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NEGOTIATING & CONTRACTING

By Moses Manuel

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NEGOTIATING & CONTRACTING

**Summarized lessons on negotiating and contracting in
procurement and supply**

By Moses Manuel
Founder **ZERITE NETWORK**

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DEVELOPING COMMERCIAL AGREEMENTS

Chapter overview

Business agreements often come in the shape of a contract or in most cases push towards some sort of contract being arrived at. It is important to know whether what you have is a legally binding agreement that can be termed as a contract or just words that don't mean much

By the end of this chapter you will be able to explain:

- What commercial agreements are
- Quotations and Tender Documents
- Know how to develop your Specifications and Key Performance Indicators (KPIs) when forming commercial agreements
- Understand terms of a contract, Standard & Model form contracts

DO WE HAVE A COMMERCIAL AGREEMENT?

Commercial agreements often are in the shape of a contract but, what is a contract? Simply put a contract is a legally binding agreement, but more on that later.

The law of contract is concerned with four basic questions, which is what you should be asking yourself whenever you are in doubt whether you have a contract or not.

These questions are;

- **Is there a contract in existence?**

The answer to this will depend on whether the essentials of a valid contract have been adhered to. (Essentials of a valid contract are presented in the next chapter)

- **Is the agreement one which the law should recognize and enforce?**

Some contract will be valid, void or voidable. This is to say that they will be enforceable, not enforceable or whose being enforced depends on the parties involved, all of which depends on if there exist some factors (vitiating) undermining them.

- **When do the obligations of the parties come to an end?**

This entails termination of a contract the most common and effective way being when the duties and obligations have been carried out. It is worth noting that there are other ways of ending contracts.

- **What remedies are available for the injured party if the other party fails to meet its contractual obligations?**

Possible remedies include the right to terminate all obligations under the contract and monetary compensation for the loss suffered as a result of the failure (damages).

The point is...

The buying organization will seek to establish a detailed description of its requirements which can be communicated to potential suppliers. The requirements are what will form the basis of the agreement and if poorly done then the agreement, when executed, will just reflect that.

Contract law is concerned with

1. Existence of a contract
2. Whether it's enforceable
3. Duties of the parties
4. Remedies for breach

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The agreement will take the form of;

- Specification
- Service levels agreements
- Contract terms

Key performance indicators, or performance measures which will be used to establish whether the requirements has been satisfactorily met

QUOTATION, TENDERS AND COMMERCIAL AGREEMENTS

Commercial agreements start in various ways. Often when initiating dealing with suppliers we tend send inquiries in the form of:

- Request for quotation
- Request for information
- Or even request for proposal

Although at times the supplier may also just send unsolicited proposals or quotations.

A standard enquiry will typically show:

- The contact information of the purchaser
- A reference number to use in reply and date by which to reply
- The quantity and description of goods or services required
- The required place and date of delivery
- The buyer's standard terms and conditions of purchase
- Terms of payment etc

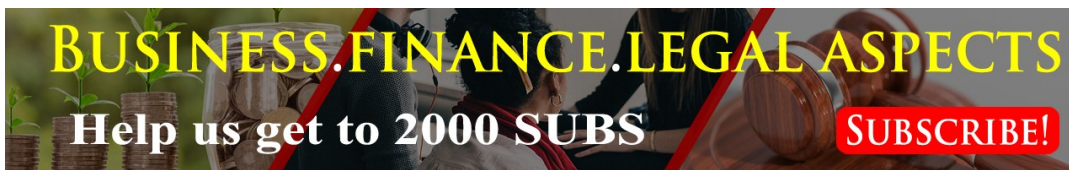
Quotations may be evaluated in different ways

- On a comparative or competitive bidding basis – in which case the best value wins
- As a basis for negotiating with a preferred supplier, in which case the supplier is asked to present a quotation as the basis for negotiation to refine contract terms
- As a way of testing the market to see what the current market price is

The aim of a typical inquiry is for the supplier to send their proposal and quotation for the contract.

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Most organizations will just use a formalize process know are **TENDERING**.

In its simplest sense tendering involve suppliers bidding for a given contract...now this can take a number approaches such as;

- **Open tendering**- usually widely advertised and open to any potential bidder
- **Selective tendering** – suppliers are shortlisted on various basis, for instance technical skills
- **Restricted open tenders** – normally the advertisement for such tenders is limited to specific media

Let's conclude this by taking about summarized **STEPS IN PREPARING FOR TENDERING PROCESS**;

- Preparation of the proper tender and contractual document, this helps in ensuring that the bidding process is;
 - a. Accurately costed
 - b. Directly compared
 - c. All requirements are complied with
- Advertisement of the requirement and procedures to be followed, and timetable for expression of interest or submission of bids
- In case of a selective tender, Sending out of pre-qualification questionnaires in response to expressions of interested.
- Issue of invitation to tenders and tender documentation to those responding to the advertisement. Tender documents would normally include;
 1. An invitation to tender and instruction to tenderers
 2. Pricing document
 3. The specification
 4. Criteria for contract award
 5. Conditions of purchase
 6. Deadlines for submission
- Tenders or offers will be received and evaluated
- Post-tender clarification, verification of supplier information or negotiation where required
- Contracts will be awarded and the award communicated to the tenderers.

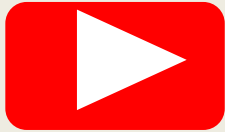
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DEVELOPING YOUR SPECIFICATIONS AND KEY PERFORMANCE INDICATORS (KPIs)

Commercial agreements are intended to achieve the parties' desires when the contract becomes enforceable. This can be arrived at by making sure that your specifications and performance indicators are properly formed.

Specifications are statements of requirements to be satisfied in the supply of a product or service

There are two main types of specification;

- **Conformance specification** - The buyer says what they want and how they want it and the supplier has to meet this

Examples of conformance specification

- ◇ Engineering drawing
- ◇ A chemical formula
- ◇ Model name, number or brand etc

- **Performance or functional specification**- The buyer simply explains problems the product should solve and the supplier provides such. In essence this is less rigid than conformance specification.

Examples of what typical specifications may be like include;

- ◇ Required quality levels
- ◇ Required safety levels and controls

Compared to conformance specification, performance specification has a number of **ADVANTAGES** such as;

1. The specifications are easier to draft
2. The efficacy of specifications does not depend on technical knowledge of the buyer
3. Supplier can use their creativity to develop the products
4. Greater share of specification risk is borne by the supplier

Main Types of specifications

1. Conformance
2. Performance/
Functional specification

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When is it advisable to use performance specification?

1. When the supplier has more technical or relevant skills than that of the buyer
2. When technology is constantly changing in the suppliers industries in which case it will be hard to specify methodologies
3. When there is a clear criteria for evaluating alternative solutions suggested by the suppliers competing for the contract
4. When there is enough time to assess the functionality of the product as proposed



Request for Information (RFI), Request for Proposal (RFP), Request for Quotation (RFQ) and Expressing of Interest (EOI)...A video showing the difference

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KEY PERFORMANCE INDICATORS (KPIs)

What gets measured gets managed; this gives us an idea of how important it is to measure supplier performance.

When we talk about supplier performance measurement, we mean assessing their current performance against;

- Defined performance criteria
- Previous performance
- Performance of other comparable organizations

Benefits of using KPIs

To the buyer

Some benefits of using KPIs as performance measures are;

1. Increased and improved communication on performance issues
2. Create a motivation to surpass the specified performance level
3. Supports the collaboration between the buyer and the supplier relations
4. Helps focus on key results areas such as cost reduction and quality improvement
5. Reduces conflicts that arise due to poorly defined goals

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To the supplier

1. Setting clear performance criteria and expectations
2. Managing supply risk
3. Supporting contract management to ensure that agreed benefits are obtained
4. Providing feedback for learning and continuous improvement in the buyer-supplier relationship

What are the KPIs Setbacks?

It is worth noting that KPIs have some disadvantages as well such as;

1. Cutting corners in quality so as to achieve productivity
2. Focusing on results at the expense of relation

In conclusion

Incorporating KPIs in the contract with external suppliers helps in defining the buying organization's expectations in regard to performance.

In other words they define the business needs in terms of measurable outputs, outcomes or behaviors which indicate that the required level of performance to meet has been met.

TERMS OF A CONTRACT, STANDARD & MODEL FORM CONTRACTS

TERMS OF A CONTRACT

In the course of negotiation a lot of statements are made, these statements are known as **representation** and if false they are known as misrepresentations.

Those that turn out to be part of that contract become its **terms**.

Terms are the rights and obligations of each party in the contract. The terms may be **EXPRESS**, that is, specifically agreed upon, or **IMPLIED** from the parties' behaviors.

The issue of whether a statement is a term or simply mere representation is important;

KPIs define the business needs in terms of:

- Measurable outputs
- Outcomes
- or Behaviors indicating required level of performance

Oscar Chess Ltd v Williams (1957)

The defendant, when selling his car to the claimant car dealers, stated (as the registration book showed) that his car was a 1948 model and the dealers valued it at £280 in the transaction. In fact it was a 1939 model, worth only £175, and the registration book had been altered by a previous owner.

Held: The statement relating to the age of the car was not a term but a representation. The representee, Oscar Chess Ltd as a car dealer, had the greater knowledge and would be in a better position to know the age of the manufacture than the defendant

But in...

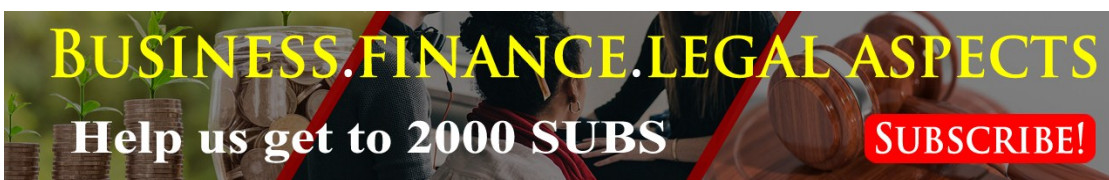
Dick Bentley Productions v Harold Smith Motors (1965)

The defendants sold the claimants a car which they stated to have done only 20,000 miles since a replacement engine and gear-box had been fitted. In fact the car had covered 100,000 miles since then and was unsatisfactory.

Held: The statement was a term. Mr Smith as a car dealer had greater expertise and the claimant relied upon that expertise.

Looking at the above cases it is clear that it is not always clear whether a particular statement is a term or mere representation. Generally the skills and the special knowledge of the person making the statement can be used to determine this, just like in the above cases.

Written statements are more likely to be considered terms, therefore in case of oral agreement subsequently summarized in writing, the statement written become terms of the contract. It is still important to note that the nature of the case will still be used to determine whether a statement is a term or just representation.



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Conditions and warranties

The terms in a contract do not carry the same weight. Some terms are more important than others. A **condition** is a major term of the contract which goes to the root of the contract. If a condition is breached the innocent party is entitled to repudiate, that is end, the contract and claim damages:

Poussard v Spiers (1876)

X entered a contract to perform as an opera singer for three months. She became ill five days before the opening night and was not able to perform the first four nights. Z then replaced her with another opera singer.

Held: X was in breach of condition and Z was entitled to end the contract. X missed the opening night which was the most important performance as all the critics and publicity would be based on this night.

Conditions can further be classified into;

1. **Condition precedent**- this is a term pre-condition to the formation of a contract, i.e, a term that must be satisfied before the contract becomes operational
2. **Condition subsequent**- this is a condition whose occurrence may affect the rights of the parties already in a contract, For instance, a condition that the contract remains valid until a stated event occurs, occurrence of the stated event may bring the contract to an abrupt end.

Warranties are minor terms of a contract which are not central to the existence of the contract. If a warranty is breached the innocent party may claim damages but cannot end the contract:

Bettini v Gye (1876)

X agreed by contract to perform as an opera singer for a three month period. He became ill and missed 6 days of rehearsals. The employer sacked him and replaced him with another opera singer.

Held: X was in breach of warranty and therefore the employer was not entitled to end the contract. Missing the rehearsals did not go to the root of the contract.

Both conditions and warranties can be express or implied.

⇒ **CONDITIONS:**
strong terms in a contract

⇒ **WARRANTIES:**
weak terms in a contract

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Innominate terms

Innominate or intermediate terms combine the features of both conditions and warranty in the terms of a contract.

In short an innocent party may or may not win depending on the context

Whereas normally any breach of condition, however minor, will entitle the innocent party to treat the contract as repudiated.

A breach of an innominate term will do so, only if the breach itself is so serious as to deprive the innocent party of substantially the whole benefit of the contract

STANDARD AND MODEL FORM CONTRACTS

Since drawing contracts can be time consuming, most organizations do not go to the trouble of drawing up special contracts every time they procure or sell goods and services.

For most routine transactions they rely on **standard term**.

Each firm will draw up its own standard terms of business, and will seek to ensure that these terms are accepted by other firms with whom they deal.

Such terms can commonly be published in the organizations purchase orders, order of acknowledge, invoice and receipts etc.

Standard terms will almost always not work in more complex or strategically critical, high risk non-routine business deals. In such cases the organization will invest time and effort in creating contracts for such.

Model form contracts are published by third party experts (such as trade associations and professional bodies).

Advantages of using standard and model form contracts

1. Helps reduce time and costs of contract development
2. Can be re-used in various contexts
3. They help reduce negotiation time
4. They are designed to be fair to both parties

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Disadvantages of using standard model form contracts

1. The terms may not be advantageous as they would have been if the contracts was negotiated
2. The terms may be missing protective special clauses
3. Legal advice is still required in amending them
4. The cost of training buyers on how to use them may be high



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LEGAL ISSUES IN CREATING COMMERCIAL AGREEMENTS

Chapter overview

By the end of this chapter you will be in a position to assess legal issues that relate to the creation of commercial agreements with customers or suppliers.

The objective of the chapter is to answer among the following:

1. Why understanding legal aspects in procurement is important
2. What makes a contract binding?
3. What are the rules relating to offers, acceptance and prices in contracts?

WHY UNDERSTANDING LEGAL ASPECTS IN PROCUREMENT IS IMPORTANT

When it comes to purchasing and supplies, understanding the law is not option. It's not just something you leave to the management level.

In fact here are a number of reasons why purchasers must understand commercial law

1. Compliance with the law is mandatory
2. The law is dynamic and its requirement are always changing
3. Purchasing involve a number of activities which are the specific focus of the law and regulation, notably the development and performance of contracts with suppliers.
4. A little knowledge is a dangerous thing

So let's quickly look at what the law says about **FORMATION OF CONTRACT**

ESSENTIALS OF A VALID CONTRACT

Contracts form the basis upon which modern businesses are built. Most business operation and transactions are quite often in the shape of promises made and the performance follows later.

The law of contract constitutes of the legal rules regarding such promises, their formation, performance and to what degree they can be enforced but: what is a contract? And most important what makes it so

A contract is a *legally binding agreement or promise between parties.*

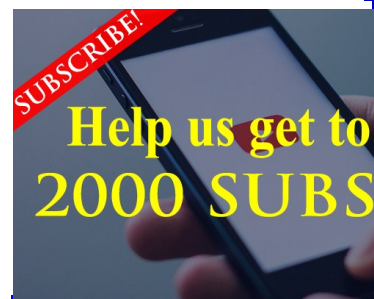
Going by this definition then how about this example:

If Mike promises to take Lizzy to the movies on a Friday night but instead he takes Joan, can Lizzy successfully sue?

Of course not, right? Fair enough

What if Mike buys a car from XYZ Motors and promises to pay for it in monthly installments, can the motor company sue him should he fail to make his payments?

Of course yes!



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So what is the difference in the above given promises?

The former agreement is of a purely social or domestic character while the latter is of a commercial nature which will attract legal consequences.

What makes a contract valid? What are the essentials of a valid contract?

Such include;

- There must be a lawful offer followed by lawful acceptance. When the offer and acceptance correspond in every respect, there is an agreement between the parties
- The parties must intend their agreement to result in a legal relation. This is often easy when looking at commercial agreements but look at this example;

A husband who lives in a different city from his wife promises to send her some household allowance of say 3000 pounds on weekly basis. If these two are later separated can the wife sue on that promise?

There is no contract here, you may say, this is a domestic agreement... you may even add

Now look at this

A husband and wife who intend to separate are discussing their future. The wife says that she will pay the mortgage for their home which was under the husbands name but on completion it should be transferred to her. She even insists she want this agreement in writing.

Will this constitute a contract?

Of course it will. *Such was the ruling in Merritt v Merritt (1970)*

In short even if the parties are in a domestic or social relationship but intend their agreement to have a legal consequence an enforceable contract is concluded

- There should be lawful consideration. Consideration is the price one party pays for the promise of the other for instance if you buy a house the price to you is the money but the seller has to part with the house
- The parties must be competent to contract

Domestic agreements turn into contract if the parties intend legal consequences to follow

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- The contract should be entered into voluntarily, i.e. free consent
- The parties must agree to a lawful object, i.e. the basis of the contract should be to do something legal
- The contract must be capable of performance

OFFER AND ACCEPTANCE

Ignoring all the activities that occur in procurement process, contracts often start with one party making **an offer** to either buy or sell. For a contract to be formed, this offer **must be unconditionally accepted**. The intention of the parties involved should be to create a legal relationship and they must have a capacity to do so. Finally there has to be some consideration between the parties.

When dispute arises between the parties to a contract, the court will look for the answers to the following two questions:

- Did the parties in fact have a contract?

And if they did

- What are the terms? The court's interest is to determine if the parties had an agreement or "meeting of the minds."

An offer is an expression of willingness to enter into a contract on definite terms, the moment the terms are accepted.

The question of what amounts to an offer is important since if there is no offer, there is nothing to accept and therefore a contract cannot be created.

It's important to note that offer is not the same as

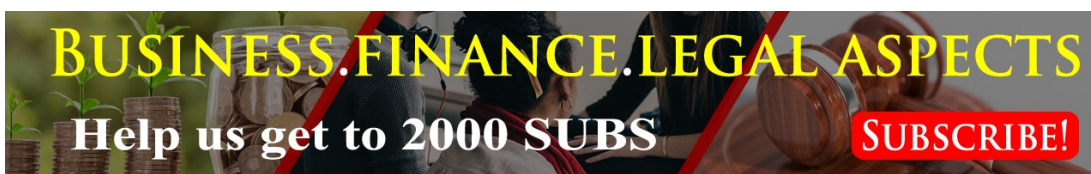
1. Statement of intention
2. A supply of information – for instance when someone asks or gives a price that doesn't really say that he or she is interested in getting in a contract
3. Invitation to treat – which is why people who send their tender bids wont later claim that there was a contract

NOTE

Offer + Acceptance = Agreement

Agreement is not a contract

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Anyway, there is a lot about offers but seeing as how this is about procurement lets a just avoid the legal mumbo jambo.

Offers are then either accepted or rejected. If accepted, we have an agreement; remember **this is not the same as a contract** yet

Acceptance can either be expressed, basically saying yes, or it can be implied, that is, via behavior.

The catch however is that, in acceptance via behavior the party has to show that he was aware of the offer and was willing to accept.

Ok imagine you run a special offer advert in your business “*buy one get one free*” and a client buys whatever you are selling, pays and leaves only for them to later come back and claim the free thing.

Will you give it or ask for another purchase?

Basically paying and leaving proves he wasn't in the need for the freebie. Well that's how implied acceptance works.

If a seller gives you the freebie later it is more of customer enticement than a contractual obligation, remember that

The offer and acceptance are not enough to result into a valid contract.

Consideration is the principal way in which the court decided if the agreement resulting from an offer and acceptance should be legally enforceable.

CONSIDERATION

This is the price one pays for the promise made by another party.

The important thing is that the consideration has to be something of value. This ensures that each party is aware of what is at stake in that contract i.e. **Quid pro quo** - something for something.

Examples of consideration scenarios

- John receives \$10 in return for which he promises to deliver goods to Ben. In this case, the money John receives is consideration for the promise he makes to deliver the goods.

Consideration is based on **QUID PRO QUO** i.e. **Something for Something**

- C promises to deliver goods to D, and D, promises to pay for the goods when they are delivered. Here, the benefit C receives is D's promises to pay, and in return for it he promises to deliver the goods.
- X lends a book to Y and Y promises to return it. Here, the advantage is entirely on Y's side, but X suffers detriment in parting with his book, and

General rules on consideration

- **Consideration is required for all simple contracts**

Consideration is necessary for the validity all contracts not in a deed. Even if the contract is written, consideration is still mandatory. **A promise without consideration is viewed as a gift and one made for consideration is a bargain.**

- **Consideration must be 'sufficient' but need not be 'adequate'**

The requirement that consideration must be 'sufficient' means that what is being put forward must be something which the courts will recognise as legally capable of constituting consideration. The fact that it need not be 'adequate' indicates that the courts are not generally interested in whether there is a match in value between what is being offered by each party.

Thus in *Thomas v Thomas (1842)* the promise to pay £1 per annum rent was clearly 'sufficient' to support the promise of a right to live in a house: the payment of, or promise to pay, money is always going to be treated as being within the category of valid consideration. On the other hand, the fact that £1 per annum was not a commercial rent was irrelevant, because the courts do not concern themselves with issues of 'adequacy'.

- **Consideration must move from the promisee but not necessarily to the promisor.**

The promisee must himself prove that he has furnished consideration for the promise, that way he can enforce it.

Price v. Easton (1833)

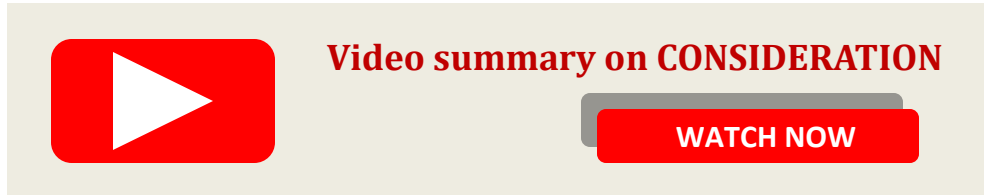
Easton made a contract with X that in return for X doing work for him, Easton would pay Price £19. X did the work but Easton did not pay, so Price sued. It was held that Price's claim must fail, as he had not provided consideration.

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- **Consideration must be legal**

An illegal consideration makes the whole contract invalid

- **Consideration must not be past**



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Types of consideration

Executory consideration

This occurs in a set up where the contract has not yet been performed, that is, party A promised to supply and party B promises to pay.

Executed consideration

In this case the promised act has been done. Party A has delivered his goods and B has paid for them. This is important in determining who has breached a contract. For if one party executes their promise and the other doesn't then the contract is said to have been breached.

Past consideration

Once the contract negotiations are through and the parties have struck a bargain any further promise is past consideration and is not legally enforceable.

Look at this example

The case of *Re McArdle (1951)* provides a good example. The plaintiff had carried out work refurbishing a house in which his brothers and sister had a beneficial interest. He then asked them to contribute towards the costs, which they agreed to do. It was held that this agreement was unenforceable, because the promise to pay was unsupported by consideration. The only consideration that the plaintiff could point to was his work on the house, but this had been completed before any promise of payment was made. It was therefore 'past consideration' and so not consideration at all

NOTE: Once you have this three in place together with **capacity to contract** and **intention** to create a legal relation a contract exist. Capacity will depend on age and mental status

RISK ASSOCIATED WITH VERBAL CONTRACTS

As long as a contract has all the essentials that make it valid, it becomes legally binding whether written or not. In most cases there is no requirement for a particular format to be adopted.

However, it is generally preferred to put commercial agreements in writing in order to minimize the risk of;

1. Different parties to a discussion having different perceptions or recall of precisely what was agreed
2. Commitment to inappropriate terms
3. Mistakes in contracts due to lack of genuine agreement
4. Ambiguity of contract terms
5. Lack terms to use in contract management



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CONTRACT AGREEMENT FOR SUPPLY

Chapter overview

By the end of this section you will be able to explain the main types of contractual agreements made between customer and suppliers specifically decisions relating to:

- Blanket ordering & Standing offer
- Hiring and leasing
- Framework arrangements

STANDING OFFER

It is common place to arrive at a contract in a straightforward one-off offer followed by acceptance. But other cases, more so in tenders, contracts can be created via use of standing offer.

Standing offer is an agreement under which a vendor allows a buyer to purchase specified goods or services at a predetermined price for a certain period on an 'as and when' requirement basis.

Remember that a standing offer is not a contract until the business issues a "call-up" against the standing offer. The business or parties involved is under no actual obligation to purchase until that time.

What happens here is that each acceptance completes a distinct contract **and** that the standing offer can be revoked at any time unless there is an obligation to keep it open.

Great Northern Railway ...which we will refer to as GNR v Witham (1873)

Witham successfully tendered for a contract to supply iron good to GNR for the period of one year. The wording of the tender was to supply such quantities as GNR "may order from time to time".

GNR placed several orders, but after time, Witham refused to service the order and GNR sued.

Held: Witham's tender was a standing offer whose acceptance meant Witham was bound to supply orders that had already been made, but he was free to revoke the standing offer in the usual way. He was not liable to supply and iron once the revocation had been clearly received by the offeree.

What if the buyer doesn't place any orders, is it a breach of contract? Well it is not.

Percival v London county council (1918)

Percival tendered to supply goods to LCC to the extent ordered and in any quantity. Estimate of required quantities were set out in a schedule to tender. Percival tender was accepted, but LCC did not order the estimated amounts.

Held: the buyer was not obliged to order anything from a successful tenderer – but he was in breach of contract if he ordered the stated kind of goods for any other place.

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BLANKET ORDERING

Blanket ordering is one of the simplest and the easiest way to deal with recurring purchases.

In this kind of agreement a supplier undertakes to provide an estimate quantity of items over an agreed period of time at an agreed price

At times the price may not be specified and instead the parties may devise a way of determining it for instance the agreement may say “market price” and explain a way to arrive at it. When the buyer needs delivery, he simply calls the supplier and orders for a given quantity and states the blanket order under which the purchase falls under.

Blanket ordering is appropriate for purchasing of items with low unit value, but with a large recurring requirement for instance office stationeries. It helps in saving time by reducing paper work and going through procurement cycle

Blanket ordering is appropriate for purchasing of items with low unit value, but with a large recurring requirement for instance office stationeries.

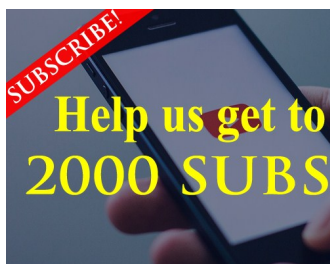
FRAMEWORK ARRANGEMENT

Overview

Rather than having to do fresh contracts in the form of one-off purchases when dealing with recurrent contracts for supplies or any work for that matter, parties may opt for framework arrangement. One of the strategies here is to establish a pricing structure although this doesn't mean that the price becomes fixed. All it does is give a context in which the parties come up with a mechanism that will be applied to pricing particular requirements during the period of the framework.

Framework Contracts and Framework Agreements

1. Framework contracts
2. Framework agreements



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Framework contracts

Framework contract is the kind of framework agreement in which consideration is provided upfront. Consideration, in this case, is in monetary form. Remember consideration is whatever is of value that you lose so as to get in a contract, but in case of framework contracts, consideration is restricted to monetary terms.

So with framework contract the supplier is paid upfront in order to create a contract on given terms and conditions they agree to.

The key thing is to have the terms and conditions properly formulated so that they are legally binding.

Expressions like “term contracts” may be used in place of framework contracts. It can also take the shape of “period contracts” in which case the agreement is put in place for a fixed period of time or “running contract” or “perpetual contract” in which case the contract is put in place without a specified date.

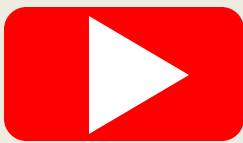
Framework Agreement

In this kind of arrangement the agreement doesn't include upfront consideration. What happens instead is that each time the buyer brings up the agreement a separate contract is formed whenever consideration is provided for in the order in question.

Phrases frequently associated with framework agreements include trading agreements, standing offers, blanket orders or even umbrella agreements.

In short

The difference between the two is that **framework contracts** are arrangements between two parties which commit one of the parties to buying at least a certain value of particular goods or services from the other over a specified period of time, while, **framework agreement** is simply an agreement between the two parties for supply of un specified amount of a product over a specified period.



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Terms and conditions in FRAMEWORK ARRANGEMENTS

What some organizations do is send stringent terms and conditions to suppliers as part of the invitation to tender documentation and in order to award the framework agreement, the supplier should accept the given terms and conditions

In some cases a “boiler plate” conditions of contract are sent to suppliers which are modified under the contract that comes into being later, for instance when a call off is made.

The thing to ensure when developing the terms, is that the framework reflects that the agreement arrived at on the given day will apply even if delivery and hence payment is a year down the line.

Remember framework is the main contract with each individual order constituting a separate mini-contract.

In other instances framework arrangements are used to simply pre-agree one or two terms or conditions that the parties agree will provide the basis of a trading arrangement if suitable opportunity arises in the future.

It is important to let the buyers dealing with you aware of these terms when the arrangement is created that way there isn't debate or re-negotiations later.

Drawing up Framework Arrangements

Setting up framework agreements and framework contracts should not be seen as an onerous process.

They should usually include:

1. Some words that describe the purpose and scope of the arrangement
2. Clarity on whether it is in fact a contract or agreement (i.e. is there consideration)
3. Terms and conditions that apply to each call-off (an identified arbiter is also useful)
4. A pricing mechanism - may not be fixed prices along with discount arrangements
5. Specifications, standards, samples as appropriate to define the requirements
6. A call-off mechanism/procedure
7. Period - duration of arrangement
8. Any limitations on the use of the arrangement
9. Estimated volumes as appropriate.

Advantages of Framework Arrangements

Framework arrangements can provide many benefits to the buying organisation including:

1. **flexibility** -to determine the specific requirement at the call-off order stage
2. **saving time** at a critical stage in a project, as the buyer can firm up the requirement at the appropriate time and simply call-off rather than having to go through a competitive exercise that could cause unnecessary delays to a project
3. **leverage/economies of scale through aggregation** - framework agreements and framework contracts can often cover hundreds of items with the prices and terms and conditions agreed
4. **avoids duplication** - one buyer goes out to the marketplace on behalf of all the other buyers in the organisation
5. **avoids re-work** -as framework agreements/contracts can be used to remove the need for requisitions and approval processes (as the risk has already been managed) – however some organisations prefer to use the full acquisition procedure, even for call-off orders
6. **a suitable method of conducting business in an organization that has devolved budgets** - by putting arrangements in place and then empowering end-users to order from them

Practical considerations when you have framework Arrangement in an organization

1. Make sure relevant parties in the organization are aware of the agreements
2. Make sure buyers and end users understand the circumstances in which they would use the framework arrangements. You don't want one of them making a \$100,000 deal on a given supplier just because the supplier ranks high on the list of suppliers you have in place for framework arrangements when it would make more economic sense to just get a supplier by putting the order out as a competition
3. Make sure the team understands confidentiality that comes with using the arrangement
4. Always remember to tailor the agreement to the contextual needs

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Factors to consider when monitoring the framework arrangements

It's very important to manage all arrangements made with suppliers the moment they are put in place. This will mean seeking end user's and buyer's feedback as well as feedback from the suppliers themselves.

1. Measure the performance by aligning it to the criteria you used to award the deal as well as the scope and purpose of the arrangement.
2. Conduct continuous reviews checking on what need improvements
3. Ensure there is clarity in defining what qualifies as management information, how the information is to be analyzed, valued etc
4. Issue like geography can be considered when deciding on who to give a framework arrangement

HIRING AND LEASING

Some times in business you need assets and yet you cannot afford to buy them or you cannot afford to have your capital tied up by such assets So what other option do you have? Well you can hire or lease.

Leasing and hiring

In both cases, the ownership of the asset remains with another organization but the client pays for possession and use of the assets. While at times some people use these two terms as though they mean the same thing, truth is they don't.

Another thing you need to remember is that contracts of hire are not the same as contracts of hire purchase.

CONTRACTS OF HIRE

Hiring is a method of renting an item from a business which supplies such items to those who wish to use them from time to time, for instance trucks or busses for a given short activity

In this contracts there is no intention to transfer ownership of such goods, one is simply paying to possess and uses them for a short period

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HIRE PURCHASE CONTRACT on the other hand works this way;

The owner of the good hires then out to another party and the party has an option to purchase once all agreed installments have been paid

A **LEASE CONTRACT** is slightly different from these contracts we have just mentioned.

Leasing is a more long term finance based arrangement, in which a leasing company (or lessor) contracts with a customer (lessee) to buy an asset (usually from a third party) and hire it to the customer.

The leasing company buys and owns the asset and the lessee makes regular installments to possess and use it

The lessee will generally have the right to secure ownership from the lessor once sufficient payments have been made as per the agreement.

Effectively, the lessor, assists in purchase of the asset but retains the ownership which it uses as collateral or security for its loan

Advantages of leasing

1. No initial investment to tie up capital
2. You don't have to worry about technological obsolescence
3. Costs are known and agreed in advance
4. It hedges you against inflation since payments are in real money terms
5. Long term commitment to pay installments may be difficult in recession

Disadvantages

1. The user lacks total control of the asset
2. Total cost may be higher than purchase
3. Contract terms may favor the leasing company



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4

THE ROLE OF NEGOTIATING IN BUYING AND SELLING

Chapter overview

In this chapter we analyse the application of commercial negotiation in the work of procurement and supply, with the following objectives in mind:

1. Understanding negotiations
2. Strategic and tactical negotiations
3. Negotiating in the sourcing process

UNDERSTANDING NEGOTIATIONS

What is negotiation?

We negotiate a great deal, more than we realize. Sometimes it goes smoothly, sometimes it seems difficult. We negotiate about food, where to go for dinner, whether or not to leave the lights on...you name it

While a lot has been said and written about being a winner in negotiations, the actual experience does not seem as straightforward as books suggest.

Why? because negotiation is a complex process.

There are a number of ways to define negotiation:

We can view it as: A process where two parties with differences which they need to resolve are trying to reach agreement through exploring for options and exchanging offers and an agreement.

The other way is to look at it as: Any form of verbal communication in which the participants seek to exploit their relative competitive advantages and needs to achieve explicit or implicit objectives within the overall purpose of seeking to resolve problems that are barriers to agreement

In a broader sense, negotiation can be seen as an *interpersonal problem-solving technique*, enabling parties to meet their own needs (as far as possible) in a conflict of interests, without damaging ongoing relations between them.

Why negotiate?

In business context there are a number of reasons why parties, whether it is the buyers or sellers, will have to negotiate. Some of the reasons are based on the need to find out;

1. What objectives will be set and given priority in making plans and managing projects
2. Mutually acceptable terms and conditions of work and working together
3. Approaches to conflicts and problems that may arise in the course of work due to difference of values, expectations, interests, priorities or schedules and so on

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NEGOTIATION

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Alternatives to negotiation: What if you don't want to negotiate?

You should be aware that negotiations is not the only approach to getting what you want from others or reaching agreement with suppliers and other stakeholders in your business or project, there are a number of alternatives.

One **major** alternative, for example, is *competitive bidding*, in which suppliers are asked to make a firm bid on terms and prices against specification, and the buyer chooses the best (usually the most advantageous) offer.

While this is a fair and efficient mechanism, negotiation may be preferred to competitive bidding in situations:

- Where production costs are difficult to estimate accurately,
- Price is not the only important variable
- There are likely to be changes to the specifications as the contract progresses.

Other alternative approaches to reaching agreement are;

- **Persuasion.**
- **Giving in**
- **Coercion**
- **Problem solving:** seeking a 'win-win' solution

In conclusion, Negotiation is a **process** –It is not a single event since choices are made along the way. It is a sequence of activities, perhaps with an underlying pattern.

It is not mechanical or deterministic – the choices negotiators make affect how agreement is achieved and what the agreement will be.

STRATEGIC and TACTICAL Negotiation

Negotiation is a basic means of getting what you want from others.

It's a back and forth communication designed to reach an agreement when you and the other side have some interests that are shared and others that are opposed. (Fisher & Ury, *Getting to yes*)

Because of the different reasons and approaches people will often take when trying to get what they want in commercial agreements, buyer-supplier relationships may require negotiation at two levels: **Strategic and Tactical.**

Video on
**STRATEGIC &
TACTICAL
Negotiation**

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Strategic Negotiation

This kind of negotiation addresses long-range issues involving the direction and objectives of a strategic or long-term supply chain relationship, things like:

- The nature of the collaboration,
- The sources of competitive advantage to be sought,
- The mutual strategic benefits of development and so on

It is about results: ***What should we be doing together, and what do we each want to get out of it?***

At this level, negotiation tends to be *collaborative (or 'integrative')* in style, because both parties are seeking mutual commitment and aligned objectives.

Examples of strategic negotiation, might include negotiations of a joint venture or partnership agreement, for instance Disney and Pixar

This kind of negotiation is usually carried out less frequently **and** at a higher level, usually by senior management teams from both parties.

Tactical Negotiation

This is your day to day negotiation.

It addresses short-range issues involving:

- Operations
- Resource allocation
- Performance and risk management ETC

It is about 'means':

1. Who does what,
2. Who pays for what and when,
3. What are the obligations and rights of each party.

At this level, negotiation tends to be more ***adversarial and competitive (or distributive)*** in style, because both parties are seeking **to maximize** their own organization's share of the value gains and **minimize** their own organisation's share of the risks, within the relationship.

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Less attention may be paid to relationship development where the relationship is purely tactical or transactional. The focus may be on opportunistic, short-term gains (eg forcing lower prices or favorable terms).

Example of a tactical negotiation might include:

- Negotiation for prices and terms on a supply contract
- Negotiation of service levels etc

In conclusion:

In pursuit of becoming an effective negotiator, it's equally important to know when **not** to negotiate.

Negotiation should be avoided:

1. If you can achieve the objective without negotiating
2. If the objective is not worth the time and effort of negotiating
3. If you have compelling alternatives to negotiating (eg a very strong alternative to a negotiated agreement)
4. If you risk losing too much by negotiating
5. If the other party acts in bad faith or unethically
6. If waiting (basically doing nothing) may improve your position for instance in cases where prices will drop

NEGOTIATING IN THE SOURCING PROCESS

The supply management professionals, typically play either of the two distinct roles in negotiation, depending on the type and value of the purchase.

- **Acting as the company's sole negotiator** (usually the case with low value, non-critical terms)
- **Acting as team leader of a cross-functional negotiation team**, usually for high-value, technically complex or strategic contracts, and for the development of long-term supply relationship agreement. The other members of the team are typically relevant technical experts (from design, engineering, finance and so on), and the procurement specialist may take the lead as the most skilled negotiator with the firmest grasp of commercial and contractual aspects of the agreement.

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Understanding
Purchasing

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In the sourcing, Negotiation may be the main approach by which a commercial agreement or purchase contract is arrived at in the private sector, or it may be used in support of tending

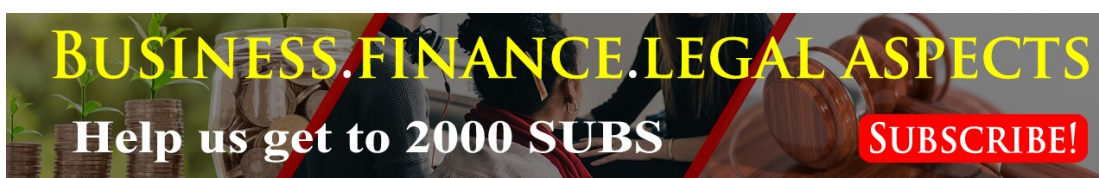
Negotiation may be necessary in situation where the terms of sale include many and varied clauses, or if the buyer suspects that the quoted price is unreasonably high for instance if the supplier has 'padded' the quoted price to cover contingencies.

Other common situations in which negotiations will be appropriate include the following.

1. Contracts for the procurement of capital items.
2. Projects with large element of uncertainty in the eventual cost.
3. Contracts where the purchaser contributes expertise, materials and so on.
4. Contracts with a 'learning curve' so that productivity, costs and performances will vary over time
5. Outsourcing agreements and contracts for services

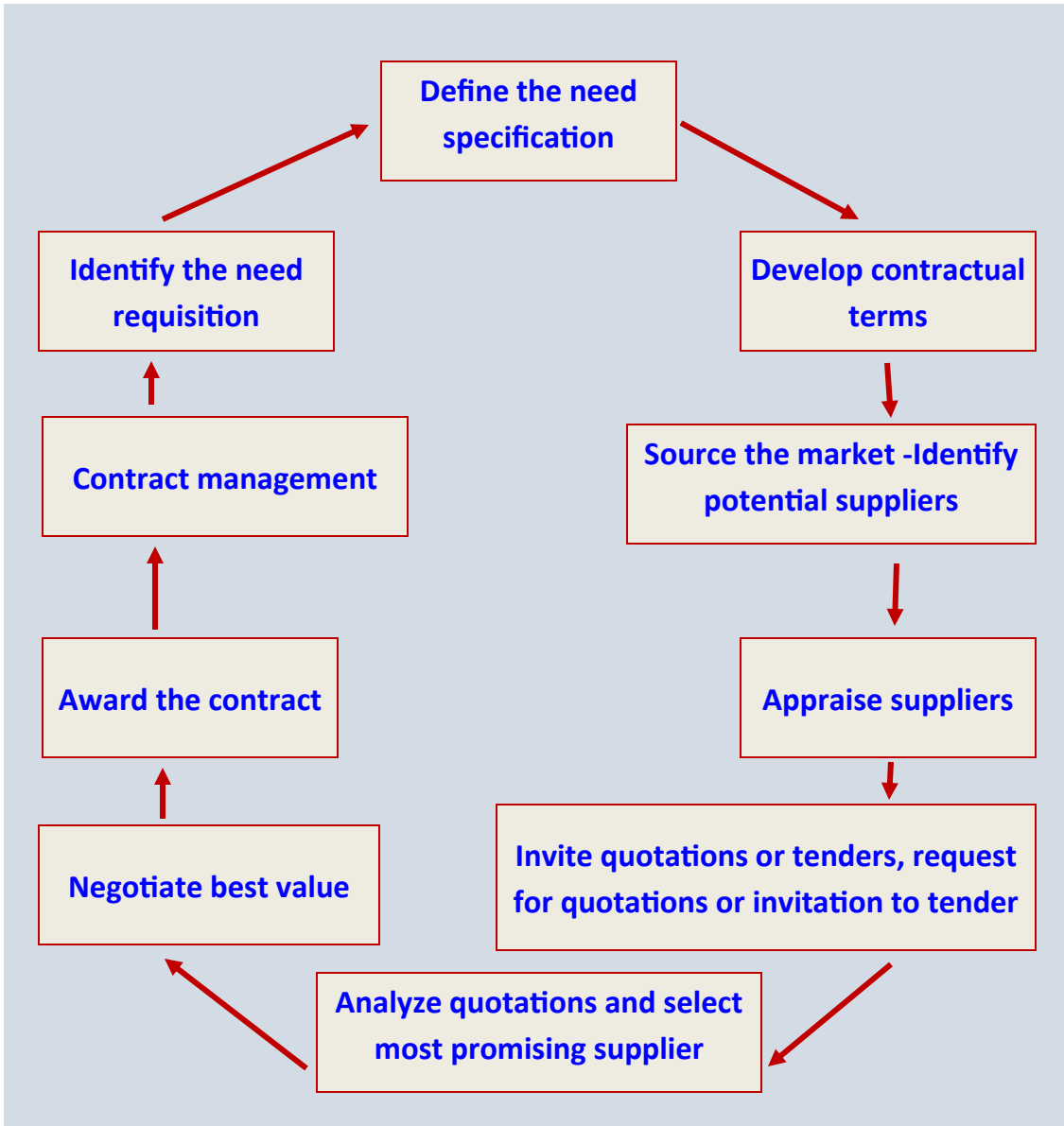
Remember, in a direct contract negotiation with suppliers, the buyers' main objectives may be;

- To obtain a fair and reasonable (or advantageous) price for the quantity and quality of goods specified
- To exert control over the manner in which the contract is performed (through the negotiations of contract terms addressing specific requirements service levels and risks).
- To persuade the supplier to give maximum co-operation to the buyer's company
- To develop a sound and continuing relationship with competent suppliers.



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SOURCING PROCESS SUMMARIZED



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5

NEGOTIATION OUTCOME & APPROACHES

Chapter overview

When you are done with this section you will be able to compare the types of approaches that can be pursued in commercial negotiations. You will be in a position to explain:

1. Outcomes of commercial negotiation
2. Distributive negotiation
3. Integrative negotiation
4. When to walk away from negotiations

NEGOTIATION OUTCOMES

Negotiation outcomes can take a number of forms such as:

1 Win-lose – where one party gets what they want at the expense of the other

2 Lose-lose – where neither party gets what they really wanted

Ok this may seem like an unlikely objective but imagine a situation where you and your sibling are about to share an orange.

Which is the best way to do so? You may say let each get half coz you really love your brother right?

The problem is what if your brother needs the juice and you need the orange peels to make a cake or something...now you both have half of what you don't need, see.

3 Win-Win – in this case both parties get what they want. This is because both parties are willing to commit in finding a solution and want the relationship to be positive

Therefore...

In most cases you have two choices in negotiation

If you are keen on results and want nothing to do with the relationship then you will go with the win-lose approach, that is, distributive style of negotiating

On the other hand if you want both results and the relationship that comes with the supplies then win-win approach also known as Integrative or Collaborative approach will do

DISTRIBUTIVE NEGOTIATIONS

Negotiations are often in the form of somebody winning and somebody losing

It's a zero sum game

The key objective in **distributive bargaining** is to maximize our party's share of value from a particular deal – regardless of the impact on future relationship with the other party.

It is thus a 'transactional' (rather than 'relation') approach.

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**NEGOTIATION
OUTCOMES**

PLAY

It does not seek to secure any kind of benefit or share of value for the other party, who is seen as an opponent, a competitor for value share, or an obstacle to what we want

Distributive strategies basically attempt:

- To discover the other party's 'resistance' point
And
- To override or influence the other party's resistance point, so that they are willing to accept an even more unfavorable deal.

There are three basic strategies to achieve a 'win-lose' outcome.

1. Pushing for a settlement as close as possible to the other party's resistance point
2. Making the other party lower its resistance point, by influencing its perceptions of what is possible (eg by persuading a supplier that its bid price unrealistic, or that the buyer has a better offer available elsewhere; and/or by emphasizing the costs and risks to the supplier of delaying settlement or walking away from a deal)
3. Making the other party think that this settlement is the best it can hope

Tactics of distributive bargaining

The kinds of tactics used in a distributive or transactional approach reflect a 'push' influencing style:

1. Presenting exaggerated initial positions, demands or opening bids, in order to allow for expected movement and compromise.
2. Exaggerating the initial distance between the two parties' positions, and polarizing conflicting viewpoints ,in order to persuade opponents that their position is unrealistic
3. Withholding information that might highlight areas of common ground or weakness in your bargaining position.
4. Using all available levers to coerce, pressure or manipulate the other party to make concessions
5. Offering no concession in return (unless forced to do so), even where

Remember the objective of this kind of negotiation is to maximize your position and ignore the relationship and so it is suitable for one off purchases

**Video on
BATTLE OF
FORMS**

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INTEGRATIVE NEGOTIATION

This is a win-win approach to negotiation, the idea being we want both results and relationship

If you are going to make this approach work then;

1. Be willing to create a free exchange of information about objectives and wants
2. Find out **why** each party needs what they want. It's the why that helps here
3. Find out where the interests of both parties dovetail.
4. Design new options, where everyone gets more of what they need.
5. Co-operate. Treat the other person as a partner, not an opponent

Tactics of Integrative negotiation

- Typical integrative tactics reflect a 'pull' influencing approach, in which the aim is to align the interests of both parties ,this may take form of:
- Being open about your own needs and concern in the situation and seeking to understand those of the other party
- Collaboratively generating options seeking to find those with genuine mutual or trade – off benefits
- Focusing on areas of common ground and mutual benefit, to keep a positive and collaborative atmosphere
- Supporting the other party in accepting your proposals, by emphasizing joint problems – solving offering additional informational or help with follows – up etc
- Maintaining and modeling flexibility by making and inviting reasonable counter – offers and compromise.

Characteristics of Integrative negotiators

- Excellent listening skills (including the ability to indicate empathy or understanding of the other person's viewpoint)
- A holistic or system orientation: seeing the 'big picture' of supply chain performance rather than just the best deal for a single transaction
- Abundance or added – value thinking
- Maturity and assertiveness
- Integrity trust: opening the way for information exchange and honest problem
- Emotional intelligence

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Factors that support integrative negotiation

Integrative negotiation might therefore be possible where:

1. Both parties believe that there is a greater likelihood of benefit from working together than from competing or working separately: ie there is a strong motivation to work together.
2. There are broadly common, shared or joint goals between the parties.
3. Both parties are prepared to let go of the need to pre-plan or control the outcome
4. Both parties are relatively confident in the process, their own problem – solving abilities
5. There is trust between the parties (at least sufficient to exchange information and begin the process)

WHEN TO WALK AWAY FROM NEGOTIATION

The only reason to negotiate is to get results that we would not have had, had we not negotiated. Success or failure in negotiations will depend on whether the parties have met their objectives

This may mean, compromising, coercion, manipulations you name it

Of course there are instances when you have no option but to walk away.... And that's assuming you have a plan B

This is what is known as **Best alternative to negotiated agreement (BATNA)**

This is what having a plan b or walk away position does;

- Its helps you to be more assertive since it can be used a leverage
- Prevents you from accepting terms that are unfavorable due to limited options
- Its helps in making a decision, when the party says “take it or leave it” you leave

So always make sure you have a walk away position



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When not to negotiate

Negotiation should be avoided:

1. If one can achieve the objective without negotiating
2. If the objective is not worth the time and effort of negotiating
3. If we have compelling alternatives to negotiating (eg a very strong alternative to a negotiated agreement)
4. If we risk losing too much by negotiating
5. If the other party acts in bad faith or unethically
6. If waiting (doing nothing) may improve our position.



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6

POWER & RELATIONSHIPS

Chapter Overview

This section will help you explain how the balance of power in commercial negotiations can affect outcomes. Areas of focus are:

1. Power in NEGOTIATIONS
2. Analyzing your CUSTOMERS (Supplier preferencing MODEL)

POWER AND INFLUENCE IN COMMERCIAL NEGOTIATIONS

Power is the ability to influence

This is not the same as authority, since authority refers to the scope and amount of discretion given to a person based on the position they hold in an organization

So power is the ability to influence while authority is the right to influence

Importance of power in commercial negotiations

1. It helps secure a win outcome for one's own party, as well as for the interests for which one is responsible for
2. It makes it easy to maximize a person's share of value gains from an otherwise "win-win" co-operative agreement
3. Keeps the negotiation going forward by forcing an issue
4. Secure agreement, commitment and buy-in to positions or solutions

Power in buyer supplier relationships

In buyer-supplier relationships, power may take various forms such as;

- **Overt power**- which is obvious and transparent.
It's normally seen through the direct tactics such as competitive leverage, hard negotiation, logical persuasion etc
- **Covert power** – this kind of power is subtle, basically hidden or implied. It can be seen through tactics such as withholding information or even excluding someone from a negotiation or a network.

In this case conflicts of interest are not explicitly stated and may not even be apparent to observers

Coercive, arbitrary, unfair or abusive exercise of power in supplier relation-

- Unlawful in most set ups
- Counter-productive

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**PORTER'S
FIVE FORCES**

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Such forms of power may secure short-term compliance, but they generally also cause resentment, resistance and loss of potential for more constructive long-term relationships

This in reality is the reason why adversarial relationships, based on overt competitive leverage, are not considered suitable for all supply situations.

They are rarely the basis for long-term best value for money, or potential for mutually satisfying relationship

Sources of personal power in negotiation

1. **Legitimate power** (or position power)- this kind of power is backed by authority, meaning it has to do with the position one has in a given organization e.g if you are a manager or something
2. **Expert power**- has to do with what you know
3. **Reward power** (or resources power)- you enjoy this power is you have control over resources that are valued by others, in which case you can influence them because of such resources.
4. This power will depend on how far you control these resources, how scarce they are and how much they are valued by others
5. **Referent power** – also charismatic power. It's the kind of power which has to do with individual personality and how attractive others find this personality
6. **Coercive power**- this power is based on the ability to threaten sanctions, hand out punishments or physically intimidate others if compliance is not obtained

An individual can actually portray all these powers, it's just a question of context.

SUPPLIER PREFERENCING (ANALYZING YOUR BUYERS)

While most books will tell you things such as, Customer is king, Customer is always right etc, The one thing you need to remember is that all *...customers or buyers are not created equal and it is a fatal error to treat them as though they are.*

The supplier preference model is one of the effective ways to analyze your buyers

Video on supply
PREFERENCING
model

PLAY

The idea is to group them into four and evaluate them in respects of how high

1. Their attractiveness as a buying organization
2. Value of their business

The customers will then fall into the following four groups

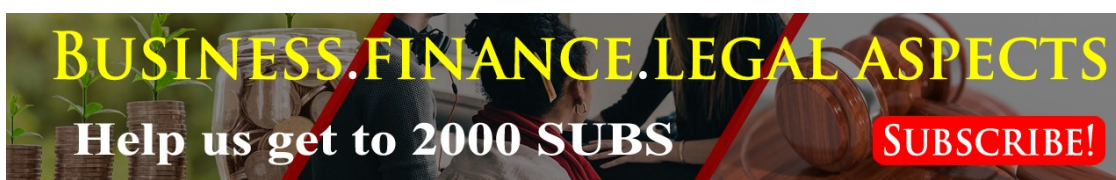
- **Nuisance customers** – these are customers who are neither attractive nor valuable to do business with.

With such you can cease doing business or simply raise their prices, the result being turning them into exploitable customers

- **Exploitable customers**- such are customers who bring large volume of business even though doing business with them doesn't aid your company position. What you do with such is perform the contract but don't go out of your way to give any extra service unless at a cost
- **Development customers** – these are customers who make your business look good if you do business with. The problem is they offer low level of business. With such you go the extra mile in your service delivery with an aim of turning them into core customers
- **Core customers** – these customers are highly desirable and valuable to your business. As a supplier you need to establish long-term mutually profitable relationships with them if possible

There are many reasons that may drive a supplier into doing business with a given organization such as, trust, reputation, willingness to share risks etc

The key thing is to make sure that as a supplier you have managed your customers in the order of their attractiveness, that way you don't waste time on the undeserving ones



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THE RELATIVE POWER OF BUYERS AND SUPPLIERS

A key step in preparing for negotiations is to appraise the relative power or bargaining strength of the two parties. The buyer and the supplier

The buyer is powerful if;

1. They are limited in number in relation to suppliers
2. There are lots of substitute products
3. Demand is not urgent and can be postponed
4. The buyer has good pre-negotiation information about the supplier and its negotiation position

The opposite of this will make supplier strong, that is,

1. Few suppliers
2. Few substitute products etc

Some of these things tend to be beyond our control...but as an individual, **how can you improve on you power hence leverage in negotiations?**

Increase expert and informational power

This you can do through a number of options such as;

- Gathering market intelligence and networking with key information holders
- Assembling strong data to support you position

The key thing here is having relevant information

Increasing resource power

You options here include;

- Securing authority to negotiate to higher levels of expenditure
- Emphasizing the value of you offers
- Managing the other parties expectation of the resources available

Increasing legitimate power

- Appealing to your own status and role
- Appealing to the necessity of your position

Remember both parties in a negotiation will try to maximize the strengths of its own position with an aim of achieving its negotiation objectives.

**Video on
BUYING
SITUATIONS**

PLAY

7

NEGOTIATION STAGES

Chapter overview

In this section you get to define the stages in negotiation and learn what to expect in each of the following stages;

1. Planning and preparation in NEGOTIATIONS
2. Opening STAGE
3. Testing and Proposing
4. Bargaining STAGE
5. Agreement and Closure

INTRODUCTION

There are a number of events that take place when people are negotiating but for learning purpose we will try to break them down into stages.

This is an introduction to what will be analysis of what happens in these stages. Normally the negotiating will start with preparation phase.

- **Preparation phase**

At this point you gather information, remember expert power. So you want to know the company prospect and as much as you can about the other party.

- **Negotiation/ interaction stage**

This is where the actual sit down is taking place. Building rapport and presenting you position offers and the likes.

- The last bit is the **post – negotiation** follow up which means having a contract, implementation and evaluation

The point here is that there are three main phases to negotiations but the stages taken in between will depend on whether we are doing distributive or integrative negotiation

In a single meeting for instance:

We may have negotiation phase followed by a meeting in which details are discussed and agreement is arrived at and then post negotiation follow up

In most cases the negotiation will in fact be a series of meetings, that is, Introduction meeting after which we prepare for discussion meeting. In the discussion meeting we discuss various aspects we want and what the other party wants

When done with that we prepare for agreement and have agreement meeting where contracts are arrived at. Later we have the post negotiation phase

Video on
stages in
negotiation

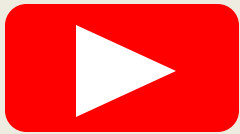
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In conclusion

The various stages that negotiation goes through can be summed up as

1. Plan and preparation
2. Opening
3. Testing and proposing
4. Bargaining
5. Agreement and closure

All of which we will look at one by one



Video on analyzing stakeholders

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PLANNING AND PREPARATION in negotiation

In negotiations you are only as effective as your plan. A proper plan will enable you to;

1. Gather information that will not only help you develop your position but also understand the other persons position
2. In cases of a team, plans make teams have a coherent approach
3. Have you worst case scenario plan in place

Some of the activities that will be undertaken in the planning stage include

1. Defining the issues to be undertaken
2. Come up with your bargain mix- that is the issues that you want to bring up on negotiation
3. Define your walk away position or BATNA – this will give you the limits under which you walk away
4. Research and understand the other party
5. Analyse the relative bargaining strength of the other party
6. Select a strategy

In conclusion you will need to make sure your plan includes

- 1) General aspects such as, objectives, assumptions etc
- 2) Financial terms
- 3) Quality and delivery
- 4) Contractual terms

Remember if the negotiation is of a complex nature...it never hurts to have a trial run or rehearsals

OPENING stage

The introduction stage is important since it “conditions” the other party’s future responses.

This will also depend on not just the physical area in which the negotiation is taking place but also the tone used

Building rapport is important whether you are going with integrative or distributive approach to negotiation.

The idea is to focus on the sense of relationship with the other person. Remember it is easier to influence a person with whom you already have a connection

With **distributive negotiation**, the opening is usually just presenting your position or offer and looking like if you are not about to move

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This is not the case with **integrative negotiations**, the focus here is to collaborate and so:

- a. Define a problem in way that is mutually acceptable on both sides. 'For positive problem solving to occur, both parties must be committed to stating the problem in neutral terms.'
- b. State the problem with an eye toward practicality Focus on the core problems and avoid distractions.
- c. State the problem as a goal and identify the obstacles to attaining this goal. (how the solution is to be reached)
- d. Depersonalize the problem. Don't assume that our viewpoints are inherently superior to the other party's.
- e. Separate the problem definition from the research for solutions.
- f. Seek to understand the problem, by reference to the underlying interests and needs of each party.

Effective behavior in this case will therefore include:

1. Rapport building
2. Assertive communication; stating the opening position, needs and wants clearly (but non-aggressively); projecting calm and confidence.
3. Using questions to elicit information and clarification from the other party.
4. Listening actively and effectively, in order to draw maximum information from the other party; not just understand the content of what is being said, but to interpret process cues (such as body language, silence, evasions, tone of voice and so on) to get underlying feelings, issues and intentions.
5. Facilitating behaviors: checking understanding, clarifying, asking for information, summarizing sections of the discussions and so on.
6. Utilizing verbal and non-verbal 'signals' to condition the other party: to set the tone, signal confidence and intentions and so on.
7. Creating an atmosphere conducive to agreement

TESTING AND PROPOSING stage

The early stages of negotiation often involve confirming the assumptions you made, testing the other parties position – the degree to which they are willing to move from their position. Basically trying to see if there are any surprises

The kind of response we get here will help us in creating our proposals

Baily et al observes that “you cannot negotiate arguments. No matter how often you agree and disagree with the other side it does not help move forward the negotiation”

An alternative in this case is to make proposals that in themselves are a solution

This will take different forms

- In **distributive negotiation** this presents itself in the shape of offers and counter-offers
- In **integrative negotiation** this can be seen through a series of process aimed at entering alternative solutions to a defined problem

During this stage don't forget that persuasion is still in play so find out how to

- Appeal to emotion – this could be fear, personal empathy e.g “my boss will kill me if I go back with this deal”
- Appeal to logic – this call for being rational. Look at the flaws or the strength in the other parties position and convince them otherwise
- Use threats if need be well as long as its within legal aspects



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BARGAINING stage

Bargaining is less of a feature of integrative negotiation than that of distributive. In the distributive model, constructive compromise is mainly arrived at through bargaining

Baily et al defines bargaining as, “the point when we convey the specific terms on which we would settle”

An example would be something like “if you reduce your price by 5% we will increase our order by 10%” in this case both the condition and order are specific

A distributed, adversarial or transactional negotiation uses concession as a trading currency. Such approach lead to tactics such as:

1. Avoiding being the first party to make a concession (a sign of weakness)
2. Making concessions strictly contingent on gaining a concession of equal or greater values from the other party: no ‘goodwill’ concessions (which can simply be taken advantage of)
3. Making concessions of least possible cost to you, while demanding concessions of greatest possible value to you (and/or cost to the other party)
4. Giving the impression that every concession you make is a major concession: of great importance and cost (in order to earn greater reciprocal concession from the other party)
5. Making as few concessions as possible, in order to avoid creating an impression of weakness (or/of excessive strength, raising the suspicion that the offer on the table is already biased in your favor)
6. Getting the other party to make minor concessions in the early stages, in order to establish a pattern that can be applied to more important issues later.

AGREEMENT AND CLOSURE stage

When bargaining with suppliers, there are list of variables one could be interested in, such as price, payment terms, quality, reliability, delivery lead time etc

Where there is a good momentum towards agreement the negotiators behavior will in most cases shift towards a more assertive, directive or even manipulative style in order to finalize the agreement

In **integrative negotiation** summarize the options and argument considered so far and come up with more variations of final deal

In a more **distributed negotiations** various manipulative tactics may be used for example “take it or leave it” “best and final offers” etc

Once the parties have come to an agreement contracts are draw and performance and follow up follows



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