding communications regarding estimates, expectations and the like. [Any purchase order we issue with "9999999.999" as the quantity term indicates that the purchase order is for our requirements for the term specified in such purchase order.]

#### Alternate #2

THIS IS A REQUIREMENTS CONTRACT. Any purchase order we issue with "9999999.999" as the quantity term indicates that the purchase order is for our requirements for

the term specified in such purchase order, or if no such term is specified, for the term set forth herein.

WE WILL TAKE AND PURCHASE AND YOU WILL DELIVER AND SELL [ALL / \_\_\_\_%] OF OUR REQUIREMENTS FOR THE FOLLOWING PRODUCTS AT THE FOLLOWING PRICES [FOR A TERM OF \_\_\_\_\_, BEGINNING ON \_\_\_\_\_, 20\_\_, AND ENDING ON \_\_\_\_\_, 20\_\_ / TO THE EXTENT XXX REQUIRES SUCH PRODUCTS TO MEET OUR OBLIGATIONS UNDER \_\_\_\_\_]:

[LIST PRODUCTS AND PRICES]

You understand that prices are fixed under this agreement and will not be adjusted for economic factors (including, without limitation, increases in raw materials costs, costs of component parts, labor costs, overhead, taxes, etc.). You agree that increased costs are foreseeable, even if not presently anticipated or planned for, and you understand that you bear the risk of increased costs. However, if unforeseeable market fluctuations in raw materials costs in the nature of a “force majeure” event occur, you will not seek termination of our agreement but we will negotiate price adjustments in good faith to accommodate the unforeseeable fluctuations. We understand that we are bound to take our requirements from you even if competing suppliers offer us better prices. [However, you agree to re-negotiate prices as necessary to remain competitive with the pricing of other qualified suppliers, or potential suppliers, generally. You understand that this requirement is typical in the auto industry, where suppliers are expected to remain competitive and to actively seek and a pass along cost savings.]

By signing and returning this letter you are acknowledging and accepting XXX’s supplier requirements and entering into a binding proposal. You agree that no oral promise or representation has been made to you to induced you to enter into this letter agreement.

Sincerely,

Purchasing Manager

Accepted

[SUPPLIER]

By: \_\_\_\_\_ Date: \_\_\_\_\_

Title: \_\_\_\_\_

#### **IV. Product Liability and Recall; Indemnification**

Sample 1: *Indemnification.* (a) To the fullest extent permitted by law, (i) Seller hereby assumes the entire, sole responsibility for any injury to person, including death, or damage to property of any kind or nature caused by, resulting from or in connection with the furnishing of

Supplies by Seller, its subcontractors, officers, agents or employees; (ii) Buyer shall not be responsible for any injury to person (including death) or damage to property resulting from Seller's possession, use, misuse or failure of any Buyer's Property or other property furnished to Seller by Buyer, and the use of any such property by Seller shall constitute acceptance by Seller of all responsibility for any claims for such injury or damage, and (iii) Seller will defend, indemnify and hold harmless Buyer, Customers, and dealers and users of the products sold by Buyer (or the vehicles in which they are incorporated) and all of their respective agents, customers, invitees, subsidiaries, affiliates, successors and assigns, against all damages, losses, claims, liabilities and expenses (including reasonable attorneys' and other professional fees, settlements and judgments) arising out of or resulting from any defective Supplies, or from any negligent or wrongful act or omission of Seller or Seller's agents, employees or subcontractors, or any breach or failure by Seller to comply with any of Seller's representations or other terms and conditions of an Order (including any part of these Terms) – including without limitation the cost of recall campaigns, Customer field service actions or other corrective service actions that, in Buyer's or Customer's reasonable judgment, are required because of nonconformities in some or all of the Supplies provided by Seller hereunder, and including without limitation interim set-offs or charges (such as interim field service action cost recovery debits) by Customers attributable to Supplies but subject to adjustment based on final determination of whether and to what extent the damages, losses, claims, liabilities and expenses were attributable to defects or other failures of Supplies or Seller to comply with its obligations under one or more Orders. Seller's obligation to defend and indemnify under this Section will apply regardless of whether the claim arises in tort, negligence, contract, warranty, strict liability or otherwise except for claims that arise as a result of the sole negligence of Buyer. Buyer has the right to be represented by and actively participate through its own counsel in the defense and resolution of any indemnification matters, at Seller's expense. The indemnification obligations of Seller set forth in this Agreement, including this Section, are independent of and in addition to any insurance and warranty obligations of Seller. (b) If Seller performs any work on Buyer's or Customer's premises or utilizes the property of Buyer or Customer, whether on or off Buyer's or Customer's premises: (i) Seller will examine the premises to determine whether they are safe for the requested work and will advise Buyer promptly of any situation it deems to be unsafe; (ii) Seller's employees, contractors, and agents will comply with all laws and regulations that apply to the premises and may be removed from Buyer's premises at Buyer's discretion; (iii) Seller's employees, contractors, and agents will not possess, use, sell, transfer or be under the influence of alcohol or unauthorized, illegal, or controlled drugs or substances on the premises; and (iv) to the fullest extent permitted by law, Seller will indemnify and hold Buyer and Customer, and their respective agents, successors and assigns, harmless from and against any liability, claims, demands or expenses (including reasonable attorneys' and other professional fees, settlements and judgments) for damages to the property of or personal injuries (including death) to Buyer, Customers, their respective employees or agents, or any other person or entity to the extent arising from or in connection with Seller's work on the premises or Seller's use of Buyer's or Customer's property, except for any liability, claim or demand arising out of the sole negligence of Buyer.

Sample 2: Supplier will defend, indemnify, and hold Buyer and its affiliates and subsidiaries, including their respective employees, officers, directors, agents or representatives and Buyer's customers and their affiliates and subsidiaries, including their respective employees, officers, directors, agents or representatives who distribute, resell, or use the goods or services provided by Supplier harmless against all claims, suits, costs, actions or proceedings ("**Claims**") and pay (i) all liabilities, losses, damages (including without limitation judgments, amounts paid in settlement and other recoveries), (ii) fees and expenses (including without limitation fees of counsel and experts) and (iii) other costs (collectively, "**Expenses**") in connection with any breach or nonperformance by Supplier of the Order, or for injury or death of any person and damage or loss of any property allegedly or actually resulting from or arising out of any act, omission or negligent work of Supplier or its employees, agents, or subcontractors in connection with performing the Order, either on Buyer or its customer's property or in the course of their employment (including without limitation, Expenses arising out of, or in connection with, vehicle recall and customer satisfaction campaigns). Buyer has the right to choose and be represented by and actively participate through its own counsel in the defense and resolution of any indemnification matters, at Supplier's expense. The indemnification obligations of Supplier set forth in these Terms, including this Section, are independent of and in addition to any insurance and warranty obligations of Supplier.