



Terms and Conditions Matrix: *Reading the Fine Print*



The Commercial Terms and Conditions Matrix is a useful resource to help better understand the legal meanings and potential risks such clauses can have on your business. This matrix is designed to be a reference tool for managers to present and discuss commonly found, and potentially harmful, terms and conditions to their employees. Use the matrix to establish your own terms and conditions educational program so your personnel are more aware of the clauses in purchase orders, contracts, RFQs, RFPs, etc.

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This Commercial Terms and Conditions Matrix and accompanying materials are designed to provide practical and useful information on the subject matter covered. The function of these materials is to serve as an educational and reference resource. They are provided with the understanding that neither the National Association of Electrical Distributors, Inc., the NAED Education & Research Foundation, Inc. nor any of their affiliates are engaged in rendering legal, accounting, risk management, insurance or other professional services. If legal advice or other expert or professional assistance is required, then the services of a competent professional should be sought.

Term in Contract	Legal Definition	Typical Distributor Assumptions	What it Actually Means	What is the Risk?
Acceptance of Order	Acceptance occurs when either material is shipped or when the acceptance copy is signed and returned	Occurs when we confirm we are okay with the order.	Acceptance carries with it all the terms and conditons, regardless of whether we are finished changing them or not.	We represent that we are willing to perform as the contract states, just by shipping or confirming in writing that we have accepted the order.
Choice of Law	The state whose law is chosen to govern the contract.	That Venue (where the court is located) is the same as the particular state's law that is chosen to govern the contract.	Typically the party drafting the agreement will choose the law of their state to govern the contract because they know the law of their state.	That the state's law that is chosen will be unfavorable.
Consequential Damages	Damages that go above and beyond Direct Damages	Damages that occur as a result of our negligence	Damages may include the loss of use of property, loss of revenue or profit, equipment downtime, or other business interruption damages. Any damages that may result from a breach of contract caused by the manufacturer's negligence as well as our own.	Damages are immeasurable at the beginning of the order. The source of damages is also unknown, and may include other parties (i.e. mfr, other third parties, etc.) which are not part of our agreement. There is no cap on consequential damages.
Contract Documents; Incorporation of Prime Contract; Flowdown of Prime Contract	All documents between Owner and General Contractor (Contract Documents). Prime Contract is between the Owner and General Contractor and normally includes General Conditions, Special Conditions, plans and specifications, and Addendum's relating to the project.	Contract Documents, or the Prime Contract, do not include us.	We accept all of the documents between the Owner and General Contractor, including damages, schedules, performance metrics, billing and documentation guidelines, labor management and payment, etc.	These documents often run several hundred pages, most of which are produced prior to our quoting the job. We do not obtain a complete set of documents, so if we agreed to accept these terms it will wipe out all of our work in modifying the terms and conditions.
Direct Damages	Directly attributable to a breach of contract	Directly attributable to the order	Direct damages are designed to put the injured party in the position they would occupy if the other party deliver the performance as promised in the contract	Damages may increase as a result of our not addressing the definition of "breach of contract."

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Fitness for a Particular Purpose	In the absence of a disclaimer, every contract has this already included in the conversation, according to the law. Specifically this is an implied warranty that the merchandise sold is suitable for the purchaser's intended use.	We are selling product that will work.	The seller agrees that the product will be fit for the buyer's specific use. Regardless of our understanding, if the product does not measure up to the buyers expectations as it is used by the buyer, we are liable.	<p>The law assumes that the buyer and seller have had a conversation that clearly included a discussion relating to the use of the product, and that the seller fully agrees that the product will perform as necessary. Regardless of our understanding of the application, we may not know how the product will be actually used. Agreeing to this warranty could open up the possibility for damages.</p> <p><i>Note: You automatically include Merchantability with Fitness for Particular Purpose</i></p>
FOB	Free on Board. Title and cost are covered, with both passing at the place of designation.	Relates only to cost, with some confusion over the terminology.	Whoever has title is responsible for freight costs and damages during shipment	Damages during shipment may extend well beyond the cost of the materials.
Indemnification	To make a party whole again should a particular event occur	We protect the customer	The protection of the buyer by the distributor may include all levels of damages.	The forms of protection may include repair, payment, or replacement, or whatever it takes to make the buyer whole again.
Intellectual Property Liability	This concerns property that is derived from a creative process, such as a product design.	This only applies to patents and copyrights on products such as music, books and inventions.	This covers product drawings and designs.	The potential for risk is mainly in the CommData market, where technology advances on a much more rapid pace. Sharing information provided by manufacturer, which may be protected, could expose us to damages if revenue and profits are negatively impacted.

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Liquidated Damages	An estimate of Consequential Damages which are not directly attributable to a breach of contract.	A certain amount, expressed in dollars, per day for delays.	Damages for delays that are determined ahead of time and based on an estimate of the consequential damages assuming the entire job is impacted.	We are unaware of the basis for determining the estimate. Liquidated Damages are not realistic since they are not only considering the impact of any negligence on behalf of the distributor. It is likely that liquidated damages may be attributed to the distributor when in fact there are other situations causing the delay on the job and we would not be able to reverse the claim without defending ourselves in court.
Merchantability	Similar to Fitness for a Particular Purpose, in the absence of a disclaimer, this warranty means that the products will perform to industry standards and is free from defects.	The product is resellable.	This is a warranty of the goods that states the products sold will meet industry standards, and that both buyer and seller have had a detailed conversation which included this warranty.	Any assumption related to "industry standards" presents potential for risk. Similar to Fitness for a Particular Purpose, there is an implied warranty and the law assumes that this conversation has taken place. We place ourselves into the position of having to hold a discussion on each transaction for the subsequent follow-up in writing covering the exceptions. Besides potential exposure to damages, the amount of time and labor required to accomplish such a task is unproductive.
Non-Disclosure Agreement (NDA)	Creation of a confidential relationship between parties to protect any type of proprietary and confidential information.	This agreement allows us to seek other business opportunities.	The NDA controls who we can talk to, what can be discussed, and for the length of time it may be discussed. It also covers the control of information of all types and the return of information upon conclusion of the confidentiality period.	Due to the extensive timeframe and the level of control required to monitor the NDA, opportunities for exposure to damages will be created. Documentation is not always easily distinguishable as being publicly available versus confidential.
Pay When/If Paid	Payment is made when, or if received.	Payment may be contingent upon payment from other parties	Replaces our terms of payment.	Slower payment could equate to excess investment charges. There could also be impacted lien/bond rights on jobs, causing filings to increase, as well as legal fees.

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Per Plans and Specifications	This is an express warranty whereby the material provided will conform to the plans, specifications, drawings, and/or prime contract for the underlying project.	This only applies to our understanding of the plans and specs.	Anything contained within the plans and specifications applies. We are agreeing to comply with the entire set of documents defined as plans and specs, which may also include performance, payment, documentation and other processes.	Assumptions can lead to losses. Not knowing what is contained within the plans and specs could create exposure to replacement and delay costs. Possible risk in accepting additional responsibility in non-material issues too (billing, compliance, use of DBE, working hours, wage law, etc.)
Prices Firm for Duration of Project	The same price will be provided until the project is complete.	The price will be honored to the extent of our quotation	Despite our quotation, we agreed to supply as much product as necessary to complete the project at the same price.	We may not have quoted the entire project and are unaware as to the extent of product required to complete the project.
Quantities May be Changed	The quantity of material may be adjusted without any additional change in price or terms.	The customer can change the basis of our original quotation by adjusting the quantity.	We agree to supply material at the same price and under the same terms regardless of the quantity originally quoted.	We may void pricing agreements, fail to meet minimum quantities, or retain low/no freight charges if the quantity is decreased. If quantities are increased, there could be risk where materials are in short supply or rationed, and the supplier may not be able to comply.
Retention	A portion of a payment withheld pending completion and acceptance of the project.	10% of payment is withheld until the job is done	Retention is defined by the contract documents. The amount retained and the duration of time it's withheld are defined in the contract.	Since we do not have access to the prime contract, we are unaware of the retention clause and payment schedule. Retention often causes excess investment charges. Retention may also exceed our profit margin and be held for exceedingly long periods, including years. Legal expense may also arise as job rights expire prior to the payment of retention.
Right to Cancel	The buyer has the right to cancel the order subject to the included terms.	A buyer can cancel subject to cancellation or restocking charges.	If we accept this term, the buyer would have the right to cancel an order at any time and not have to pay anything.	We may be exposed to damages from the manufacturer and freight carrier. We may also lose job protection.

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Schedule of Values	Contract term which states performance milestones and billing amounts.	This is often confused as being a deadline for the receipt of goods.	We are agreeing to the Prime Contract terms and conditions. We agree that the delivery and billing of product will be in sequence with the Prime Contract, subject to the same level of billing percentages in the contract.	At best, delay in payment. At worst, damages if milestones are not met.
Time is of the Essence	A legally specific contract term that must be performed to avoid a breach.	It is important to be on time.	Failure to meet the milestone creates a "breach of contract", which could open the door for the customer to declare a breach of contract.	Late delivery may allow the customer to cancel the agreement with no protection against damages imposed by our supplier. It may also open the door to damages from our customer.
Venue	Location: The place where the court case is heard.	Where we have to go to court	Any action to collect would be heard at the location most beneficial to the party inserting the clause. In some instances, the law clearly states that the action would have to be heard in the county where the project was located.	Location could drive up legal expense substantially.
Warranty	A guaranty from one party that may be relied upon by another party. Legally binding.	The manufacturer supplies the warranty.	We are quoting the warranty, not the manufacturer, therefore becoming a responsible party.	We fail to identify the differences in warranty between the manufacturer and the buyer during the quotation process. Often the differences in warranty are not uncovered until the purchase order is issued.