

DMA Suggested Standard Terms and Conditions: Mailing Houses and their Clients

SUB-CONTRACTING
POLYTHENE ENCLOSING
PROJECT MANAGEMENT
STORAGE
DELIVERY
FINISHING CONSIDERATIONS
COMPUTING
ENVELOPES
RESPONSIBILITY
VARIABLE PRINTING

2006



MAILING HOUSES
& SUPPLIERS
Council

INDEX

1	Introduction	3
2	Quotations	
3	Order, supply and delivery of materials	
4	Delivery of orders	5
5	Force Majeure	
6	Data Protection	6
7	Intellectual property	7
8	Charges and payment	
9	Codes of practice and indemnities	9
10	Provision of computer data	
11	Liability	10
12	Termination and cancellation	11
13	Agency, partnership and joint ventures	12
14	Enforceability	
15	Severability	
16	Entire agreement	
17	Jurisdiction	13
18	Signature	

PREFACE

The following suggested terms and conditions for Mailing Houses and their Clients have been prepared by the Direct Marketing Association (UK) Limited (DMA) with the assistance of the DMA Mailing Houses and Suppliers Council.

The chief reason for using written terms and conditions is to provide clarity on the respective obligations of each of the parties and to avoid potential disputes as to what the two parties had actually agreed at the outset. Disputes are more likely to arise if the parties had merely concluded an oral contract.

However, the use of written terms and conditions is only the beginning. Though terms and conditions might make obligations clear, Mailing Houses should always spell out to the Client what is expected from them in a practical sense. This can be done either in planning meetings or by having an aide memoir to accompany written terms and conditions. Where this is carried out there is likely to be a much smoother contractual relationship.

The enclosed suggested terms and conditions should be treated as a guide only. They cover the main contractual issues. However the circumstances for each Mailing House and their Client will differ and these terms and conditions will need to be adapted to each individual set of business needs.

Finally these suggested terms and conditions do not purport to be exhaustive on every aspect of the law mentioned within them and they do not constitute legal advice. Members are advised to take their own separate legal advice where appropriate, to ensure that they have terms and conditions, which adequately reflect their own specific business needs.

SUGGESTED STANDARD TERMS AND CONDITIONS: MAILING HOUSES AND THEIR CLIENTS

These are proposed terms of business suggested by the DMA to its members and other interested parties. The shaded boxes (like this one) are meant to explain the meaning behind the clause. They are not to be reproduced as part of the final text. The clauses and commentary draws upon the DMA's 'Best Practices in Direct Mail Production' publication.

1 Introduction

This introductory clause states who the parties to the contract are and what goods and services are being provided. They also specify that they supersede any previous terms and conditions between the Mailing House and the Client.

These terms and conditions shall apply to any contract between the Mailing House and the Client (which shall mean the person, firm or company placing any order which is accepted by the Mailing House) for the supply of goods (including any instalment or part of them) and services (including any part of them) which the Mailing House is to supply or deliver.

These terms and conditions supersede any of the Mailing House's previous terms and conditions and any practice or course of dealing previously applying between the Mailing House and the Client.

2 Quotations

Any provision concerning quotations should allow revisions in the light of further knowledge of the Client's requirements. A time scale for the acceptance of the quotation should also be specified. The clause makes clear that the Mailing House has the discretion to turn down any order that constitutes only part of the order to which the quotation relates.

A quotation is based on information available to the Mailing House at the date of the quotation and is subject to sight of materials, their suitability and any artwork to be supplied to the Mailing House by the Client.

Quotations are valid for a period of 30 calendar days and are for the whole of the goods or services to which the quotation relates. The Mailing House may extend the period for consideration of its quotation at its discretion and may refuse to accept any order for goods and services, which constitute only a part of the quotation unless the initial specification requested separate quotations for separate elements of the order. All orders must be in writing. No contract shall exist between the Mailing House and the Client where the Mailing House rejects the order.

3 Order, supply and delivery of materials

This clause allocates responsibilities with regard to the supply and storage of materials, their insurance and physical delivery

3.1.1 The Client shall be responsible for ensuring that the materials supplied by it or on its behalf to the Mailing House:

- (a) conform to specifications in the quotation and Royal Mail's, or any other carrier's as appropriate, requirements;
- (b) are supplied punctually;

SUGGESTED STANDARD TERMS AND CONDITIONS: MAILING HOUSES AND THEIR CLIENTS

- (c) are accompanied by a delivery advice note stating the quantity and description of the materials supplied;
- (d) are delivered on pallets, boxed, packed and supplied in such a way as to withstand normal storage and handling;
- (e) are sufficient to enable the Mailing House to deliver the correct quantity of any printing or reproductive work ordered allowing for normal wastage and spoilage.

3.1.2 The Mailing House shall use its reasonable endeavours to provide the Client with a reasonable estimate of the quantity of printing or reproductive work required.

3.2 Checking materials

This sub clause is based on the assumption that a 100% mailing is not required by the Client. Where the Client wishes to guarantee a 100% mailing and needs to have materials checked more thoroughly, this clause should be amended accordingly. Where a Client wants materials checked he should define the level of checking required and pay accordingly. The clause below provides that the Mailing House will check the quantity of materials delivered at pallet level.

The Mailing House shall count the number of pallets containing materials supplied by or on behalf of the Client against any delivery note and shall immediately report any discrepancy to the Client. The Mailing House shall not however be responsible for any loss arising from any errors or omissions in the goods supplied.

The Mailing House shall not be required to check the contents of pallets supplied by or on behalf of the Client.

3.3 Insurance of materials

The Client should ensure that goods are adequately insured both while in transit and whilst on the Mailing House's premises. An alternative to the Client having his own insurance is for the Mailing House to provide it subject to a charge.

All materials supplied by or on behalf of the Client are at the Client's risk whilst on the Mailing House's premises or in transit to such premises and the Client is responsible for arranging adequate insurance cover for those materials unless arrangements have been made to the contrary.

3.4 Storage of materials

It is reasonable for free storage of materials to be provided by a Mailing House for a period of time both before the start of a project and for a period of time following completion. Outside these periods the Mailing House should be entitled to charge for storage. The Mailing House and Client should if necessary discuss arrangements for destruction of any excess materials.

Any of the Client's materials which remain in the Mailing House's possession after [specify] calendar days from the completion of any order will be subject to storage charges. The Mailing House reserves the right to destroy or dispose of all such materials at the Client's cost not less than 14 calendar days after written notice to that effect is given to the Client.

3.5 Physical delivery of materials

The costs of delivering goods to or collecting materials from the Client will not usually be included in the quotation. Where this is the case there should be a clause making this clear.

The cost of collection and delivery of the Client's goods or materials is not included within the quotation and where this is carried out by the Mailing House for the Client it will be charged for as an extra.

SUGGESTED STANDARD TERMS AND CONDITIONS: MAILING HOUSES AND THEIR CLIENTS

4 Delivery of orders

Mailing Houses and their Clients should have arrangements in place for the Client to approve copy before the final version is dispatched and run off.

Time is usually an important factor in any mailing contract and in this example there is a clear statement that time is of the essence. Where time is not of the essence the clause should be clearly amended to say this.

The specified time for delivery, which shall be of the essence, shall be subject to receipt by the Mailing House of all information and materials to enable it to proceed with the contract and to comply with any applicable governmental or other consent.

5 Force Majeure

The law generally only excuses breach of contract if it is literally impossible to perform and it has become frustrated and a 'Force Majeure' situation has arisen. The following clause provides for a termination of the contract by the Client upon a situation of 'Force Majeure' arising.

The Mailing House shall be under no liability if it shall be unable to carry out any of the provisions of the contract for any reason beyond its control including (without limiting the foregoing) Act of God; legislation; war; fire; flood; drought; failure of power supply; lock out; strikes or other action in contemplation of the furtherance of a dispute (but not strikes or other action in contemplation of the furtherance of a dispute taken by the Mailing House's employees).

If the 'Force Majeure' situation continues for a period of [X calendar days] then the Client may by written notice to the Mailing House terminate the contract upon [X calendar] days notice and pay for work done and materials used, but subject to this shall otherwise accept delivery when available.

SUGGESTED STANDARD TERMS AND CONDITIONS: MAILING HOUSES AND THEIR CLIENTS

6 Data Protection

The Data Protection Act 1998 provides that where processing of personal data is carried out by a data processor on behalf of a data controller the data controller, in order to comply with the Seventh Principle on the security of data, must ensure that the processing is carried out under a contract in writing, must ensure that the data processor acts only on his instructions and must have sufficient technical and organisational security measures in place.

The definition of data processor under the Act is not restricted to bureau type operations and any organisation carrying data processing activities of any kind is now a data processor. This also includes Mailing Houses.

6.1 The processing of personal data

The Mailing House represents, warrants and undertakes to the Client that it shall process any personal data (as defined in the Data Protection Act 1998), only on the instructions of the client, solely for the purposes of this contract and for no other purpose.

The Mailing House represents, warrants and undertakes to the Client that it has in place appropriate technical and organisational measures against accidental or unlawful destruction or loss of alteration to, unauthorised disclosure of or unauthorised access to any personal data.

The Mailing House shall ensure that each of its employees, agents and subcontractors are made aware of its' obligations with regard to the security and protection of personal data and shall require that they enter into binding obligations reflecting the provisions of this clause.

The Mailing House shall ensure that each of its employees has signed a confidentiality agreement in respect of its clients' data.

6.2 Auditing of security measures

Under the Data Protection Act 1998 a data controller is to take reasonable steps to ensure that its data processor has the requisite technical and organisational security measures in place and the following provisions provide for this.

The Mailing House shall, when requested to do so by the Client, submit its data processing facilities, data files and relevant documentation to auditing by the Client, subject to the Mailing House's security and confidentiality procedures and shall comply with all reasonable requests from the Client to enable it to comply with any and all of its' obligations under the Act.

Upon the completion or termination of the contract the Client shall provide instructions for the return or destruction of personal data.

SUGGESTED STANDARD TERMS AND CONDITIONS: MAILING HOUSES AND THEIR CLIENTS

7 Intellectual property

As a general rule, the creator of the intellectual property is the owner of the intellectual property rights (IPR) unless it is agreed otherwise.

When a Client engages a Mailing House it typically is purchasing the technical expertise and services of the Mailing House rather than any intellectual property rights that the Mailing House may have. For example, the design of an envelope or the computer program used for mailsort and name selection. The Client is free to negotiate with the Mailing House to purchase any IPR which it wishes to have assigned to it and the clause provides for this.

The intellectual property rights in any work created by or for the Mailing House in relation to this contract shall vest in the Mailing House unless it is agreed in writing that such intellectual property rights shall pass to the Client.

8 Charges and payment

This clause should lay out clearly what charges the Client is to pay. Where there are to be charges made for any preliminary work this should be stated prominently on any estimate.

8.1 Payment of invoices

Clause 8.1 provides for the payment of an invoice within 30 days of the invoice date. Some Mailing Houses may prefer to be paid in advance and the clause should be amended accordingly. The third sub-clause of clause 8.1 refers to corrections.

Invoices will be paid on completion of the contract and in any event at not less than monthly intervals within 30 days of the invoice date unless otherwise agreed.

All prices quoted are strictly net and are exclusive of VAT which should be payable by the Client.

The Client shall also be charged for any preliminary work produced by the Mailing House at the Client's request whether experimentally or otherwise and any corrections made after the first proof and any other changes requested by the Client on or after the first proof.

8.2 Payment for postage

Where the Mailing House has taken on responsibility for postage it should have these costs paid in advance preferably by Direct Bank transfer. Where payment for postage is made to the Client's own account this clause should be amended accordingly. The other option is for the Client to set up its own postal account directly with the Postal Providers rather than use the postal account of the Client in which case this clause would be unnecessary.

Where the mailing is to be undertaken through the Mailing House's own postal account, the cost of postage shall be paid, and cleared, no later than 48 hours before the mailing begins. If the cost of postage is not paid within the specified time limit the Mailing House shall have the right to withhold the mailing.

8.3 Postal charge refunds

In a case where arrangements for postage are made through the Mailing House, the Mailing House should notify the Client and refund the difference between gross and net postage. An alternative is for the Mailing House to provide the Client with a credit, which it can offset against the cost of the next mailing it puts through the Mailing House's postal account.

SUGGESTED STANDARD TERMS AND CONDITIONS: MAILING HOUSES AND THEIR CLIENTS

Where the cost of postage is less than the amount paid by Direct Bank transfer the Mailing House shall either refund any sums remaining to the Client or shall provide a credit for the Client for the next mailing it puts through the Mailing House's account.

8.4 Interest on overdue bills

Members should note that The Late Payment of Commercial Debts Act 1998 now implies into contracts provisions for the payment of interest on the late Payment of bills. From November 1998 small businesses (i.e. those with 50 or fewer full time employees) have been able to claim interest from larger businesses and the public sector if they are paid late. Mailing Houses may wish to have their own specific clause in terms and conditions and one is provided for below.

The clause below defines the date on which payment was due as 30 days after the date of the invoice.

The Mailing House reserves the right to charge interest at the rate of X% above the base rate of [name of bank] or part thereof on any overdue sums from the date on which payment was due (which shall mean 30 calendar days after the date of any invoice) to the date on which payment is received.

SUGGESTED STANDARD TERMS AND CONDITIONS: MAILING HOUSES AND THEIR CLIENTS

9 Codes of practice and indemnities

This clause places the responsibility on the Client for ensuring that that all direct mail and advertising copy issued in its name meets all current legal requirements and establishes the codes of practice that the Client is to comply with. The Client is to indemnify the Mailing House for any liability it may suffer as a result of the Client's failure to comply with these requirements.

The Client shall:

- (a) provide the Mailing House with a true copy of all advertising material or other material intended to be enclosed with any material prepared by the Mailing House;
- (b) ensure that all information or materials provided by it complies with all applicable statutory requirements and with the codes of practice of the appropriate supervisory bodies including, but not limited to, the British Codes of Advertising, Sales Promotion and Direct Marketing (Cap code); and the Direct Marketing Association's Code of Practice;
- (c) ensure that any consumer mailing addresses provided to the Mailing House are cleaned against the Mailing Preference Service (MPS) files, unless it is agreed that this will be carried out by the Mailing House

The Client shall indemnify the Mailing House against all costs, claims, liabilities, penalties and expenses which the Mailing House may incur by reason of its' works being illegal, unlawful, infringing any copyright, trademark or other intellectual or other proprietary rights of any third party or is defamatory, obscene or the distribution of which may infringe postal or other regulations or which is in breach of any trade description or other legislation.

The Mailing House shall have the right upon request from the body administering the Quality Standard in Mail Production (QMP) or any successor accreditation scheme, to supply that body with samples of any mailings relating to the contract.

10 Provision of computer data

This clause obliges the Client to ensure that all computer data supplied to the Mailing House is 'clean' and does not contain any computer viruses and specifies what the Client is to provide in terms of file layout.

The Client shall ensure that any computer data supplied to the Mailing House is clean, unadulterated, capable of being read and processed and does not contain any computer viruses. In the event of the computer data supplied being corrupt, the Mailing House shall either require the Client to supply clean unadulterated data which does not contain any computer viruses or decontaminate the data itself but at the Client's expense.

The Client shall ensure that all data supplied to the Mailing House are completely unambiguous with regard to their format. A specification of the formats of the data supplied and instructions for interpretation must be provided in writing.

SUGGESTED STANDARD TERMS AND CONDITIONS: MAILING HOUSES AND THEIR CLIENTS

11 Liability

In order to maintain the high standards of business practice expected of DMA members it should not be possible for members to avoid liability for providing poor quality goods or services. The DMA Code of Practice now provides that members should not attempt to exclude terms implied into their contracts by the Sale of Goods Act 1979 as to description, satisfactory quality or fitness for a particular purpose.

11.1 Limitation of Mailing House's liability

The first sub clause below seeks to limit the value of any claim either to the value of the contract or else to a particular sum. Members are strongly advised to have insurance cover in place to meet any claim that is made against them. Where there is insurance indemnity cover in place the figure £X overleaf would be the insurance indemnity limit and could include an element of consequential or indirect loss, which has been excluded under 11.2.

The Mailing House should aim to have a limit of liability that is set at a realistic level. The courts are now looking more closely at limitation of liability clauses and are striking out those limitation clauses which they see as unreasonable.

The Mailing House's entire liability (including liability for acts and omissions of its employees, agents and sub contractors) in respect of any breach of its contractual obligations and of any representations, statement or tortious act or omission including negligence shall be limited to the contract price (excluding postage and telecommunications costs) or the sum of £X whichever is the greater.

11.2 Consequential or indirect loss

This sub clause excludes liability for consequential or indirect damages. Another alternative is to have the liability limited to a certain figure and to have this potential liability backed by insurance cover.

The Mailing House shall not be liable for any indirect or consequential loss or damage, loss of profits or goodwill or loss of any kind, other than the direct loss suffered by the Client and subject to limitation under sub clause 11.1.

11.3 Liability for death or personal injury

The exclusion clauses above are subject to sub clause 11.3 which refers to liability for death or personal injury. This is because liability for death and personal injury cannot be excluded.

Notwithstanding the sub clauses 11.1 and 11.2 above, the Mailing House's liability to the Client for death or injury resulting from its own or that of its employees, agents or sub contractors negligence shall be unlimited.

SUGGESTED STANDARD TERMS AND CONDITIONS: MAILING HOUSES AND THEIR CLIENTS

12 Termination and cancellation

This standard termination clause enables both the Mailing House and the Client to terminate the contract where the other party has committed a breach. The clause gives the breaching party an opportunity to remedy the situation by providing that termination takes effect upon the expiry of 14 calendar days after being notified about the breach. The Mailing House can also terminate the contract where the Client goes into liquidation or faces severe financial difficulties.

12.1 Termination in the event of breach of contract by either party or upon the bankruptcy, liquidation etc of the Client

Subject to clause 12.2 either party shall be entitled to terminate this contract by notice in writing to the other in the event of any material breach by the other party of any of its obligations under this contract. The termination will take effect [14] calendar days after receipt of written notice unless the defaulting party has remedied the default within this time.

The Mailing House shall be entitled to terminate this contract by notice in writing in the event of the Client's failure to pay in accordance with the terms of the contract or in the event of the Client committing an act of bankruptcy or taking any steps leading to liquidation, making any agreement with its creditors or having a receiver or administrative receiver appointed over any of its assets.

In the event of termination by the Mailing House under this clause, the Client shall immediately pay any outstanding sums due from it to the Mailing House.

12.2 Termination in other circumstances

This is an optional clause for both sides to consider. In usual circumstances where one party decides to terminate a contract early this would amount to a material breach of the contract and all sums from the Client would become due. However a Client or a Mailing House may, during the course of a contract, decide that they wish to terminate it for a particular reason.

Where this is the case the clause provides for the payment of compensation by the terminating party. The difficulty with this clause is that it is impossible to give any guidance as to what a reasonable sum is likely to be under 12.2 (a) and this will all depend on the amount of work carried out by the Mailing House and is a matter of negotiation between the parties.

If either the Mailing House or the Client wishes to cancel the contract (other than for a breach of the contract by the other and the instances arising under clause 12.1) then:

- a) where the Client cancels the contract it will pay to the Mailing House a reasonable sum for any work carried out by it prior to such cancellation together with a reasonable profit on the uncompleted portion of the contract;
- (b) where the Mailing House cancels the contract it will pay to the Client all costs incurred by the Client relating to that contract.

Termination of the contract by cancellation in 12.2 (a) & (b) above will take effect immediately upon receipt of written notice from the cancelling party to the other party.]

SUGGESTED STANDARD TERMS AND CONDITIONS: MAILING HOUSES AND THEIR CLIENTS

13 Agency, partnership and joint adventure

In the absence of express provisions to the contrary, contracts can potentially set up unwanted relationships between the parties in a way not contemplated by the contract. This clause avoids this possibility.

Nothing in this contract shall be construed as to constitute either the Mailing House or the Client to be the agent of the other and it shall not operate so as to create a partnership or joint venture of any kind between them.

14 Enforceability

Failure to enforce rights under an agreement can in some circumstances amount to a waiver of those rights. This clause enables both parties to enforce their rights even where they have failed to exercise them in the past.

No failure or delay by either the Mailing House or the Client in exercising any of their rights under this contract shall be deemed to be a waiver of those rights. No waiver by either of them of any breach of the contract by the other, shall be considered as a waiver of any subsequent breach of the same or any other provision.

15 Severability

This type of provision covers a situation where some of the clauses of a contract turn out to be illegal or unenforceable. It provides that any clause which is declared illegal or unenforceable can be severed from the contract without affecting the remainder of it.

Notwithstanding that any provisions of this contract may prove to be illegal or unenforceable the remaining provisions shall continue in full force and effect.

16 Entire agreement

In the interests of legal certainty, the parties will want the contract to be restricted to one document as well as excluding any oral representations or discussions. However, members should be aware that the Unfair Contract Terms Act 1977 (UCTA) prevents the exclusion of liability for pre-contract misrepresentation unless it is deemed reasonable.

These terms and conditions constitute the entire contract between the Mailing House and the Client with respect to the matters dealt with herein. No variation to this contract shall be valid or effective unless made in writing and signed by both of them.

SUGGESTED STANDARD TERMS AND CONDITIONS: MAILING HOUSES AND THEIR CLIENTS

17 Jurisdiction

This clause may need to be changed if the agency or client do not operate under English Law. If the contract is not going to be governed by English law the Mailing House should check that its insurance cover extends to claims brought in foreign courts.

This contract is subject to English law and the Mailing House and the Client agree to submit to the jurisdiction of the English courts in respect of any dispute or difference arising under it.

18 Signature

Standard terms and conditions are not normally signed by parties in a business to business relationship. Typically, standard terms and conditions will appear on the back page of a quotation. The quotation should make reference to the terms and conditions by saying "subject to our terms and conditions see overleaf". This should assist in proving that the Client was aware of, or should have been aware of them if it subsequently claims that it was not.

Sometimes quotations may go to and fro between a Client and its Mailing House. Where this is the case, it will be the last quotation or order form acknowledgement which passes between the two parties and is accepted by both of them, which will become the terms and conditions of the contract.

The other alternative specified below is to have both parties sign the standard terms and conditions. Each party signing them will be bound by them and in the absence of misrepresentation or fraud, it will be immaterial whether or not they have been read. Someone who can commit the company to the terms and conditions should sign. This is typically a director, company secretary or someone such as a line manager who has the authority to bind the company.

Note: Signatures should always appear on a page containing contract clauses - they should not appear alone on a separate page.

Signed for and on behalf of [Mailing House] Limited:

Signature _____

Title _____

Dated _____

Signed for and on behalf of [Client] Limited:

Signature _____

Title _____

Dated _____