

Negotiation Strategies: Dealing with Vendors and Suppliers



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Negotiation Strategies:

Dealing with Vendors and Suppliers

Written by Francis X. Taney, Jr.

A. Key Goals for Contract Negotiation with Vendors and Suppliers

When negotiating on behalf of an entity purchasing services or goods from a vendor or supplier, you have the opportunity to use the process to achieve a number of benefits. First, you should achieve clarity with respect to the performance required from the vendor. This minimizes the likelihood of disputes over ambiguities and lessens the potential for opportunistic behavior. Second, you should ensure an appropriate allocation of commercial risk. There is risk inherent in every contractual relationship, but it is important to ensure that the risk is commensurate with the potential benefit the customer will derive.

Third, you should ensure appropriate remedies in the event of the vendor's breach. Vendor failures do occur, and this is something for which you should plan. Fourth, you should protect and retain appropriate intellectual property rights in connection with the relationship. This will protect the customer from being hamstrung in its business, as well as from unfair competitive disadvantage.

Fifth, you should use the contract to establish a framework for managing the vendor's performance. Carefully negotiated contract provisions can provide effective project management tools for the customer. Finally, you should create tools for minimizing the impact of disputes. In the unfortunate event that a dispute arises, carefully

considered contractual provisions can minimize the disruptive impact of such a dispute.

B. Best Practices for the RFP Process

For complicated procurements, the request for proposal or “RFP” process is a time proven tool for obtaining cost competitive quotes for services and products from qualified vendors. The mere use of the tool does not necessarily guarantee that a customer will derive the intended benefits from the tool, however. There are a number of best practices that customers should employ to maximize the benefit derived from RFP process.

The first necessary step is to involve a multidisciplinary team in the drafting of the RFP materials. The team, where applicable, should include technologists with the requisite technical expertise to understand the nature of the technology involved in the procurement, the customer’s business stakeholders who understand the business needs giving rise to the procurement, and legal resources capable of understanding the key legal issues and risk points in light of the applicable technical and business constraints.

Once assembled, the team should create descriptions, using objective terms, of the scope of the vendor’s undertaking, as well as any specific warranties or performance standards applicable to the vendor’s performance. The goal in drafting these descriptions is to achieve clarity and avoid ambiguity with respect to what the customer wants the vendor to do, and how well the customer wants the vendor to do it. Eventually, these descriptions will become important parts of the contract. Later sections of these materials will discuss specific

techniques for achieving clarity and avoiding ambiguity with respect to the scope of work and performance standards. The RFP materials should also include the key proposed legal and business terms for the contemplated contractual relationship; this will aid in early identification of difficult negotiation points with vendors.

To the extent possible, the customer should identify multiple potential qualified and interested vendors and send the RFP materials to all of these vendors. First and foremost, involving multiple vendors increases the likelihood of getting a more competitive price. In addition, in many situations, the vendors may have questions about the RFP that may reveal unintended ambiguities in the RFP materials, or suggestions for changes in the products or services to be provided that may improve the results that the customer is able to achieve.

The customer should catalogue and save all vendor communications, and the customer's responses thereto, for at least two reasons. First, it may be advantageous to incorporate the substance of these exchanges into the ultimate contract documents to improve the procurement or to remove potential ambiguities. Second, the exchanges may also serve as important "parol" evidence as to the parties' intentions and understanding as to disputed issues in the event of litigation. (*See, e.g., Bohler-Uddeholm America, Inc. v. Ellwood Group, Inc.*, 247 F.3d 79 (3d Cir. 2001) (holding that in the face of latent or patent ambiguities, extrinsic or "parol" evidence is admissible to allow a court to interpret of these ambiguities).

Finally, once the customer has selected a vendor and come to agreement on the overall set of terms governing the relationship, the customer should take care to ensure that all of the vendor's representations and promises are physically incorporated, either

literally or by reference, into the final contract document. This is because these representations and promises may be physically spread over numerous documents and media, and over time.

In sum, while good use of the RFP process is no guarantee of a successful procurement, use of the RFP process, and the best practices described above, will improve a customer's chances of a successful contractual relationship.

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