

Memoranda of Understanding (MoU) Writing Guidelines

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Approval Authority

These guidelines are issued under the authority of the National Defence Memoranda of Understanding Coordinator (NDMOUC) at 992-3817.

Overview

This document contains step-by-step directions on how to draft an MoU, from the establishment of a requirement for an MoU to final sign-off. While some sections are repeated from DAOD 7014-1, this is to provide you with an overall picture of the cradle-to-grave MoU process.

Document Content

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Initiation Phase

Process

The following table describes the three sequential stages in the MoU initiation phase. Each stage must be completed before starting the MoU preparation.

Stage	Who does it	What happens
1	JAG Legal Advisor	JAG ensures that a MoU is the appropriate instrument for the type of obligation being undertaken.
2	NDMOUC	NDMOUC will: <ul style="list-style-type: none">• Establish whether an arrangement already exists between the Participants that may

		<p>accomplish what needs to be done (example: Mutual Logistic Support MoU between DND and the United States Department of Defense).</p> <ul style="list-style-type: none"> • Provide, if required, a hard copy of the MoU Writing Guidelines, which provide explicit instructions on how to draft an MoU. • Provide a copy (ies) of any existing boilerplate MoU that pertains to the topic for which an MoU is required.
3	Director Financial Operations (D Fin Ops 3-3)	D Fin Ops 3-3 ensures that financial resources are used in compliance with legislative and governing direction and that accountability and financial control are established over each project and undertaking covered by the MoU.

MoU Preparation

Document Structure

MoU are structured in a prescribed way. This structure must be adhered to when preparing a MoU. Every MoU **shall** contain the sections designated as mandatory. Only include an optional section, if it is required. The following table shows the sequence of sections in a MoU and the criterion for including each section.

Sequence	Section	Requirement
1	Table of Contents	Use if there are many sections.
2	Introduction	Mandatory
3	Legal Disclaimer	Use if entered into with industry.
4	Definitions	Use if there are many abbreviations/acronyms or specialized terminology.
5	Objectives and Scope	Mandatory
6	Organization and Management	Optional
7	Contractual Arrangements	Optional

8	Work-Sharing	Optional
9	Financial Arrangements	Mandatory
10	Taxes , Customs Duties and Similar Charges	Optional
11	Disclosure and Use of Technical Information	Optional
12	Liability	Optional
13	Status of Personnel	Optional
14	Sales and Transfers to Third Parties	Optional
15	Quality Assurance	Optional
16	Project Equipment	Optional
17	Logistic Support	Optional
18	Security	Optional
19	Access to Establishments	Optional
20	Inclusion of Add'l Participants	Optional
21	Settlement of Disputes	Mandatory
22	Amendment	Mandatory
23	Duration , Withdrawal and Termination	Mandatory
24	Languages	Use if the MoU is written in more than one language.
25	Effective Date and Signature	Mandatory

Placement of Information

Include only sufficient detail to ensure the proper execution and administration of the project. Use the following table to properly place information in the MoU.

IF the information deals with ...	THEN ...
fundamental aspects of the project (example: cost, work sharing, contractual details, intellectual property, all financial	describe them explicitly, but briefly, in the body of the MoU.

responsibilities)	
detailed program schedules	attach them as Annexes to the MoU.

Disclosure of Information

There are a variety of different laws throughout the world concerning the disclosure of information. This could obligate governments to disclose information in their possession (including information contained in a MoU). In most countries, the terminology in the following table applies.

IF the information is ...	THEN that information is ...
disclosed "in confidence" (not to be confused with "Confidential")	exempt from disclosure under most information disclosure legislation.
freely given	available for disclosure under most information disclosure legislation.

Numbering

Number all pages, sections, paragraphs, and sub-paragraphs. The following table provides some examples as a guide. Any consistent numbering system may be used.

Division	Numbering
Page	1, 2, 3 or 1/* etc.
Section	1, 2, 3 etc. - left or centre justified with section heading
Paragraph	1.1, 1.2, 2.1, 3.1 etc., relating to section number
Sub-Paragraph	1.1.1, 1.1.2, 1.2.1, 2.1.1 etc.

Terminology Overview

The terminology used in a MoU must reflect the fact that a MoU has no binding basis in law and is not a legal or contractual document. Specific terminology is reserved for use in contracts or treaties and should, therefore, be avoided in a MoU. While other terms may be used their use is discouraged. The following tables provide examples and alternatives for both cases.

To be Avoided

The following table shows those words and phrases that **shall** be avoided in a MoU in all circumstances. Use the alternatives provided.

Do Not Use	Use Instead
shall	will
enter into force	come into effect
continue in force	remain in effect
terms/conditions	provisions

To be Discouraged

The following table shows those words and phrases that may be used in a MoU, but are discouraged. To avoid legal implications, use the alternatives provided.

Use Discouraged	Use Instead
agree	concur
agreements/undertakings	arrangements/understandings
undertakes	intends
agree(s) to	will
party/parties	Participant(s)
be entitled to	enjoy
commitments	arrangements
obligations	responsibilities
constitute an obligation	continue to apply
rights	benefits

Mandatory Sections

The Introduction Section

The Introduction section to the MoU should:

- Fully identify all the participants and, where appropriate, their representatives.
- Briefly state the background of and the rationale for pursuing the arrangement.

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Objectives and Scope

The Objectives and Scope section should:

- Describe the work to be accomplished.
- Establish the extent of any research, design, development, production and in-service support activities.
- Determine whether there will be any formal testing and evaluation.
- Set forth program schedules.
- State whether the commitment is for the program in its entirety or phase-by-phase.
- Establish arrangements to facilitate transition to the next phase, as applicable.

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Financial Arrangements

If there are no financial implications, this section shall read: "This MoU will not impose any financial responsibilities on its participants, except that each participant will be responsible for the funding costs it incurs in its own interest, related to the support of the MoU."

The Financial Arrangements section should:

- Establish a cost ceiling for the arrangement and each participant.
- Determine who may change the cost ceiling and under what circumstances.
- Prescribe the method of sharing the costs of the collaborative effort among the participants.
- Identify any common costs to be shared by the participants and any costs for noncommon requirements to be borne by the participant(s) incurring the costs.
- Establish provisions for assessing changes of program costs that may result from such things as inflation, currency fluctuations, and technical changes. This will provide grounds for adjustments to financial contributions.
- Establish and value any nonfinancial contributions by a participant that are to be reflected in that participant's cost share.

Note: As a general principle, a participant should not claim taxes paid to its Government as a result of the program as part of its cost share.

If there are financial implications, include a Funding Arrangements, Cost Recovery, and Auditing sub-section.

Funding Arrangements

The Funding Arrangements sub-section should:

- Either establish a funding procedure, including a financial schedule, or establish a schedule for subsequent development and approval of such a funding procedure.
- Determine whether the use of special bank accounts will be required.
- Establish authority and procedures for disbursement of funds.
- State the national currency in which contributions will be made and, if necessary for determining project cost shares, establish a reference currency for the project.

Cost Recovery

The Cost Recovery sub-section should establish the principles governing cost recovery. Chapter 7 of the Provision of Services to Non-Defence Agencies (B-GS-055-000/AG-001) provides information on cost recovery principles. Before writing this section, discuss cost recovery issues with D Fin Ops.

Auditing

The Auditing sub-section should:

- Determine who should perform the audit.
- In the case of an international MoU, where a joint international board of auditors appears appropriate, specify the composition of the board. Some nations are bound by law, statute or general practice to choose specific types of representatives. Therefore, it may be appropriate for some participants to be represented by several auditors.
- Specify the nature, frequency and extent of the audit to be performed, bearing in mind that any disruption of the program should be avoided.
- Ensure that due account is taken of any legitimate interests of the national audit bodies external to the defence organization of the participants, when these are not represented in the joint international board of auditors.

- Specify the nature of the audit report (i.e. independent personal, national reports or preferably, a single joint report). Determine the time allowed to the board to establish its report and the publicity to be given to the report.

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Settlement of Disputes

The Settlement of Disputes section should address the means of resolving disputes between the participants.

Sample: "Any disputes regarding the interpretation or implementation of this MoU will be resolved only by consultation among the participants and will not be referred to a national or international tribunal or other third party for settlement."

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Amendment

The Amendment section should set forth the procedure for amending the MoU and/or its supplements.

Sample: "This MoU may be amended with the mutual written consent of the participants."

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Duration, Withdrawal and Termination

The Duration, Withdrawal and Termination section should:

- Specify the duration of the MoU. If the MoU is for a fixed term, include the following paragraph: "This MoU will remain in effect for a period of () years from the effective date."
- Provide for the participants' termination of the MoU by unanimous consent on conditions to be established at the time. Include the following paragraph: "This MoU may be terminated at any time, with the mutual written consent of the participants."
- Provide for the conditions under which the participant may withdraw. Include the following paragraph: "Either participant may withdraw, at any time, upon presentation of () days (months) written notice."
- Specify the withdrawal provisions that should be adopted for each phase of the project. Whenever practicable, the effective withdrawal date should coincide with the completion of a phase.
- State whether a withdrawing participant should meet its own commitments up to the effective date of withdrawal. The withdrawal provisions should be

aimed at compromise. However, if a participant finds it necessary to withdraw, wholly or partly, from the program, provisions should be made for consultations between the participants on the consequences of such withdrawal.

- Consider whether the MoU should include provisions for:
 - industry continuing the work allocated to the withdrawing participant;
 - continuing program contracts awarded by the withdrawing participant; and
 - transferring work from the industry of the withdrawing participant to the industry of the remaining participants.
- Determine the extent to which the withdrawing participant should try to minimize disruption of the program and any costs arising from its withdrawal by:
 - giving reasonable notice;
 - continuing to carry out its responsibilities regarding the transfer of information related to its participation in the program; and
 - bearing all unavoidable additional costs resulting from the withdrawal, as determined by the participants (example: administration, contract termination, or program modification costs caused by the withdrawal). MoU negotiations should consider whether the withdrawing participant should be liable for any costs in excess of its original commitment under the MoU.
- State which sections of the MoU remain in force when a participant withdraws, or termination/expiration of the MoU.

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Effective Date and Signature

The Effective Date and Signature section should:

- Establish the date on which the MoU will come into effect for each participant.
- Specify whether the MoU will come into effect only after all of the participants have signed or as soon as a specified number of the participants have signed.

- Specify the titles of the individuals who are authorised to sign the MoU.

Sample: "This MoU becomes effective on the date of the last signature."

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Optional Sections

Legal Disclaimer

The Legal Disclaimer section should be used only if the MoU is entered into with industry. Clarify that the MoU is not a legally binding agreement.

Sample: "This MoU is not legally binding and places no legal obligation on the participants."

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Definitions

The Definitions section should clearly define all significant words, phrases, abbreviations and acronyms used throughout the document.

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Organization and Management

The Organization and Management section should:

- Allocate management authority and responsibilities within the organizational structure.
- Establish the management structure of the arrangement.

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Contractual Arrangements

The Contractual Arrangement section should identify how, and by whom, the contracting functions (bid solicitation and evaluation, contractor selection, contract award and administration) will be performed.

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Work-Sharing

The Work-Sharing section should identify any arrangements that allocate work (in response to a common requirement of the participants) to be performed by the supply sources of the participants.

Note: This can be a sensitive issue as it has Industrial Benefit implications.

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Taxes, Customs Duties and Similar Charges

The Taxes, Customs Duties and Similar Charges section should address how taxes, customs duties and similar charges will be treated.

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Disclosure and Use of Technical Information

The Disclosure and Use of Technical Information section should:

- Clarify how technical information will be used and disclosed.
- Clarify how other types of information will be used and disclosed (example: business, finance, commerce and personnel). If other types of information are to be used and disclosed, a clear definition of the term "Information" may be required.
- Address the following items:
 - Ownership of foreground information;
 - Disclosure of technical (foreground/background) information;
 - Use and protection of technical (foreground/background) information;
 - Rights of participants;
 - Rights of Contractors;
 - Indemnification;
 - Use of thirdparty proprietary background information, and
 - Improvements.

AC/313 - NATO Guidelines and Sample Provisions for Memoranda of Understanding contains additional information on this topic. Due to the complexity of this topic, assistance should be sought from both the Directorate Intellectual Property (DIP) and the applicable Directorate in JAG.

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Liability

The Liability section should provide for the resolution of claims for property damage and personal injury arising under or related to the MoU. The participants should generally not indemnify contractors against third party liability claims. However, in some circumstances participants may wish to indemnify contractors against specific types of third party liability claims. Furthermore, in a decentralized program with national contracting and funding arrangements, different provisions may be appropriate.

DND/CF takes the view that personnel involved in collaborative programs with other North Atlantic Treaty Organization (NATO) countries come under the NATO Status of Forces Agreement (SOFA). As a result, the claims resolution formulae contained in Article VIII of the NATO SOFA apply. Some countries take a different view. So, legal advice must be obtained in this regard.

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Status of Personnel

The Status of Personnel section should:

- Define the status (determining the rights and obligations in terms of, inter alia, customs, taxation, arms, jurisdiction, claims, immigration, health care) of personnel associated with the project during its execution.
- Determine whether an existing agreement may apply. If one does not exist, specific arrangements should be made.
- Define the personnel who will hold a unique status and those who will not.

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Sales and Transfers to Third Parties

The Sales and Transfers to Third Parties section should state the conditions for sales, disclosure or transfer of technical information to third parties.

AC/313 - NATO Guidelines and Sample Provisions for Memoranda of Understanding contains additional information on this topic. Due to the complexity of this topic, assistance should be sought from both DIP and the applicable Directorate in JAG.

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Quality Assurance

The Quality Assurance section should:

- Establish appropriate arrangements to ensure quality assurance and compliance with the requirements.

- Determine who will perform the quality assurance function and who will bear the costs.

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Project Equipment

The Project Equipment section should specify procedures regarding the management of project equipment.

Address the following questions in this section of the MoU.

- Does a participant provide the project equipment?
- Do the participants jointly fund project equipment?
- Who will bear the risk of loss or damage?
- Who will make the disposal decision and how will proceeds (if any) be handled?

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Logistic Support

The Logistics Support section should establish the principles governing logistic support.

Note: Logistic support covers a range of elements necessary to ensure effective and economic support of equipments at all levels of maintenance and use during their program lifecycle. It covers elements such as maintenance planning and support, supply support, packaging, storage, transportation, facilities construction and engineering, and training.

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Security

The Security section should:

- Fully establish the obligations of participants to control, safeguard and protect sensitive (classified/designated) information and assets.
- Describe provisions for classification/designation and use of information, the use of other than official government to government channels, and procedures in case of disclosure of classified/designated information and/or assets.
- Describe the safeguarding measures required when there is both contractor involvement and sensitive information received under the terms

of the MoU. Sensitive information shall not be released to any non-participant unless specifically authorized in the MoU.

Note: Chapter 13 of the National Defence Security Policy (A-SJ-100-001/AS-000) offers general guidance on the security clauses to include in a MoU.

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Access to Establishments

The Access to Establishments section should set out the conditions for and regulations applicable to access to facilities, the obligations of visiting personnel and the procedures for requesting permission to visit.

If this is an international MoU, determine the application of the relevant security regulations of the Host participant and of NATO document "Security with the North Atlantic Treaty Organization" CM(55)15(Final), dated 1st October 1990, and subsequent amendments.

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Inclusion of Additional Participants

The Inclusion of Additional Participants section should:

- Establish the rules by which non-participants may become participants or observers.
- Determine to whom the nonparticipant wishing to join the cooperative effort should address its request.
- Determine whether agreement of each of the participants will be required prior to conducting discussions with potential new participants.
- Establish whether the participants should be required to establish ground rules for discussions prior to those discussions.
- Establish whether any preexisting conditions to accession or observer status exist at the beginning of the collaborative effort.
- Establish the procedure by which the participants will establish the conditions governing accession to participant or observer status.