Common Draft

A manual of pre-packaged contract terms, in plain business language.

Extensively annotated and explained

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The last name is pronounced "Tate."

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Ask your lawyer about using *just your term sheet* — plus one or more of these *Common Draft* contract packages — as the signable contract.

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CHAPTER 1

NEGOTIATION PROTOCOL

Contents and review checklist:

(Telephone symbols ☎ indicate items that might require discussion)

- 1.1. Purpose of this Protocol
- 1.2. Final written agreement needed
- 1.3. ☎ Confidentiality of discussions
- 1.4. ☎ Non-exclusivity of discussions
- 1.5. ☎ Right to withdraw
- 1.6. ☎ Effect of letter of intent

Section 1.1

Purpose of this Protocol

1. *Why are the parties agreeing to this Negotiation Protocol?*

   The parties anticipate that they will negotiate, and that they might — or they might not — eventually sign and deliver, a final, integrated, definitive agreement (the "**Final Agreement**") that sets forth all material terms of a proposed business arrangement. The parties are agreeing to this Negotiation Protocol to set out the agreed "ground rules" for their anticipated negotiations.

2. *How important do the parties consider this Negotiation Protocol to be?*

   Each party acknowledges (with the effect stated in Section 18.1) that the other party would not go forward with discussions about the proposed business arrangement but for the parties' agreement to this Negotiation Protocol.

Commentary

This section will give a future reader — such as a reviewing court — some background information about why the parties are agreeing to the Negotiation Protocol.

The term "proposed business arrangement" is borrowed from generally accepted accounting principles‡, which require "[p]ersuasive evidence of *an arrangement*" before revenue can be recognized (emphasis added).

Section 1.2

Final written agreement needed

1. *When — if ever — will the parties' discussions and messages become a legally-binding agreement?*

The partiers' discussions and other messages concerning a potential business arrangement will *not* create a binding agreement unless the parties clearly and unmistakably agree — in a writing signed by an authorized representative of each party — that they (the parties) intend to be bound. This is true:

a. no matter how long a discussion and/or an exchange of messages continues; and

b. no matter how many different discussions and/or messages exchanges occur about the subject in question.

2. *In subdivision 1, what does the term "message" cover?*

For purposes of subdivision 1, the term "message" includes, without limitation: emails; text messages; Internet chat messages; hard-copy letters, memos, and notes; and other messages of any kind —

a. whether the message is in tangible or intangible form (e.g., hard-copy versus electronic form);

b. whether the message includes writings; pictures; video- or sound recordings; or any other form of recorded communication;

c. no matter how the message is transmitted; and

d. even if the message or messages are in the form of a letter of intent ("**LOI**") or memorandum of understanding ("**MOU**").

Commentary

In negotiating agreements, parties often exchange emails, texts, and other messages. Under the law in many jurisdictions, parties can unwittingly create a binding contract if their messages, taken together, show that the parties agreed to all of the "material" terms needed to create an enforceable contract.

(So just what *are* the "material" terms of a contract? That will depend on the type of contract — and perhaps, to a extent, on the views of the particular court. As an example, the material terms for a contract for the sale of goods are likely to be the description, quantity, price, and date of delivery or pickup.)

Merely *saying* that the parties' discussions are "subject to contract" might not be enough to avoid a binding effect. As an example, consider the famous case of *Pennzoil v. Texaco*:

- The selling Getty entities and the buyer, Pennzoil, issued press releases announcing their deal. The press releases said that "the transaction is subject to execution of a definitive merger agreement."
- That wasn't enough to save Texaco from liability of over $10 billion for interfering with the Getty-Pennzoil contract. An appeals court said that "[r]egardless of what interpretation we give to the conditional language in the press release, we conclude that it did *not* so clearly express the intent of the parties *not* to be bound to conclusively resolve that issue, as Texaco asserts." Texaco, Inc. v. Pennzoil Co.‡, 729 S.W.2d 768, 789-90 (Tex. App. – Houston [1st Dist.] 1987, writ ref'd n.r.e.) (affirming judgment against defendant Texaco as to liability and actual damages, but ordering a remittitur‡ as to punitive damages) (quoting press release) (emphasis added).

See also § 1.6 concerning letters of intent.

Section 1.3

☎ Confidentiality of discussions

Can the parties let others know about their discussions?

Normally not: unless the other party clearly and unmistakably consents in writing, neither party may disclose the existence, contents, or status of:

1. the parties' discussions concerning the potential business arrangement in question, nor
2. any resulting agreement (if any).

Commentary

Parties can consider also agreeing to the Confidential Information Protocol.

Section 1.4

☎ Non-exclusivity of discussions

Are the parties allowed to enter into similar discussions with others?

Yes — each party will be free — in its sole and unfettered discretion — to seek, discuss, negotiate, and/or enter into arrangements with other parties that are similar or even identical to their proposed business arrangement.

In case of doubt, this Section 1.4 will apply even if, as a result of other discussions, a party would no longer be willing (or would be unable) to enter into the proposed business arrangement in question.

Commentary

In some LOIs, one or both parties might insist on an exclusivity provision, but any such provision should be negotiated carefully.

Section 1.5

☎ Right to withdraw

Are the parties obligated to continue participating in the discussions? When, if at all, can they walk away?

1. Any party may withdraw from negotiation of a Final Agreement (see § 1.1):
    a. at any time until the Final Agreement is signed and delivered by all parties;
    b. in the withdrawing party's sole discretion, with a view toward none but its own interests and desires; and
    c. without obligation or liability of any kind, under any legal- or equitable theory, to any other party.
2. Each party agrees not to claim, under any circumstances, that a withdrawing party withdrew from negotiation of the Final Agreement in bad faith.

3. Any obligation to negotiate the Final Agreement in good faith is to be conclusively deemed to have been satisfied.

Commentary

Subdivisions 2 and 3 try to forestall a claim that a party failed to comply with a putatively-applicable duty of good faith or fair dealing. Its approach is inspired by UCC § 1-302(b)‡ (which by its terms applies only to contracts that come within the scope of the Uniform Commercial Code): "The parties, by agreement, may determine the standards by which the performance of those obligations *[of good faith, etc.]* is to be measured if those standards are not manifestly unreasonable."

Note the "optics" approach taken by these subdivisions: They do not state that the parties are not required to act good faith. Leaving aside whether such a statement would be enforceable, imagine how a judge or juror might react to the statement, and/or how the statement might look if reported in the newspaper.

CAUTION: Business people sometimes like to include obligations to negotiate in good faith as a way of trying to signal (or protest) their own bona fides. But business people also sometimes think such provisions are mere throwaways. That's far from the case: in many jurisdictions, *an agreement to negotiate in good faith will be legally binding* — and also is likely to be a serious mess to litigate.

Section 1.6

☎ Effect of letter of intent

1. *When does this § 1.6 apply?*

   This § 1.6 applies if the parties enter into a letter of intent, memorandum of understanding, or similar document, each referred to generically here as an "**LOI**."

2. *Why are the parties entering into a letter of intent?*

   Instead of proceeding directly to negotiation of a Final Agreement (see § 1.1), the parties are entering into the LOI for use as a convenient reference during their remaining discussions.

3. *What portions of the letter of intent are binding?*

   The parties intend for only the following terms to be binding:

   a. the terms of this Negotiation Protocol; and

   b. any specific terms clearly and unmistakably identified in the LOI as being binding.

   Otherwise, neither party will have any enforceable right or obligation concerning their proposed business arrangement.

   This subdivision 3 applies whether the purported right or obligation allegedly arises in contract, tort, strict liability, quantum meruit, quasi-contract, unjust enrichment, or otherwise.

4. *How does the letter of intent affect an NDA?*

   The LOI will neither limit nor expand any separate confidentiality agreement that may exist between the parties.

5. *What if the parties "get started" before the Final Agreement is signed?*

   It is possible that one or both parties might begin taking action under the Final Agreement before that agreement has been fully signed and delivered. If that happens, then:

   a. each party taking such action will be doing so at its own risk and expense except to the extent (if any) that the parties have clearly and unmistakably agreed otherwise in writing; and

   b. the parties intend that such action should not be interpreted as meaning that the parties have formed a partnership, joint venture, or other kind of relationship.

6. *Can the parties orally amend the letter of intent?*

   Any amendment to, or waiver of, the LOI must conform to the requirements of the Amendments and Waivers Protocol, including but not limited to its choice of English law.

Commentary

For annotated examples of short- and long-form provisions that the parties might wish to indeed be binding, see American Bar Association Section of Business Law, Letters of Intent‡ (Ancillary Document B to Model Stock Purchase Agreement, Second Edition), Part Two, at 10, archived at https://perma.cc/Z4UX-LN9X‡.

Subdivision 6: Letters of intent often contain their own extensive confidentiality provisions, but sometimes parties enter into separate confidentiality agreements.

Subdivision 7 tries to forestall a particular type of finding: That a partnership or other relationship was formed, not by negotiation of a contract as contemplated in a letter of intent, but instead by the parties' actions. (Every first-year law student (at least in the U.S.) learns that an offer for a contract can be accepted by performance. *See, e.g.*, UCC § 2-206‡. Moreover, under state law a partnership can arise even without a contract.) According to a Texas jury — whose verdict was subsequently overturned on appeal — two parties formed a partnership *after* signing an LOI by conducting themselves as though they were partners, notwithstanding the contrary language in the LOI itself. See Energy Transfer Partners, L.P. v. Enterprise Products Partners‡, 529 S.W.3d 531 (Tex. App.—Dallas 2017).

Subdivision 8 tries to keep a party from later claiming that the parties *orally* agreed to vary the terms of the LOI or of the Negotiation Protocol.

CHAPTER 2

MASTER AGREEMENT PROTOCOL

Contents and review checklist:

(Telephone symbols ☎ indicate items that might require discussion)

- 2.1. Purpose of this Protocol
- 2.2. Effect on prior master agreements
- 2.3. Written Order changes required (usually)
- 2.4. ☎ Non-binding nature of Master Agreement alone
- 2.5. ☎ No obligation to agree to particular Orders
- 2.6. ☎ Orders as separate agreements
- 2.7. ☎ Precedence of Orders vs. Master Agreement
- 2.8. ☎ Electronic signatures for Orders

Section 2.1

Purpose of this Protocol

Why are the parties agreeing to this Master Agreement Protocol?

When this Master Agreement Protocol is made part of the Agreement — sometimes referred to as a "**Master Agreement**" — it is because the parties have the following in mind:

1. The parties anticipate entering into one or more agreed "**Orders**" such as, without limitation, (i) a purchase order for goods, and/or (ii) a work order for services, sometimes referred to as a "statement of work" or a "scope of work."

2. The Master Agreement will serve as a pre-negotiated set of terms and conditions that will govern each Order, so that the parties do not have to negotiate those details for each Order.

3. In case of doubt, when clear from the context, the Master Agreement can itself include an Order, for example (without limitation) as an exhibit, an appendix, etc.

Commentary

Parties often negotiate master agreements when they think that they might do multiple transactions together. Typically, a master agreement itself does not obligate the parties, but merely serves as a reference document. That way, each order form — e.g., a purchase order for goods or services, or a statement of work for services — incorporate the master agreement by reference. That saves time and expense by letting the parties avoid renegotiating the major terms and conditions each time they want to do a transaction.

Section 2.2

Effect on prior master agreements

If the parties had a prior master agreement in place, what happens to it?

Any prior master agreement between the parties concerning the subject matter of the (new) Master Agreement is terminated, on a going-forward basis only, as follows:

1. The Master Agreement (along with any applicable transaction-specific agreement) will govern any transaction concerning that subject matter whose performance is begun during the term of the Master Agreement.

2. IF: Performance of a transaction has already commenced under the prior master agreement; THEN: That prior master agreement will remain in effect *as to that transaction* until its performance is completed.

Section 2.3

Written Order changes required (usually)

Can an Order under a Master Agreement be modified orally? If so, how?

Normally an Order may be changed only by a writing that is agreed to by all parties. But parties don't always work that way in the real world.

Accordingly, an Order may be changed orally, but only if all of the following prerequisites are met:

1. Clear and convincing evidence must indicate that the change was indeed agreed to by all parties that might be adversely affected by the change.

2. Such evidence must include (without limitation) reasonable corroboration of any self-interested statements, whether the statements are in the form of witness testimony or otherwise.

3. If asked, the party claiming that an oral change was made must promptly provide all evidence referred to in subdivisions 1 and 2 (where such evidence is in the possession, custody, or control of that party) to all other parties referred to in subdivision 1.

Otherwise, any amendment to, or waiver of, an Order must conform to the requirements of the Amendments and Waivers Protocol, including but not limited to its choice of English law.

Commentary

Possible changes to an Order might include, without limitation, changes in: 1) the scope, cost, and/or schedule of the services to be performed; and/or 2) the deliveries to be provided.

Some services agreements insist that all changes to work orders must be in writing and signed by all parties. But that might not be a realistic approach: • It's not clear that a court would enforce such a requirement: see the discussion in the commentary to the /###; and • parties to contracts don't always practice what they preach: As a project progresses, parties will sometimes agree orally to changes to the project but never document their agreement in writing — then later, one or another party might have a very-different recollection of just what change was agreed to (possibly due to a change of heart about what's agreeable). So Section 2.3 offers an alternative but somewhat-rigorous path to enforcing a modification to an Order even if it's not in writing.

Subdivision 1 requires the supporting evidence to add up to more than just the usual "preponderance of the evidence" called for in civil litigation.

Subdivision 2: The reasonable-corroboration requirement helps to guard against "creative" memory (and even outright fraud).

Subdivision 3: Early turnover of evidence relevant to a dispute can go a long way toward preventing the dispute from escalating into expensive litigation.

Section 2.4

☎ Non-binding nature of Master Agreement alone

Does signing the Master Agreement, in itself, obligate either party?

No — the master agreement itself, without an Order, does not in itself obligate either party in any way unless it clearly and unmistakably says otherwise.

Commentary

Drafters should consider whether a Master Agreement contains any particular terms that they intend to be binding, and if so, specify in writing which terms are so intended.

Section 2.5

☎ No obligation to agree to particular Orders

Does the Master Agreement commit either party to agreeing to a certain number (or dollar amount, etc.) of Orders?

No — the Master Agreement does not obligate either party to agree to any particular Orders.

Commentary

This disclaimer is informed by a lawsuit in which a subcontractor claimed that IBM had supposedly promised, but failed, to provide the subcontractor with $3.6 million of work on a project for the Chicago Transit Authority. IBM won the case on summary judgment, but it still had to defend against the claim. See Bus. Sys. Eng'g v. IBM‡, 547 F.3d 882 (7th Cir. 2008), *affirming* 520 F. Supp. 2d 1012‡ (N.D. Ill. 2007).

Section 2.6

☎ Orders as separate agreements

Each Order under the Master Agreement is to be treated as a separate agreement that incorporates the Master Agreement by reference, whether or not the incorporation is expressly stated.

Commentary

This § 2.6 differs from some services agreements in which each work order is considered to be incorporated as an addition to the "main" or master agreement.