



## **Business Decision Expedition: Don't Get Turned Around During Contract Negotiations**

**Commercial and Contracts**



## CHEAT SHEET

- **Scope it out.** Begin a negotiation by analyzing the scope, identifying key decision makers, prioritizing important items, and referring to a request for proposal.
- **Rely on experts.** Your procurement team should consist of representatives from other departments to fully understand the needs and expectations of any contract.
- **Assess the vendor.** When assessing a vendor, consider its track record with your company, other customer reviews, and whether third parties are involved in the offer.
- **Use templates.** Using a vendor template vendor form can help you spot potential roadblocks that often come up in provisions like liability, indemnification, and compliance

Flashback eight years. Your business is sold on a new widget.

The widget is going to revolutionize processes by saving time, money, and effort with a substantial return on investment. WidgetCo is the best of its kind and a known industry leader. And, to nobody's

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surprise, the deal must close immediately. After a few weeks of rushed, tumultuous negotiation, the widget deal closes. Everyone pats each other on the back. Confidence is at an all-time high. A new budget is drafted for the following years' worth of widgets.

Fast forward six years, the widgets have indeed lived up to a vast majority of its promises. Your business buys more widgets. Fast forward another two years to present day. A few widgets have begun to exhibit buggy behavior. These widgets have become so vital to the core of your business that even a few minor malfunctions translate to screeching stops and lost revenues. The parties disagree on how to handle the bugs.

You pull the agreement from eight years ago. No one who negotiated the original transaction on either side is there to give any detailed insight. For all the negotiated provisions, all notes point to a resounding "business decision." Now, you are faced with the negotiation of this critical relationship based on an unfavorable contract.

All too often, engaging a new service or entering into a different transaction — and assuming certain risks as a result — are ultimately business decisions. But what is the role of in-house counsel? Are in-house counsel tour guides, helping the company avoid the pitfalls in contracting? Or are they strategic advisors, carefully guiding the business toward the proper considerations? It depends on the company, but there are disadvantages to either role. Guides risk not seeing the forest for the trees. Strategists risk missing the path through the trees for the forest. Here are seven steps that will help in-house counsel balance their dual guide and strategic advisor roles as they seek the right path.

## **1. Map the trail: Analyze the scope of the negotiation**

Skilled navigators research the terrain and plan their routes before embarking on a journey. If you are in a rush, planning is an act of "hurrying slowly" toward your destination. Without a plan, you risk injury along the path. As in-house counsel, you analyze the scope of the negotiation from the outset as part of your strategic plan. For complicated transactions, first identify all the key decision makers, both internally and externally. For simpler negotiations, prioritize the big-ticket items, such as warranty terms or timeline, in the initial conversations. Mapping out a potential trail in the beginning will help you guide your business through the negotiation and may guarantee a successful contract relationship and outcome.

Depending on your business or the nature of the deal, some companies implement request for proposal (RFP) processes that help business, procurement, and legal teams develop a clear scope. If legal partakes in the RFP drafting, which is highly recommended, use a formal RFP process. It will benefit the vendor's legal team in understanding your company's main areas of concern. The RFP process will also assist your company (and any intermediary buyers) keep track of the important topics during contract negotiations.

In the absence of a formal RFP process, or other formal contracting frameworks, use meeting notes or an email exchange of key topics to help you focus on crucial points without getting lost in the day-to-day details. As conversations between the parties progress, there is a high probability that your team's focus areas and requirements will change over time. Thus, always consider the impact of future changes within your contractual relationship and follow up regularly with your teams to ask for any significant updates. Regardless of what tools are used during this initial stage, it is important to maintain the key concepts identified on your trail map in order to avoid ending up at the wrong destination.

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## 2. Gather supplies: Identify the must-haves and the nice-to-haves

Once the trail is mapped out, the next step in any expedition is packing the essential and non-essential items. In contract negotiations, a clear set of must-haves and nice-to-haves is important during negotiations. This will help you focus and engage your internal clients with the comfort of knowing that you have kept their issues in mind during negotiations. Keep in mind that the development of a priority list of must- and nice-to-haves will require active engagement with key stakeholders (e.g., the chief information officer or the chief technology officer).

Many times, this assessment will also require working with other supporting departments that provide guidance on specific topics such as tax, operations, and human resources. Common contract must-haves include properly defined payment clauses to ensure revenue flow for your vendor and to keep your account current; clear time commitments and service level agreements (SLAs) to guarantee meeting timelines and budgets; compliance matters (data privacy, international regulations, security software, restricted territories, and cybersecurity); business priorities (strategic product procurement, commitments on future updates, and support); and last but not least, adequate legal protections (projecting and accounting for potential litigation risk, warranties, indemnity coverage, policies, etc.).

The must-haves are where in-house counsel can act as guide and gatekeeper. For example, if robust data privacy practices are a vendor must-have for your organization to proceed with the deal, then prior to moving on with other salient terms, identify the missing data standards and be such a gatekeeper. If your chosen vendor is in fact the best (or one of the best), it will likely have your missing data standards in a detailed data security document within its internal repository. The same vendor may not know to give you its data standards. If you identify this gap in information early in the process, you give yourself and the vendor ample opportunity to fill the information gap. If your selected vendor is resistant or unreceptive to your must-haves early in the process, then you have two options immediately available: (1) go back to the drawing board to evaluate the other vendors; or (2) require the vendor to meet the standards prior to contracting, assuming there is ample time remaining before the expedition. Under the first option, the business has an opportunity to evaluate the reasonableness of the “must-have” based on responses from the other vendors. Under the second option, you give your selected vendor an opportunity to be more competitive, which helps solidify the relationship on a go-forward basis.

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Attention to detail will go a long way when dealing with nice-to-haves. As a strategic advisor to the business, you should help the procurement team see possible gaps or cause-effect relationships in vendor offerings. If you identify these issues from the outset, then it will allow you to anticipate future problems during the contractual relationship. Look at the vendor’s template agreement, even if you are considering using your own, to shed light on some of these nice-to-haves. The vendor may offer them as standard clauses, so they may be sought without expending too much effort. Moreover, discussing possible issues within your contract will reduce the risk of future disagreements. Even if you do not have a broad knowledge base of certain procured products, use your legal rationale when dealing with confusing or ambiguous language. Once you have your list of supplies, you’ll be ready to provide exceptional legal guidance during negotiations.

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## Read the signs: Assess vendor promises

When in route to your destination, you follow the signs to keep from getting turned around. In the pursuit of business, companies will exchange continuous “signals” throughout the pre-sales and sales stages to stay on track. Signals often take the form of presentations, demonstrations, and proofs of concept outlining proposed benefits. These initial promises form an integral part of the agreement and provide a valuable basis for other covenants, including maintaining the security of confidential information, delivering quality in a manner consistent with service-level agreements and, for the vendor, a reliable promise of payment from you, its customer. Some initial promises described in the earlier stages, like delivering a particular function, product, or service, may be carried over into the contracting stage, while others may fall out along the way.

If available, other customer reviews, accolades, or words of caution may position the conversation and provide a useful blueprint for the vendor to begin flagging the substantive points for discussion. Throughout the negotiation, the vendor seeks to meet your company’s expectations without broadening the scope of the transaction beyond what was anticipated or discussed.

If the signs are clear, and your business is receptive, you and your business must then select the right path. Knowing what the realistic promises are will undoubtedly provide valuable insight, especially if the insight comes from the procurement and business teams. Has your company worked with the vendor previously? Align the business team’s expectations with the risk team’s; review a legacy agreement for a historical perspective on past business pursuits. If your company’s relationship with the vendor has many years of history, make a list of the vendor’s strengths and weaknesses in a given project. Run the past insights by the team and have a conversation to avoid any past pitfalls.

Are there ways to remediate past issues, or should the business seek alternative routes? If there are known gaps in the vendor’s capabilities, speak candidly with the vendor about possible technical or commercial gap fillers. The vendor may be well positioned to seek external help, including acting as a valuable resource for certain subcontracting opportunities in its pursuit of strategic procurement.

Finally, as a consideration of the vendor relationship, take into account any third parties involved in the offer. What exactly are their roles within the transaction? Depending on the level of participation, decide the extent to which you should include their involvement within the agreements. Additionally, in case your vendor subcontracts part of its services, you must consider what obligations should pass onto said subcontractors. Assessing the signals from your vendor and deciding what action to take in response will keep you on the right path.

## 4. Get to a higher vantage point: Consider multiple perspectives

Everything starts to look the same when you’re deep in the forest, so get to higher ground for perspective on the whole landscape. Review the documentation provided by your potential vendors to get your bearings. All the documentation, including everything from the simple marketing pamphlets or websites to the more complex specifications and instruction booklets provided post-NDA signing, will give you key insights into the vendor’s business and capabilities, which, in turn, will provide the basis for reps and warranties you can request during negotiation. By engaging in a careful analysis of the vendor’s materials in conjunction with the procurement team’s support, you will be able to share with the vendor what works and what doesn’t. At the end of the day, every vendor wants to know what it can sell you, and every customer wants to be sure that he or she is

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selecting the right vendor and products.

Take a step back and consider both side's motivations. From the vendor's perspective, mitigating risk means not losing you as a customer; selling you what you intend to buy; and making sure its product descriptions accurately represent the product it will offer. On the other hand, you as a buyer may very well have your own definition for mitigating risk, including picking the right vendor/product; obtaining the necessary warranty and support from the vendor; and guaranteeing that the purchased product will resolve the underlying business need without issues.

If the teams are ready to proceed with contracting, then the big-ticket items have likely been flagged, including a basic plan and a few layered promises. Preferably for more complex purchases, the team would have a grounded understanding of the delivery model, the timeframe, and a list of expectations for the vendor prior to any redlining. From atop the mountain, you can survey all the variables and better understand how to move forward.

## **5. Avoid roadblocks (and deal-breakers)**

Even the most prepared and cautious explorers run into roadblocks. The path towards a purchase can be riddled with unexpected challenges. What is an appropriate liability cap? What are the risks of third-party litigation? Are the parties compliant with applicable law? Discussions of potential first-party liability, third-party harm, and compliance are arguably three of the most contentious issues in any procurement matter. They can affect numerous departments and span many conference calls. As a strategic advisor, expeditious contracting includes knowing when to stop.

Depending on the sophistication of your chosen vendor, begin with a vendor template form because they are framed and detailed in accordance with the vendor's product specifications. In doing so, you can identify potential roadblocks and discuss them internally with your procurement or business teams.

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Start with the most legally contentious items to lead internal discussions toward potential stopgap provisions. Since the greatest legal risks are associated with the unknown, certain provisions, including liability, indemnification, and compliance will likely be at the forefront of these discussions. The three areas tend to seep into other areas of concern, including covenants and warranties. Any limitation of liability or indemnification agreed to would ideally reflect the benefit of the bargain on all sides, whether internal or external. In this case, the most effective negotiation with the vendor would be exploratory and minimal. Avoiding roadblocks in negotiations begins with spotting them.

## **6. Connect with others: Operate within the broader business ecosystem**

Linking up with others who know where the rough patches are and how to solve them is essential to successfully make it out of the woods. With the upper limits and risks of the transaction in mind, you can rely on feedback from the team to chart your path forward.

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It takes a team — of two or 200 — to effectively clear the way. The makeup of your procurement team, for example, may consist of a business liaison, risk manager, procurement specialist, compliance professional, and legal counsel. Since the request generally originates from the business, it is important to understand the need behind the purchase, which you can obtain from a liaison. You can also use your relationship with this liaison to effectively communicate relevant processes and advise the impacted business teams along the way. The management of procurement risk is not just about project and liability vulnerabilities, it's also about mitigating relationship issues and internal expectations. Provide strategic advice on financial expectations, technology concerns, and risk areas that may affect other parts of the company. This will offer balance and control to seemingly urgent business needs.

To strike a balance between the business pursuit and legal considerations, effectively engage a procurement specialist to explain the minutia of the purchase. For example, a technical procurement specialist could identify specific areas of risk that affect small areas of the operation but have large-scale financial implications for the business. A specialist can see and recommend strategic points of contact within the company for ongoing discussions. If technical specifications are important for privacy compliance, the specialist may be the ideal person to explain needed areas of compliance. The compliance professional could then expound upon it in terms of current and planned compliance for your company. The combined team feedback not only molds future discussions but paves the way for a smooth negotiation with the vendor.

## **7. Finish the journey: Execute and implement**

See the expedition through to the end. After the parties have discussed the scope of the transaction, understood each other's concerns, and agreed on next steps, the moment of truth emerges. No matter how thorough you and your team have been, there are inevitable instances of uncertainty during the course of implementation.

To minimize uncertainty and any risk of litigation, sophisticated vendors will be forthright with their ongoing performance obligations and may use SLAs as a signal of quality. As a customer, your primary concern with respect to these SLAs is likely how to enforce them during moments of need. Perhaps there was an unexpected technical issue and a vital component within your business has halted operations. To minimize the risk of consequential losses in this scenario, use SLAs to set clear expectations with your vendor on what performance obligations are necessary to directly restart operations. Sometimes, the best route may be a side trail to get back on track.

As data security and privacy become more ubiquitous in modern contracting, selecting a legal forum and authority within a contract may be a broader way to minimize the risk of conflict during performance. In other words, if neither party is willing to go through the time, expense, and hassle of conflict resolution in a mutually inconvenient forum, then an alternative conflict resolution route would be the most favorable route for the parties.

If the transaction spans geographic borders and neither party is willing to preemptively select a venue or governing law provision, parties should consider having multiple governing jurisdictions and venues based on the various locale of the transaction. For example, if the parties are purchasing cloud services for multiple affiliates located primarily in the United States and Spain, it could be desirable for the parties to have governing law and venue clauses based on the locations of both countries, at the convenience of the contracting affiliates.

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Your role as a guide and a strategic advisor are not mutually exclusive. Arguably, the act of guiding, in part, lends itself well to strategically advising the business to ensure a reasonable and sound outcome. Providing counsel in this sense is not unlike leading a team through a trail: identify the roadblocks, avoid the pitfalls, and arrive successfully at your destination.

## **ACC EXTRAS ON... Contract negotiations**

### ***ACC Docket***

[Five Secrets to Successfully Negotiating with ... Your Own Side \(Oct. 2018\).](#)

[The Secret to Japanese Contract Negotiation: Patience, Pragmatism, and Polite Manners \(June 2018\).](#)

### ***Sample Forms, Policies, and Contracts***

[Why is it Risk Minimising and Cost Efficient to Choose the UNIDROIT Principles of International Commercial Contracts 2016 when Negotiating an International Contract? \(April 2018\).](#)

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