

## TERMS AND CONDITIONS OF SALE

### SUMMARY

**NTMA member companies deal with diverse kinds of customers, sell diverse machined products ranging from finished equipment to parts, tool, dies, molds, to doing work on customer parts and materials and performing engineering services. Customer purchase orders commonly have "fine print." But, legally and as a matter of sound management, terms and conditions of sale must be decided upon by each individual company. This BMA is designed to help you select your business terms and conditions and protect your legal rights.**

### INTRODUCTION

Although it's true that most business transactions depend more upon mutual understanding and goodwill, each company should fully protect its legitimate interests. To do so necessitates some understanding and reliance upon legal technicalities.

Remember that unreasonably severe provisions may alienate valued customers. Further, they may be legally unenforceable. However, most customers will accept reasonable, well-drawn terms and conditions of sale.

Deciding upon terms and conditions of sale involves virtually every aspect of the law of sales and many aspects of related fields of law, all of which may vary widely from state to state. Because of these considerations, you should consult your company's business terms and conditions of sale. Matters of particular significance to your company may not be covered in this BMA.

Included as part of this BMA is a Sample Quotation Form, designed especially for companies engaged in the precision machining of parts, followed by additional suggestions for those who produce tools, dies and/or molds. This quotation form is not a "required" or "official" form, but simply one which can be modified to suit that particular special conditions necessary for each company.

The suggested Terms and Conditions of Sale following the Sample Quotation Form should be used as a checklist which might help eliminate overlooking a contract term important for your business. Study the brief Explanatory Comments, together with the three Sample Form Letters (Confirmation of Oral Acceptance; Confirmation of Order; Confirmation of Changes) which follow the Quotation and the Terms and Conditions of Sale portions of this document.

### TERMS AND CONDITIONS OF SALE

1. **Effect of Buyer modifications to this quotation.** The price and delivery terms in this quotation are subject to change if Buyer wishes to change any terms of this quotation.
2. **Acceptance** of this quotation may be by any reasonable and customary communication. No inconsistent terms in Buyer's purchase orders, such as quantities, delivery schedules, or inconsistent printed text will have any force or effect unless specifically agreed to in writing by ABC Company.
3. **Price increases for materials.** This quotation is based on the present cost of materials. Buyer shall pay ABC Company for any increase in cost of materials purchased by ABC Company to fulfill this contract.
4. **Payment terms** quoted are based on the Buyer's present financial condition and record of payment. If any material change arises, ABC Company has the right to require C.O.D., or other security for payment, or to withhold delivery. Buyer agrees to pay X% per month interest on all invoices unpaid after 30 days. If Buyer defaults in payment, Buyer shall pay ABC Company's costs of collection including reasonable attorney's fees, in addition to damages.
5. **No warranties on goods.** The goods sold to Buyer will be as described, and no other express or implied warranties are made by ABC Company, including any warranty of fitness to perform any particular function unless expressly stated in this quotation. Buyer has furnished the drawings and specifications for the goods and Buyer is not relying on ABC Company to select goods or engineering designs. Therefore, ABC Company DOES

NOT WARRANT THAT THE GOODS ARE FIT FOR ANY PARTICULAR PURPOSE AND MAKES NO WARRANTY OF MERCHANTABILITY, and Buyer indemnifies and holds harmless ABC Company from any claims or liability arising from any use of the goods subject of this contract.

6. **Raw materials availability.** This contract is contingent upon the availability of raw materials required for the manufacture of the goods. ABC Company shall not be deemed in breach of this agreement for delay in manufacture or delivery where such raw materials are unavailable. In such case, ABC Company may, at its option, cancel this agreement or deliver to you its pro-rata share of its production.
7. **Force majeure.** ABC Company will not be liable for any delay or failure in performance resulting from labor disputes, war, riot, insurrection, fire, flood, accident, storm, act of God, or other causes beyond its control, or from ABC Company's good-faith compliance with any foreign or domestic governmental law, rule, order or regulation, whether or not it later is held invalid.
8. **Special tooling.** Unless otherwise specifically provided in ABC Company's quotation, special tooling developed by ABC Company to complete this contract shall be the property of ABC Company. Special tooling supplied by Buyer or special tooling developed by ABC Company subject to property ownership of Buyer shall be maintained by ABC Company with reasonable care at Buyer's risk or loss of damage arising from force majeure events and Buyer is encouraged to provide its own insurance against such loss or damage. In the event Buyer does not claim such special tooling within two years after completion of ABC Company's deliveries under this contract, then ABC Company shall have the right, following 30 days' written notice to Buyer, to dispose of such special tooling without liability to Buyer.
9. **Buyer's requests for changes.** Following acceptance of this quotation, any technical, quantity, delivery or other change requested by Buyer shall be in writing and shall be construed as a request to renegotiate the contract without prejudice to the rights of ABC Company under the contract.
10. **Cancellation by Buyer.** In the event Buyer cancels this contract following acceptance of this quotation, Buyer agrees to pay ABC Company the greater of: (a) X% of the contract amount, or (b) ABC Company's expenditures for raw materials, unamortized tooling, labor incurred, handling and overhead, and for all work completed to date and in progress but not yet delivered to Buyer, plus a cancellation charge of X% of the above amount. This is without prejudice to such other and additional rights as are available to ABC Company under the law.
11. **Incidental charges.** Any special packaging requirements, source inspection by Buyer on the premises of ABC Company, or other requirements not expressly provided for shall be subject to additional charges by ABC Company.
12. **Short count.** Buyer shall be deemed to have accepted the numerical count of goods shipped unless Buyer notifies ABC Company in writing of any claim for short count within 10 days after delivery to Buyer.
13. **Nonconforming goods.** Goods delivered to Buyer shall be deemed to conform to this contract unless Buyer notifies ABC Company in writing of any claim of non-conformance within 30 days after delivery to Buyer. Buyer will then await instructions and unless otherwise agreed to in writing by ABC Company Buyer assumes the full risk and expense of returning goods to ABC Company, including but not limited to damage arising from Buyer's improper packaging. ABC Company agrees to repair or replace nonconforming goods or allow a credit for nonconforming goods at its option, which shall be the sole liability of ABC Company with respect to nonconforming goods.
14. **Customer-supplied raw or semifinished materials.** In the event this contract requires ABC Company to perform work on raw or semifinished materials supplied by Buyer but not purchased by ABC Company from Buyer, Buyer shall supply an adequate excess to allow for machining losses. If ABC Tool scraps any such materials, it shall not be liable to Buyer for such scrapped materials. Buyer warrants that any raw or semifinished materials shall be suitable for the operations intended to be performed by ABC Company, free of defects in workmanship and material. If found defective during processing, Buyer shall promptly deliver suitable replacements at no charge to ABC Company. Buyer shall pay ABC Company for all work performed to the time when the defect was discovered.
15. **Other indemnification.** Buyer agrees to defend at its own expense, indemnify and hold harmless ABC Company from all claims of patent infringement of trade secret misappropriation arising from its performance under this contract, including damages, costs and attorneys' fees.
16. **Taxes.** Prices quoted are subject to added charges levied by any government taxing authority, all of which shall be paid by Buyer.
17. **Construction, modification.** This quotation upon acceptance becomes the entire understanding of the parties with respect to this subject matter and supersedes all representations or understandings relating thereto. It may not thereafter be modified orally, but only in writing, signed by the party to be charged; and, it shall be construed in accordance with the laws of (ABC's state).

#### ADDITIONAL TERMS AND CONDITIONS

*(Directed toward the sale of tools, dies, molds and miscellaneous provisions of general interest)*

1. **Progress payments,** if any, unless otherwise provided in this quotation, shall be made in installments invoiced by ABC Company as the work progresses, but not more frequently than bi-weekly (monthly or some suitable interval) up to 80% (or another percentage) of the amount of ABC Tool's recorded costs for payment of goods or services acquired to fulfill this contract plus the

costs of materials withdrawn from inventory and placed in the production process to fulfill this contract, plus direct labor, travel, engineering and other direct costs to fulfill this contract. ABC Company shall maintain, in accordance with generally acceptable accounting principles, books and records reflecting such costs and to make such books and records available for inspection by the Buyer on reasonable notice. The aggregate amount of progress payments shall not, however, exceed 80% (or another percentage) of the total contract price.

*(OR progress payments may not be related to costs by providing in the quotation any desired timetable for predelivery payments.)*

2. **Ownership title to molds, tools and dies** subject of this contract and all accessories and components shall remain with ABC Tool until full payment by the Buyer of all indebtedness incurred by Buyer pursuant to this contract, and ABC Company has the right, at its sole option, to withhold delivery of any goods to Buyer if, at the time ABC Company has agreed to deliver such goods, Buyer is in default by more than 30 days on previously submitted invoices pursuant to this contract, all without prejudice to such other relief available to ABC Company under the law.
3. **Risk, or loss of damage** from any cause shall pass to Buyer upon delivery of goods to Buyer or Buyer's carrier as applicable and in the event of any such loss or damage, Buyer nevertheless shall pay ABC Company the full contracted amount.
4. **Engineering, design, and construction suggestions** by ABC Company representatives, if and when approved by Buyer in writing following acceptance of this quotation, shall constitute thereby an amendment of this contract and shall be the sole responsibility of the Buyer unless ABC Company, and ABC Company's disclaimer of warranties and all other provisions in this contract shall continue in full force and effect.
5. **Defects.** Buyer shall, within X days after delivery of goods subject of this contract, notify ABC Company in writing of any claimed defect in or failure of the goods to conform with the technical specifications subject of this contract. Buyer shall not, without the prior written consent of ABC Company, return the goods to ABC Company. If following such notice, the parties agree that there exists such a defect or failure to conform due to the fault of ABC Company, then at the option of ABC Company: (1) the defective goods shall be returned, at ABC Company's expense, to ABC Company properly packaged and safeguarded against normal transit hazards as ABC Company may require for repair or replacement by ABC Company, at its sole option, and thereafter returned to Buyer at ABC Company's expense; or (2) the parties shall negotiate an agreed amount to be deducted from the purchase price of such goods for the repair of the goods by Buyer or others, Buyer's failure to so notify ABC Company in writing of any such claimed defect or failure to conform within the above period shall constitute Buyer's complete waiver of any such claim with

respect to defects or nonconformance, and Buyer's release and covenant not to sue ABC Company with respect to such claim.

## EXPLANATORY COMMENTS

### Sample Quotation Form

The quotation form should be filled in fully and completely, leaving no room for misunderstandings about precisely what work is to be done, the price, and the delivery schedule and the details of customer supplied materials or special tooling. The front page must include a reference to the terms and conditions on the reverse side. Drawings and specifications should be identified fully. If there is insufficient space on the form, simply type in "per Attachment A" and add a separate "Attachment A" with the detailed information sheet, preferably with the signer's initials in the lower corner. A duplicate copy of the quotation, of course, should be maintained in your files.

### Additional Terms and Conditions

**Progress payments** are designed in a way to relate to the Seller's costs and in this connection, it is important that the Seller's accounting books and records are maintained in a way which justifies the charges involved. In this connection, the assistance of your accountant in establishing cost accounting records is highly desirable.

**Ownership title to molds, tools and dies** includes language designed to help take advantage of the Seller's possession or title until payment is made.

*Risk of loss or damage* is clarifying language designed to put the Buyer on clear notice when the Buyer assumes certain risk.

**Engineering design and construction suggestions** text is designed to make the Buyer ultimately responsible for the choice of technical changes.

**Defects** constitutes an alternative drafting choice which can be compared with paragraph 13 in the terms and conditions on the reverse side of the ABC Company quotation.

### The Terms and Conditions of Sale

Typically the Terms and Conditions of Sale would be part and parcel to the Quotation and appear on the reverse side of that document.

**Para. 1. Effect of Buyer modifications to this quotation.** The purpose of this clause is two fold: (a) it makes clear to Buyer that, for a contract to arise, the Buyer must accept with no changes; and (b) the Buyer is informed that it cannot expect to get the same price for smaller quantities, different delivery schedules, or other modifications. If the Buyer does not accept as is, then negotiations must resume and another quotation submitted.

**Para. 2. Acceptance,** allows the Buyer to accept by telephone or by other oral communications, and puts the Buyer on notice that it is the Seller's "fine print" which governs, unless, of course, Seller accepts "fine print" terms of Buyer.

Appendix A is a form of acknowledgment which should be sent if the Buyer accepts orally, to avoid misunderstandings later on if the Buyer tries to deny unequivocal acceptance of the quotation. Appendix B is a form of acknowledgment which can be sent if the Buyer sends you a purchase order in response to your quotation. Do not sign and return the Buyer's purchase order if you want your own terms to govern because this could be an acceptance of Buyer's counter-offer.

**Para. 3. Price increases in materials**, is self-explanatory and of course may or may not be acceptable to Buyer. If not, note its inapplicability on the face of the quotation if previously negotiated away in favor of a fixed price contract.

**Para. 4. Payment terms**, reflects the sort of language available to help protect Seller against "slow pay" Buyers' or situations where Buyer's financial situation deteriorates.

**Para. 5. No warranties**, is a key provision to limit your liability.

**Para. 6. Raw materials availability**, is a self-explanatory provision.

**Para. 7. Force majeure** is a usual provision for avoiding liability arising from acts outside Seller's control.

**Para. 8. Special tooling**, is an approach to clarifying "who owns what," and provides for disposal of tooling after completion of the job. The specific terms of course, may be changed to suit your way of doing business.

**Para. 9. Buyer's requests for changes** clarifies the legal relationship where the Buyer wants to change any provision after acceptance. The Seller should take care to document fully all changes so that a written contract amendment is achieved in all situations.

**Para. 10. Cancellation by Buyer**, is one approach towards arriving at "liquidated damages" in the event Buyer cancels. It is important to keep the amount claimed here reasonable and not punitive.

**Para. 11. Incidental charges** should not be overlooked and the examples given might be expanded for special situations.

**Para. 12. Short count** is designed to provide a prompt resolution of any claims for shortages in delivered goods.

**Para. 13. Nonconforming goods**, strives for resolution of defect problems within a reasonable time after delivery and describes an orderly procedure to be followed. See also the clause in the "additional terms and conditions."

**Para. 14. Customer supplied raw or semifinished materials** clarifies the duties of Buyer in this area and recognizes the need to deal specifically with such potential problem areas.

**Para. 15. Other indemnification** is a usual safeguard to avoid involvement in any Buyer's patent or relate technology disputes with third parties.

**Para. 16. Taxes**, makes clear Buyer's obligations in this area.

**Para. 17. Construction; modification** is an important clause designed to avoid disputes over precisely what the terms of the contract are. The Seller should scrupulously document contract changes in the manner required and expect the Buyer to do the same.

**Prepared by Arent, Fox, Kintner, Plotkin, & Kahn, NTMA Legal Counsel, at the direction and guidance of NTMA Business Management Committee.**

# SAMPLE QUOTATION FORM

ABC COMPANY  
1000 Industrial Road, Central City 99999  
Telephone: (123) 999-9999

Ref: \_\_\_\_\_ Date: \_\_\_\_\_

To: (Buyer) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

ABC Company is pleased to offer this quotation subject to the terms and conditions on the reverse side of this page:

QUANTITY	DESCRIPTION, INCLUDING DRAWINGS, PLANS, SPECIFICATIONS WHICH ARE A PART OF THIS CONTRACT UPON ACCEPTANCE	UNIT PRICE	TOTAL PRICE
Special charges:			
Tooling:			

*BUYER MATERIALS* supplied and delivered at no cost to ABC Company: (describe the specifications, drawings, quantities, lots, deadlines for receipt, etc).

*DELIVERY SCHEDULE*: (timetable deadline) (provision allowing for advance shipments in advance of deadline) (delivery X days after acceptance of quotation) Delivery F.O.B. our plant.

*PRICE AND PAYMENT TERMS*: (X% 10 days/net 30 days or other variations) (X days following lot shipment and invoice) (partial payments) (progress payment schedule).

*OTHER PROVISIONS*:

This quotation is valid until the following date:

ABC COMPANY  
By \_\_\_\_\_  
NAME TITLE

## SAMPLE FORM LETTERS

### CONFIRMATION OF ORAL ACCEPTANCE OF QUOTATION

ABC COMPANY  
1000 Industrial Road, Central City 99999  
Telephone: (123) 999-9999

(Buyer) \_\_\_\_\_ Date: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Dear \_\_\_\_\_

This will acknowledge your oral acceptance of all terms of our quotation no. \_\_\_\_\_ dated \_\_\_\_\_ pursuant to (M. Jones' telephone call of \_\_\_\_\_); (our meeting of \_\_\_\_\_) (etc.).

Sincerely,  
ABC Company

By \_\_\_\_\_

**SAMPLE FORM LETTERS (continued)**

**CONFIRMATION OF ORDER FOLLOWING QUOTATION**

**ABC COMPANY  
1000 Industrial Road, Central City 99999  
Telephone: (123) 999-9999**

(Buyer) \_\_\_\_\_ Date: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Dear \_\_\_\_\_

This will acknowledge receipt of your purchase order no. \_\_\_\_\_ dated \_\_\_\_\_ which we understand to be your acceptance of our quotation pursuant to paragraph 2 of our terms and conditions. If you have not unequivocally accepted our quotation please notify us immediately.

Sincerely,  
ABC COMPANY

By \_\_\_\_\_

**CONFIRMATION OF CHANGES**

Note: When a Buyer gives you an oral change request, for example, over the telephone, and you consider the request acceptable, the following form letter should be used to secure written confirmation:

**ABC COMPANY  
1000 Industrial Road, Central City 99999  
Telephone: (123) 999-9999**

(Buyer) \_\_\_\_\_ Date: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Dear \_\_\_\_\_

This will acknowledge your request to change the terms of our contract ref: \_\_\_\_\_ dated \_\_\_\_\_ as follows:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

This request is acceptable to ABC Company but will be effective only upon your signing and returning the enclosed confirmation copy in accordance with paragraph 9 of our contract. In all other respects the above referenced contract shall continue in full force and effect.

Sincerely,  
ABC COMPANY

By \_\_\_\_\_

The above changes are authorized and agreed to:

(Buyer Co. Name)

By \_\_\_\_\_

NAME

TITLE

DATE