

### Part 1. Forming a contract

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#### Identifying a contract

Many business situations involve contracts. It can be helpful to know when a contract is in place between your business and a supplier or customer.

The traditional way to recognise a contract is to identify whether the main elements of a contract are all present. These are:

- an offer
- acceptance of that offer
- consideration
- an intention to create legal relations between the parties, which can include certainty of the terms agreed
- that each party has the capacity to enter into the contract

When deciding whether a contract is in place, the law considers the intentions of the parties by considering such factors as any verbal and written interactions, where the discussions took place and the actions and conduct of the parties.

#### What is an offer?

An example of an offer is where one party communicates that they would like to buy or sell goods or services. The offer needs to have sufficient information to be capable of being accepted and it needs to be clear that the party (whether it is the business or the consumer) making the offer intends to be bound by their offer.

## **Quotations**

Providing a quotation for home improvement work to a customer will usually involve an offer. Quotations will often be given to a customer after you have visited a consumer's home and will include a detailed breakdown of the goods and services to be supplied, and the total cost for that work, inclusive of VAT.

A quotation should only be given when you are happy that you understand the customer's needs and that you have priced the job correctly. Once the customer accepts the quotation, it is likely that you will have a legally binding contract.

## **What is not an offer?**

Sometimes communications do not provide enough information to be legally considered an offer. For example, displaying goods in a shop window are not usually considered to be offers. These communications are called 'invitations to treat'.

An invitation to treat is a communication whereby you are inviting consumers or other businesses to engage in further negotiations to purchase your goods or services. A common example would be where you have goods on display in your shop. The invitation to treat is therefore advising other people that you have goods or services that you may be willing to sell and that further discussions or negotiations would be needed to form a contract. If the customer is interested in your goods, they may bring them to the till with the intention of purchasing them (in legal terms, this becomes the 'offer', which you can then choose to 'accept').

## **Estimates**

Often, businesses will give estimates to customers who are looking to cost work that they may wish to have done. These are often given before a full site inspection or survey has been conducted and at the early stages of a discussion between a business and a customer. An estimate is not usually deemed to be an offer because it will be based on incomplete information.

The estimate should clearly state that it is an approximation of costs, and a full survey or additional information would be needed to provide a full quotation. This makes it clear to the customer that the costs could increase or decrease once full details, measurements, etc have been obtained. It is however very important that estimates are realistic and not misleading to avoid infringing consumer protection legislation.

## **Advertising your services**

Most businesses will advertise their goods and services online, whether that is via an online shop on a website, through influencers, or the use of general marketing campaigns. The general legal principle is that advertisements or goods on display in online shops are usually 'invitations to treat' (see above). The consumer makes the offer to purchase the goods and services when they put them into their virtual shopping basket and go through the process of purchasing the goods. The business accepts the offer (usually signified by taking payment from the consumer or otherwise stating that the order has been accepted) and goes on to dispatch the goods to the consumer.

You also need to be aware that if you provide key information about your product and its price in a commercial communication that enables a consumer to decide whether to purchase your product, you

may be making an 'invitation to purchase' under the Consumer Protection from Unfair Trading Regulations 2008 (CPRs). For example, pages on your website displaying products that consumers can order, or prices on products in a shop, are likely to be 'invitations to purchase'. If you are advertising your business generally and no prices are supplied, this is unlikely to be an invitation to purchase.

If you make an 'invitation to purchase', certain information becomes 'material information' (a term used in the CPRs) that the consumer needs to be given in order to make an informed choice. This includes the main characteristics of the product, your business details (including your trading name and geographical address) and information such as the price (including all taxes). You may breach the CPRs if you fail to give consumers the information they need to make an informed choice in relation to your product if this would cause, or be likely to cause, the average consumer to take a transactional decision they would not have taken otherwise. More information about your responsibilities under these Regulations can be found in the ['Protection from unfair trading'](#) guide.

## Accepting an offer

In order for an offer to be accepted, a party usually has to clearly communicate their acceptance of the offer. If any changes are made to the offer or if any further negotiations are entered into such as offering a lower price, this is considered to be a 'counter-offer'.

Any counter-offers made will set aside the original offer and the counter-offer will be making a new offer to the other party. The other party would then be free to accept or reject that offer.

### **Example: changing details in a quotation**

Your business provides a quotation to a customer. This is an 'offer', as discussed above. The customer is unhappy with the quotation, so they come back to you with their suggested changes. This is a counter-offer and they have made you a new offer. You can choose to either accept or reject the customer's proposed changes to the quotation. If you accept them, you have a contract with the customer. If you reject the changes, there is no contract and either you or the customer would need to make a new offer / quotation if you wished to continue with your transaction.

Offers can also be set aside in other circumstances - for example, if they are rejected or if they are not accepted after a reasonable amount of time has passed.

## Time limits for offers

If you are making an offer, you may wish to put a time frame on any quotations or other offers made to customers. This should be a reasonable time frame to enable them to carefully consider your offer. Doing this will clearly show what you consider to be a reasonable time frame for accepting your offer.

Once acceptance has taken place, there is usually a legally binding contract between you and the other party. This is known as the formation of the contract.

## **When does acceptance take place?**

This depends on how the acceptance has been sent. For most forms of communication, acceptance takes place when it has been communicated to the party who made the offer. If the acceptance is given verbally, it takes place at the time of the conversation.

If the acceptance is communicated by instantaneous communication methods such as via email or a text message, for example, then acceptance is deemed to be received when it would be reasonable for the other party to have received it. For businesses, this is usually during their opening hours, when the other party could reasonably expect them to have read it. It does not matter whether they actually have read the communication or not. The contract would therefore be formed from this time.

There is an exception to the general rule about acceptance being received by the person who has made the offer. This exception is called the postal rule.

### **The postal rule**

This is an area of law that was developed when the postal system was predominantly used for business contracts and it states that acceptance takes place when a correctly addressed and stamped letter is placed in the post box, not when it is received by the party. However, this area of law is rarely applied.

It is therefore advisable for businesses to make it clear that acceptance takes place when it has been communicated to the business who has made the offer. This will show that you do not intend the postal rule to apply to your offer.

### **Contracts made online**

Many online businesses will state in their terms and conditions when acceptance of a customer's offer takes place. It is therefore advisable to make it clear to your customers at which point you are accepting their offer to purchase your goods and services, and it is vital that you do not mislead consumers about when you are accepting their order. Doing this can prevent misunderstandings and can make it clear when your business intends to be legally bound by a contract entered into online.

## **Consideration**

Consideration is a right, interest, profit or benefit; or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other. For example, this is often the goods or services that you are supplying in exchange for the money being paid for them. For contracts in England and Wales, sufficient consideration must be present for there to be a contract.

However, the consideration given does not need to be adequate. This means that the law requires parties to have entered into a bargain where each side has provided something of value, but the value does not have to be equivalent to what they are getting in return. It is usually left to the parties to determine the appropriate value, as long as this agreement has been reached fairly and the price agreed is clear, transparent and not misleading. It is also important that you calculate the cost of your goods and services carefully and ensure you are happy with any quotations or prices that you give to customers before a contract is formed.

## **Intention to create legal relations**

Parties to a contract must have intended to create a legally binding contract with each other. The law presumes that agreements made in a social or domestic context, such as with your friends and family, are not intended to create a legal relationship. Whereas agreements entered into in a business or commercial

context are more likely to be viewed as intending to be legal contracts, unless the parties can demonstrate otherwise.

## **Capacity to enter into a contract**

Parties must also have entered into a contract of their own free will and not due to factors such as undue influence, duress or by misrepresentation. As a business, it is important that you consider whether a person has the capacity to enter into a contract with you and you must not take advantage of any vulnerability that they may have. You can find out more information about this in our '[Consumer vulnerability](#)' guide.

Contracts which have not been entered into fairly, contain unfair contract terms or try to bind a consumer to terms they could not possibly have been aware of, will not be legally binding. See part 3 of this guide ('Terms and conditions') for more details.

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