
CONTRACT NEGOTIATIONS: BUSINESS BRIEFING

AS A BUSINESS OWNER, failing to consider key issues and avoid common pitfalls during contract negotiations may result in unforeseen obligations, unintended breaches or financial consequences under a contract. This is a checklist of issues to consider when negotiating contracts on behalf of your business. It is divided into two main sections:

- Key issues.
- Negotiating pitfalls.

As always, please consult with an attorney before negotiating or entering into any contract or negotiation for a contract. We have several business attorneys available for you at the Contiguglia Law Firm, P.C.

KEY ISSUES

WHO IS THE OTHER PARTY TO THE CONTRACT?

- What is the reputation of the other party? Has your business done business with the other party before? If not, should your business do research on or get references for the other company?
- Consider doing a credit check if relevant. A party's creditworthiness may impact both its ability to pay amounts owed and perform its non-monetary obligations under the contract.
- If the other party is based overseas, this presents its own special set of legal issues. Be sure to speak with an attorney to ensure that your business is complying with relevant laws and will be properly protected if things go wrong.
- If the other party is part of a group of companies, is it the right member of that group to be a party to the contract? Only parties to a contract are bound by its terms, so a party's affiliates will not be bound by the terms of a contract unless they are also parties to the contract.
- Is there any other party that is key to the deal? If so, consider whether it should be made a party to the contract so it is also bound by the terms of the contract.

☑ IS THE IDENTITY OF THE OTHER PARTY IMPORTANT TO THE PERFORMANCE OF THE CONTRACT?

- In a contract for services, who will actually be performing the work?
- Is it important for your business to have specific individuals or entities perform the services or provide the goods specified in the contract?
- Should your business allow the other party to sub-contract some or all of the work or pass on the benefits of the contract to others? If not, the prohibition on assignment and delegation must be made clear in the contract.
- What is the impact on your business if the ownership or structure of the other party changes, either through a sale of all or a majority of stock or assets? Consider ways to handle a situation where there is a change in control (particularly if a competitor takes control of the other party to the contract), such as the right to terminate the contract immediately.

☑ WHAT IS YOUR BUSINESS BUYING OR SELLING?

- A great number of contractual disputes relate to what services are to be performed or goods are to be delivered.
- Describe the goods and services as clearly and accurately as possible to avoid risk of disputes.
- If your business is buying goods or services, make sure it is very clear what your business is receiving under the contract. The seller may not be obligated to highlight deficiencies or oversights.
- All important issues and assumptions should be confirmed in the written contract. It is best not to rely on verbal assurances or points agreed during negotiations. In many circumstances, verbal assurances before the contract is signed will not be binding.
- List what the other party should and should not be doing regarding the services or goods being sold under the contract.

☑ WHAT IS THE PRICE AND HOW IS PAYMENT TO BE MADE?

- How is the price determined? Is it a fixed or variable sum?
- If the price is linked to variable factors, what are the mechanics for determining price and at what points during the term of the contract will the price be determined?
- In what currency is payment to be made? Is there an exchange rate risk? If so, can it be limited in any way?
- Is tax included in the price (notably sales tax)? Tax advice must always be sought if goods or services are being delivered or performed in a foreign country to ensure there is no unexpected tax liability. For advice on tax issues, contact the Contiguglia Law Firm, P.C. and speak with our tax attorney.
- What are the delivery terms? Are delivery costs included in the price?
- How is payment to be made (for example, cash, electronic bank transfer or bank draft)?
- When is payment due? Is it a single lump sum or by installments? Is there a retention of payments to be held as security?

☑ IS THE CONTRACT CONTINGENT ON ANYTHING ELSE HAPPENING?

- His performance of the contract conditional on any event such as regulatory approval or any other party doing something?
- Are there any circumstances in which your business would wish to be released from its obligation to perform the contract?

☑ WHAT HAPPENS IF THINGS GO WRONG?

- What could go wrong with the deal, and what loss could your business suffer as a result? Consider all the possible consequences. For example, could your business be prevented from fulfilling obligations to a third party and suffer financial losses as a result?
- If your business is buying goods and services under the contract, try to ensure that:
 - the seller is responsible for all possible losses (including consequential losses); and
 - liability is not limited in any way.
- If your business is selling goods and services, try to limit liability to a fixed sum. Resist any responsibility for consequential losses as these may be far greater than the contract amount and impossible to quantify.
- Speak to an attorney before agreeing on any clause that seeks to limit liability under a contract.

☑ IS THE DEAL TIME CRITICAL?

- When does your business want the work done or goods delivered?
- A clear timetable is essential, especially if price is tied to delivery or performance dates.
- Does your business want to be able to end the contract or to impose pre-determined damages if work or goods that it is buying are delivered late?

☑ IN WHAT CIRCUMSTANCES COULD YOUR BUSINESS PULL OUT OF THE CONTRACT?

- How long does your business want to be tied in to the deal?
- Are there any factors which might affect how long your business wants to be tied in to the transaction? For example, is the deal linked to another deal which may end or could costs increase so as to make the deal unprofitable?
- Should the contract be for a fixed period of time or does your business need to include a right to terminate by giving notice to the other party?
- Are there any circumstances in which your business would wish to terminate the contract immediately, such as if the other party damages your business's reputation or goes out of business?
- Should there be a fee for early termination?

☑ ARE THERE ANY BRAND, COPYRIGHT OR OTHER INTELLECTUAL PROPERTY ISSUES?

- Is the other party creating something specifically for your business (for example, an advertisement or custom made computer software)?
- Is your business going to use the other party's brand, or will the other party use your business's brand?
- If any modifications or improvements to a product are made, determine who owns the modifications.
- If a product is jointly developed with the other party, determine which party owns the intellectual property rights to the products.
- Speak to an attorney to ensure that the correct formalities are followed, otherwise valuable intellectual property assets may be lost or infringed.

☑ ARE THERE COMPETITION ISSUES?

- Is there a possibility that the other party may start to compete with your business? If so, speak to an attorney because it may be possible for the contract to prevent this through non-competition provisions and other similar measures.

☑ CONSIDER INSURANCE.

- In addition to contractual protections, always consider whether insurance can cover potential risks and liabilities. Always check with your insurance provider.

☑ IS THERE A PAYMENT, PERFORMANCE OR ENFORCEMENT RISK?

- Remember that if anything goes wrong, the protections in a contract are only as good as the party giving them. It will be very difficult to get any compensation if the other party has no money.
- Consider requiring security to secure performance or payment under the contract. Examples of security include:
 - retention, where a buyer may require a retention to hold back part of a purchase price as security for potential breaches of contract by a seller; and
 - guarantee, where a seller may require a guarantee from a third party in case a buyer fails to make payment under a contract.

☑ IS YOUR BUSINESS DEALING ON STANDARD TERMS?

- Most companies have standard terms of business drafted in their favor. If your business's terms conflict with the other party's terms, it can be difficult to determine which prevail.
- Be wary of documents such as purchase orders, acknowledgements and delivery notes. These can have a party's standard terms of business included on them. For example, by signing a delivery note, your business may inadvertently commit itself to the seller's terms.
- Always be clear about the terms on which your business is dealing. If in doubt, speak to an attorney.

NEGOTIATING PITFALLS

✓ WHO IS NEGOTIATING FOR THE OTHER PARTY?

- Does the person representing the other party have authority to negotiate for that party?

✓ SHOULD NEGOTIATIONS BE KEPT CONFIDENTIAL?

- If negotiations should be kept confidential, get the other party to sign a confidentiality agreement (also called a non-disclosure agreement or NDA) **before** starting negotiations. An attorney can give you an appropriate form.

✓ IS YOUR BUSINESS SHARING BUSINESS SENSITIVE INFORMATION WITH THIRD PARTIES?

- Speak to an attorney before sharing any business sensitive information. It can be illegal to disclose certain types of information, such as personal data about customers or employees.
- A confidentiality agreement may give some protection but it must be signed before any information is disclosed between parties.
- Consider whether the other party actually needs the information or whether it is simply on a fishing expedition.

✓ DO NOT EXAGGERATE OR MISLEAD THE OTHER PARTY.

- If you exaggerate or mislead the other party during negotiations, the contract may be dismissed and compensation may be payable to the other party.

✓ DO NOT OFFER OR ACCEPT BRIBES OR INDUCEMENTS.

- This is unethical and could lead to criminal liability under a variety of laws, such as the US Foreign Corrupt Practices Act and the UK Bribery Act of 2010.

✓ PREVENT THE OTHER PARTY FROM POACHING EMPLOYEES OR CUSTOMERS.

- If the other party has access to your business's customers or employees, consider asking the other party to sign a non-solicitation agreement. Speak to an attorney for an appropriate form.

 **TAKE CARE BEFORE SIGNING ANY PRE-CONTRACTUAL AGREEMENTS.**

- When negotiating a big or complex deal, your business may be asked to sign a summary of the main terms before the main contract is agreed. This document can be called a term sheet, letter of intent or memorandum of understanding.
- Speak to an attorney before signing a term sheet. Even if the term sheet is not meant to be legally binding, it may create legal obligations. In any event, it can create strong moral obligations which can weaken your business's negotiating position.

 **DO NOT ENTER INTO A CONTRACT BY MISTAKE.**

- A contract does not have to be signed and in writing to be binding. For example, one can enter into a binding contract over the phone or by e-mail provided the key terms are agreed. Be clear in communications that no contract is being entered by means of that communication.
- To help clarify that the parties are still in negotiations, mark all correspondence "subject to contract" or "not legally binding."

IF YOU HAVE ANY QUESTIONS

relating to this checklist, please contact the Contiguglia Law Firm, P.C.

and speak with one of our business lawyers.

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