


# P&SM: Writing Contracts



A contract is a legally binding agreement between two parties. This can take the form of a written document, a verbal agreement or implied by conduct.



CIPS members can record one CPD hour for reading a CIPS Knowledge download that displays a CIPS CPD icon.

### Introduction

The CIPS' practice documents are written as a statement in time. They are a collection of views on good practice within a particular subject area and are intended to provide direction on good practice with some guidance for context and interest. The reader is encouraged to use the CIPS practice documents for their own purposes, such as writing policy statements, guidance or procedures. This particular practice statement has been written primarily for the benefit of full-time purchasing and supply management professionals, but can be used by anyone associated with, or interested in, purchasing and supply management (P&SM).

This document is about writing contracts.

### Definition

A contract is a legally binding agreement between two parties. This can take the form of a written document, a verbal agreement or implied by conduct.

### Background

In order for a contract to be considered in place there must be offer, acceptance, intention, agreement, capacity and consideration. Intention means that both parties mean to enter into a legally binding arrangement. Agreement means that both parties understand and have accepted the terms of the contract; this takes the form of two stages, the offer (and counter-offers) and the acceptance (unconditional assent to all the terms of the contract). Consideration is the exchange of money, goods or services between the two parties. The parties to an agreement must also have the capacity to contract e.g. they must not be minors or of unsound mind. The contract must also be legal i.e. it cannot be an illegal purchase, e.g. illegal drugs, etc.

### Explanation

A soundly written contract provides a good basis for a successful commercial relationship between parties. However, this is not to say that a formal written contract is always necessary; the need is dependent on the value and risk associated with the nature of the purchase concerned.

It is often the case that legal documents are only referred to when typical relationship management techniques are seen to have failed. However it can be argued that a good contract encourages good project processes and management, one example being the suite of contracts that originated in construction but has since been expanded to include service and supply contracts.

### Composition of the contract document

Written contracts are often standard terms and conditions on the back of purchase orders or invoices. Standard terms are subject to the principles laid down in the “of the forms”, i.e. “the last shot prevails”. This approach is often sufficient as far as low value and low risk orders are concerned.

If the parties consider that a formal detailed written contract is appropriate and necessary then they should be prepared to spend some time coming to an agreement on its contents. Each document will be different; for example, the contract associated with a Public Private Partnership for information technology services will be very different from that for the construction of a building. The specific terms and conditions which normally appear in written contract documents are: names and addresses of the parties, dates of commencement and completion, deliverables, acceptance procedure, warranties and indemnities, provision for early termination, etc.

CIPS believes that the terms and conditions of a contract need to be harmonised with the scope of work and the obligations and liabilities of each party.

### Drafting the contract

It is unusual for contracts to be drafted from scratch; there is usually a model form that can be used as the basis for negotiations. This is a cost-effective way of drafting the contract, providing the P&SM professional is familiar with the content and meaning of each clause.

The key point is that all aspects of the contract, whether clauses or schedules, should (where possible) be written in plain English with short succinct sentences that are easy to follow and understand. In those cases involving complex legal issues and concepts it is often instructive and perfectly acceptable to provide a "worked example" to illustrate and underline the form of wording used.

Practice and procedure in drawing up complex contracts will also vary from one sector to another. In the case of the Ministry of Defence for example, with the emphasis on competitive tendering, it is usual to produce a draft contract which is issued as part of the invitation to tender package. This enables all tenderers to see the sort of document they would be expected to sign up to and therefore, in theory at least, that they can all bid on the same basis. This is not to say that post-tender negotiation on terms and conditions will not occur, but this ensures that they can do so with the existing groundwork in place.

The importance of the pre-contract stage is often underestimated but it is vital to invest time and effort at this point in order to clarify the respective roles and responsibilities, facilitate the drafting process and minimise the risk of future misunderstandings. However, it is important to avoid going into excessive and potentially confusing detail.

Where a contract has to be drafted from first principles, or considerably customised from the existing model form, heads of agreement are often agreed as a first step. CIPS advises taking care, when drawing up heads of agreement, to avoid the risk of creating an agreement that will in any way prejudice mutually beneficial and satisfactory formal contract negotiations. It is important to ensure that where a heads of agreement does exist that it is clear in the main negotiated contract that it replaces any former agreements. The P&SM professional can subsequently work with lawyers, as appropriate, on the contract drafting process.

### Contract amendments

CIPS believes that it represents good practice to put the specific (non-standard details) of the contractual relationship into schedules. This allows for flexibility, as schedules can easily be amended to reflect the changing requirements of the contract. The parties must agree any

amendments using the documented change management process and the amendments are formalised on appendices to the contract. An example of this is when there is a change, e.g. in commercial terms or key performance indicators contained within the schedules. CIPS believes that these types of changes are more easily dealt with using the agreed change control procedure as this maintains certainty and clarity of contract.

It is important that the contract documentation should contain guidance as to who has the authority to make amendments, as well as the level of entitlement of the other party or parties to agree or reject such changes.

It has been suggested that every change reflects a lack of foresight at the drafting stage. However it is not a perfect world and so CIPS recommends that a clause, (or, in extensive or complex contracts, a schedule), should be devoted to change control procedures, setting down the agreed process as well as the requisite escalation clauses and arbitration or mediation procedures.

CIPS recommends that such clauses be as precise and unambiguous as possible; vague generalisations about, for example, 'reasonable prices' should be avoided as they can so easily lead to misunderstandings and bad feeling between the parties.

## Disputes

Only a small percentage of cases in procurement ever come to litigation, not least because litigation is a painful and expensive process and usually the parties involved have a strong commercial interest in continued constructive relations. A further reason is that P&SM professionals effectively manage the supplier/buying organisation relationship, identifying problems and dealing with them before they can develop to this stage.

Under English law, contracts for construction are required to provide an process before a dispute can reach the courts. This is a desirable practice that can usefully be applied in many procurement contracts. CIPS believes that mediation should be used wherever possible as this allows the parties to the contract to maintain control over the solution to the dispute. Adjudication should be considered as an alternative as its aim is to resolve disputed issues in order to enable work to continue. Arbitration is a formal process and the arbitrator's decision is legally binding on both parties. It is less expensive than formal litigation but like litigation it is adversarial and therefore likely to destroy any business relationship.

## Conclusion

Whilst acknowledging that it is permissible for contracts to be verbal in form and that as such they do carry full legal force, CIPS acknowledges that commercial contracts are almost always in writing for the avoidance of any doubt in the contractual relationship.

CIPS considers that contract documents, carefully and correctly drafted, can provide a sound basis not only for a successful relationships between the parties but can also serve as a solid foundation for project management processes.

---

**CIPS Group** Easton House, Easton on the Hill, Stamford, Lincolnshire, PE9 3NZ, United Kingdom  
T +44 (0)1780 756777 F +44 (0)1780 751610 E [info@cips.org](mailto:info@cips.org)

---

**CIPS Africa** Ground Floor, Building B, 48 Sovereign Drive, Route 21 Corporate Park, Irene X30, Centurion, Pretoria, South Africa  
T +27 (0)12 345 6177 F +27 (0)12 345 3309 E [infosaf@cips.org.za](mailto:infosaf@cips.org.za)

---

**CIPS Australasia** Level 8, 520 Collins Street, Melbourne, Victoria 3000, Australia  
T 1300 765 142/+61 (0)3 9629 6000 F 1300 765 143/+61 (0)3 9620 5488 E [info@cipsa.com.au](mailto:info@cipsa.com.au)

---

**CIPS Middle East & North Africa** Office 1703, The Fairmont Hotel, Sheikh Zayed Road, PO Box 49042, Dubai, United Arab Emirates  
T +971 (0)4 327 7348 F +971 (0)4 332 5541 E [mena.enquiries@cips.org](mailto:mena.enquiries@cips.org)

©CIPS 2013



*Printed on stock containing  
50% post consumer  
recycled content*

---

[www.cips.org](http://www.cips.org)

CIPS™ is a registered trademark of the  
Chartered Institute of Purchasing & Supply