Welcome
Let’s talk about the easy stuff first
Ten simple negotiation rules

1. Don’t let the work start before the contract is signed
2. Don’t click agree on software
3. Don’t pay for work partially completed
4. Do a complete scope of work before the work starts
5. Delay “acceptance” for as long as possible
6. Don’t let the supplier use a SLA to bill you, instead make everyone flat fee their work
7. Make everyone sign your standard terms and conditions
8. Don’t agree to let the supplier limit their liability
9. Have multiple suppliers for everything
10. Do not forecast for the supplier
Why did I create this session?

This session is way too short

Core Competencies – Add Contracts, Project Management, Risk Management, Statements of Work, Services and Contract Administration to your tools

Have a good set of internal documents and policies

Donald Trump

Separate out key provisions and put them in your NDA

Standardize contract clauses across agreements

Win?

I want to be a marketer
Get Your House in Order First

• Negotiation should be the last training your organization gets, not the first
• Agency Law
• Think like a lawyer - but BEWARE - you might actually know more than your lawyer
• Don’t take it personally when no one listens to you
• Web based terms and conditions, Order of Precedence and the Entire Agreement Clause
• Make your negotiation performance based even when you don’t know what you want
• Go digital!
Exercise

- You have two dollars.

Pick a partner.
Negotiate to divide the two dollars between you and your partner.
What was the outcome?
Did you win?

(Do you want another chance at winning?)
EXERCISE

Rate yourself as a negotiator
Establish a Negotiation Foundation

- Determine your negotiation style
- Determine the negotiation environment
- Deal with the three critical negotiation factors: Power, Information and Time
- Control your internal customer
- Have the support of your legal department
- Have internal documents
- Develop a negotiation script
- Talk to everyone internally in a way that properly conveys your message while at the same time being very careful
- Manage the bidding process
- Create multiple suppliers
Every purchase can be evaluated using three factors:

- Dollars
- Time
- Risk

*The higher the dollars, time or risk, the bigger the contract and the more time you must allocate to its negotiation.

*Risk trumps dollars and time.
Time Management

• Time is of the essence
• Everything is time and materials
• Convert service levels to flat fees over time
• Make sure you know what your supplier is doing with their efforts
• Supplier must use their full time and attention for you
• Negotiations take time so plan accordingly
• Be careful of Q4 negotiations
• Recognition of revenue
SOME THINGS YOU CAN CHANGE/SOME THINGS YOU CANNOT CHANGE

• You can change
  • Front of the PO vs. back of the PO
  • Never change “magic language”
  • Run important changes by legal
  • Know implications of what you are changing
  • Making a clause “mutual” may not be the answer

• Do not change
  • Confidentiality
  • Basic warranty, remedy, indemnity, force majeure language
  • Notice
  • Insurance

• Third option: take it out
  • Jurisdiction and venue
  • Some things you cannot have if it is not in your contract
Consult with your legal department
Determine what are “must have” provisions
  • i.e. Safety
Discuss negotiation sticking points
  • i.e. Limitation of Liability
Can you change the wording?
  • i.e. “time is of the essence” vs. “time is important”
How to negotiate the clauses

• Review the attached exercise and determine how you would edit the Sales Order Acknowledgement.

• Look for 3 key things
  1. What should be changed?
  2. What would you remove?
  3. What would you add?

• Words are important

• If you cannot get it in the contract, put it in the scope of work or purchase order
How to control the negotiation with your supplier

• Do not use their paper
• Make sure person you are talking to has authority
• Get confidentiality, work for hire and own the IP
• Do not let the person doing the sales disappear after the deal is done
• Key Person clause
• Sweat the small stuff, especially if the supplier has all the knowledge
• Use a bidding process and qualify more than one supplier
Tips and Tricks

• Review the Fifteen Tips
• Use these tips as a template for your own negotiation “Playbook”
• Involve legal in this task
• There are over 175 contract clauses
Properly manage your legal department

• Have legal create an alphabetical playbook for you
• Everyone should be able to answer a simple “quiz” to work on contract documents
• Do not send a document to legal without providing input
• Know your limits
• Have a system to track contracts internally
• Know your own documents
Arbitration

Any controversy arising under the Contract, or any breach thereof, shall be finally settled by arbitration in ______________ (city), ______________ (state), under the rules of the American Arbitration Association, and judgment upon this award may be entered in any court having jurisdiction.

Instructions: Use this clause only in the case of (1) international suppliers; (2) sole source situations or (3) where supplier is much larger than our organization.

Options: Legal has also approved the use of Arbitration by Panel in the case of technology contracts or large technical purchases.

Notes”

______________________________________________________________________________

______________________________________________________________________________
Playbook Example Two

Time is of the essence

For any dates in this Agreement time shall be of the essence.

WARNING: DO NOT CHANGE OR REMOVE THIS PROVISION WITHOUT APPROVAL OF LEGAL.

Notes

______________________________________________________________________________
______________________________________________________________________________
Working off the supplier’s paper

• Start with the CAPS
• Anything that will raise price, cause delay or change the scope
• Keep contract current with amendments and change orders
• Don’t negotiate against yourself
• Add warranty, remedy, indemnity, insurance, right to use IP, data protection and labor harmony
• Send a PO with your terms
Indemnity and Insurance

• Suppliers MUST have proper types and amounts of insurance
• You cannot have mutual indemnity
• Make indemnity and insurance exceptions if you allow Limitation of Liability
• Waiver of subrogation
• Cyber-risk insurance limitations
THE FOLLOWING ITEMS WILL RUIN YOUR GOOD CONTRACT

- Battle of the Forms
- LIMITATION OF LIABILITY
- Force Majeure
- Sole Source
- Letters of Intent

- Co-employment
- DISCLAIMER OF WARRANTY
- Bilateral Termination for Convenience
- Failure to enforce contract with rewards and penalties
- Accounting department
Price

• Increase the initial price period to two-years minimum
• Don’t allow year of year price increases
• Take set-offs and credits where necessary
• Make suppliers flat fee prices
• Limit the use of rate sheets
• Fuel
Deliverables

• When you don’t know what is acceptance start with what you have, benchmark it and use that to establish KPIs for future performance
• No Waiver of your rights
• Develop a Form for Payment Request
  • No extra work has been requested
  • All subs have been paid
  • Project is on time and on budget
  • Do they foresee any problems going forward
  • Scope is accurate as of date of request
• Do not pay for work partially completed
Negotiating the Statement of Work

- Remember project managers are managing multiple projects at the same time
- Don’t let supplier write statement of work for you
- Have a great template
- Your statement of work must remain current
- Engage the project manager properly
- Involve the internal customer
- Determine who is responsible for the statement of work internally
- Is upper level management driving the project?
- Focus on negotiating the actual deliverables
- Tell supplier what you want – not how to do it!
Negotiating Facilities

- Be careful when you don’t know what will fix an issue – break out the work into two parts: bid and performance
- Once work is performed, benchmark that task for future performance
- Who is controlling the budget?
- Things are most likely to break when no one is there
- Create a list of critical tasks
- Always have a supplier point of contact
- Remember project managers are in multiple locations
- Try not to be “special”
- Have multiple suppliers
- Delay acceptance
Checklist for buying goods

• Get title to goods and intellectual property (Patent indemnity)
• Make sure quality is acceptable (Remedy)
• Carrier (Indemnity and Insurance)
• Goods identified to the contract
• Forecasts
• Risk of Loss
• Warranty
• Increases to cost
• Liquidated Damages
• Statement of Work
Checklist for buying services

• Ownership of deliverables
• Time and materials
• Statement of Work
• Timeline and delay
• Determining if services are acceptable
• Key service providers
• Termination rights and other remedies
• Professional service providers should be better than everyone else
• Remove people immediately who do not work fast enough or do not make you “happy”
How do you negotiate a construction contract?

• Obey the law
• Understand the process
• Get a good project manager
• Do not pay unless you get a release of lien
• Make sure the subs get paid
• Manage the scope
• Add lien, bond and withholding to the contract at a minimum
• You need a custom contract for this purchase
How do you negotiate a professional services contract?

- Deal with supplier’s level of expertise in contract
- Insurance
- Use key person
- Tie deliverables to experience
- Check their level of experience and make them prove it
- Custom contract if over a certain dollar amount
- Pay less if they need help
- Remove people immediately if they don’t make you happy
How do you negotiate technology?

- Every contract must have data protection and cyber-risk insurance
- Understand it is probably win-lose
- Get warranties and remedies
- Go to a conference or training before you buy
- Time your purchase with revenue recognition
- Walk away once before you buy but time it perfectly and blame legal
- No modifications!
- You adapt to the software it does not adapt to you
- It should perform at least as good as what you currently have
• Your contract clauses are not good if you do not give yourself a GOOD ENOUGH remedy for non-performance.

• Duty – Breach – Remedy

• A remedy is not GOOD ENOUGH if you cannot collect it or achieve it.

• Most companies will not sue, they will just throw money at a problem.

• Legal decisions are very different from business decisions.
DO YOUR HOMEWORK

- Get your house in order
- Know the laws that affect purchasing
- Train everyone in your company
- Have policies and procedures
- Document each and every breach
- Get a signature on the contract
- Don’t just reference the terms and conditions
- Use a system so everyone can track contracts and see clauses
- Talk to your lawyer
- Be a good negotiator
- Get a reference book
WANT MORE TRAINING FROM MARK?
There are plenty of chances

July 27 and 28, Contracting Beyond the Basics, Denver, CO
August 24 and 25 Contracting: What the Ts and Cs Mean, Chicago, IL

Podcasts, Videos, Articles and Past Session Materials on the ISM web site

In-house seminars

Local Chapter lectures

Latest book is on Amazon.com

Subjects include, Software, Data and Technology Agreements; Contracting; Negotiations; Services, Statements of Work; Project Management and Contract Administration; Risk Management
QUESTIONS?
Thank you for joining us

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YOUR FEEDBACK IS IMPORTANT

Please take a few minutes to complete this brief survey.

Survey link: www.instituteforsupplymanagement.org/ISM-17-NEGOTIATION
or Scan the QR code on your smartphone.