

ENTERPRISE

Five steps to shaping deal clarity



Negotiation strategies

■ Raphael E. Lapin

Often in business negotiations, a proposed or boilerplate contract is presented by one side to the other. A purchaser may present his standard purchasing contract to a supplier, who will then put red lines through wording in the contract that he rejects and insert his own language instead. The contract goes back and forth like a game of ping-pong as each side continues to amend, change and insert language that they perceive as acceptable and fair.

But this kind of tug-of-war over contract wording is inefficient, adversarial and produces sub-optimal results due to its zero-sum nature.

Here's a five-step approach to negotiating contract language that will result in more optimal outcomes, meet the parties' true needs, result in clearer contracts and maintain strong working relationships:

1. Move discussion away from language to intent.

Contract language should be an accurate reflection of what the parties have agreed to. Therefore, rather than focusing on the contract document and haggling over what specific wording to use, it is helpful to initially move the discussion away from the contract and explore the concerns of each party with regard to the proposed language. After that, try to jointly design an agreement that meets those concerns. Once an agreement has been reached, it is much easier to go back to the contract and wordsmith language that reflects that agreement.

2. Uncover their concerns.

When the other party has red-lined an item in the contract, do not counter with your wording or insist on the original language, but rather try to understand his concerns.

As an example, you are a merchant purchasing goods from a supplier and in your standard purchasing contract there is a clause which states F.O.B destination, which means that you only assume liability and risk of damage or loss at the time of actual delivery and not before. The supplier sends back the contract with FOB destination red-lined and replaced with FOB origin, which effectively means that the goods are considered delivered at the time they leave the supplier's loading docks and for which he is no longer responsible. Rather than insisting on your FOB destination clause, question him about his concerns with FOB destination.

He may say that based on their accounting principles they can only recognize revenue once the goods have been delivered, and being a publicly traded company, early revenue recognition is really important to them.

3. Share your concerns.

When you have adequately uncovered his concerns about the original wording and understood what drove him to red-line it, you are ready to share your reasoning as to why that wording is important to you.

In our example, having understood his concerns about early revenue recognition, explain why you prefer FOB destination. You may tell him that you are concerned about damage and loss liability; cost of freight and insurance; and immediate replacement should goods be lost or arrive damaged.

This dialogue has now expanded the negotiations in that it has redefined the problem to be solved. The problem is no longer whether the contract will state FOB origin or FOB destination (haggling over the language), but rather what agreement can be crafted that will

allow early revenue recognition for the supplier while at the same time address the merchant's concerns of damage and loss liability, cost of freight, insurance etc. With this elegant redefinition of the problem to be solved, the groundwork for negotiation is set.

4. Negotiate.

You are now ready to explore creative ideas that could meet both your set of concerns as well as theirs. This step may require the innovative thinking and ingenuity which makes negotiation so satisfying. You may agree for example to an FOB origin contract but with provisions that they will pay for freight with a carrier of your choice, and for insurance. You may further agree that in the event of lost or damaged goods, the supplier warrants that he will deliver replacement goods within seven days at no extra cost. Such an agreement would address the early revenue recognition concern of the supplier and the risk concerns of the merchant.

5. Draft language.

With an agreement now in place, it is easy to draft language that reflects that agreement. Co-draft the language so that you are both comfortable that it unambiguously states both of your intents. When you are both satisfied with the draft, it is always a good idea to run it by the legal department for review, but make sure however to explain to the reviewing attorney exactly what the intent of your agreement is.

This approach will help you to create favorable and fair deals, draft very effective contracts and lead you to stronger relationships with your business partners.

RAPHAEL LAPIN is principal and founder of Conflict Management, Inc., a corporate negotiation consulting and training group based in San Jose. Reach him through the firm's Web site at www.conflict-management.net