

Negotiating Terms & Conditions For the BUYER and SELLER

Presented by
Erin Felix and Daniel Chalfant

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Agenda

- 8:30 – NCMA introduction
- 8:35 – Speakers introduction
- 8:45 – Topic Introduction
- 9:00 – Specific Terms
- 10:15 – Break
- 10:30 – Specific Terms
- 11:30 – Q&A, Discussion

ERIN FELIX



Erin Felix is a Government Contracts and International Trade attorney with Polsinelli PC and currently serves as the Vice President of Programs for the NCMA Tysons Chapter.

Erin counsels prime and subcontractor clients through all phases of procurement, including contract negotiations, compliance, claims and disputes, bid protests, audits, and investigations. Her experience spans multiple industries and contracting agencies, with particular focus on Defense and Aerospace; intellectual property and data rights under government contracts; sole source issues, including certified cost or pricing data and the Truth In Negotiations Act; and ITAR compliance.

For 15 years prior to practicing law, Erin managed government and commercial contracts and subcontracts for one of the largest defense contractors in the industry. Her extensive business background gives Erin a unique understanding of client concerns and enables her to provide practical solutions to complex business issues.

DANIEL CHALFANT



- Mr. Daniel A. Chalfant is a Senior Cost Price Analyst for General Atomics in San Diego, CA. He is responsible for major subcontract cost analysis and negotiation. Mr. Chalfant has a BA in Economics and an MBA from the University of California, Irvine. He holds designations as a Certified Professional Contracts Manager (CPCM), Certified Federal Contracts Manager (CFCM) by NCMA, and a Certified Purchasing Manager (C.P.M.) through the Institute for Supply Management (ISM). Mr. Chalfant was formally the US Navy Contract Manager for Accenture and Corporate Manager of Cost/Price Analysis at SAIC. He is an adjunct instructor in contract management at San Diego State University. He has taught Sourcing and Cost/Price Analysis at Accenture, Booz Allen, CACI, General Dynamics, Northrop Grumman, SAIC and UTC. Mr. Chalfant is currently President of the San Diego chapter of the National Contract Management Association (NCMA).

Today's Topics

- Approach to Negotiations
- Focusing on Top Ts&Cs Priorities
- Breaking the Log Jam – Relational vs. Positional Negotiating
- Leverage / Position of the Parties
- Walk-Through for Major Clauses

Word Game

- Write down 3 adjectives that immediately come to mind when you think of contract negotiations

Approach to Negotiations

“Now that we have reached agreement on price, let’s turn to the Ts&Cs”

- Price vs. Ts&Cs vs. Scope
 - Where do we start?
 - How do we end?

The Devil is in the Detail



If You Take Nothing Else Away From Today...

- NEVER close a deal until *all* elements are accounted for and agreed to!
 - Price
 - Contract Type
 - Terms
 - SOW
 - ...

Tradeoffs made in one area are worth something (good or bad) in another

Breaking the Log Jam - Relational vs. Positional Negotiating

- Ts&Cs negotiations present a unique relationship opportunity
 - What makes the other party tick?
 - What concerns keep them up at night?
 - Where have they been “burned” before?

Focusing on Top Ts&Cs Priorities

- Which clauses are the most critical to the company, considering:
 - Scope
 - Risk
 - Company financial situation
 - Relative positions of the parties
 - Leverage

- Be strategic

- Remember the “negotiation dance”
 - Don’t go overboard *but* it’s an inevitable element of negotiation psychology

Walk-Through for Major Clauses

- Common terms and conditions to be negotiated
- Buyer's position
- Seller's position
- Sample negotiated position

Commonly Negotiated Terms

Financial: Payment Terms
 Audit Rights

Legal: Limitation of Liability / Indemnification
 Choice of Law
 Termination for Convenience / Default

Operational: Shipment and Delivery
 Warranty
 Inspection / Acceptance
 Changes
 Assignability

PAYMENT TERMS

BUYER

- NET 75 Days after the later of Buyer's receipt of Seller's correct invoice for such shipment or the date on which the Materials are received by Buyer.
- NET 30 Days after receipt of payment from the USG
- The purchase price for the Materials shall include all taxes, customs duties, customs fees or other governmental charges due with respect to the Materials

SELLER

- NET 30 Days from date of invoice.
- If payment is not received by the due date, invoices are considered past due.
- Past due payments will be subject to a service charge of 1 ½ % per month

PAYMENT TERMS

SAMPLE NEGOTIATION

- NET _____ Days from date of Acceptable invoice, and receipt of acceptable goods/services.
- Past due payments will be subject to interest at _____% per month.

AUDIT RIGHTS

BUYER

- Buyer may perform an audit of Seller's books and records upon request

SELLER

- Buyer shall have no right to access Seller's proprietary internal financial information

AUDIT RIGHTS

SAMPLE NEGOTIATION

- Buyer may have an audit of Seller's books and records performed by USG or an independent third party and receive a summary report of pertinent findings
 - Seller may preview audit report for any objectionable proprietary information
 - Who pays?
- Upon *reasonable* request and ____ days' advance notice
- *"In no event shall Buyer have the right to directly access Seller's proprietary books and records."*

LIMITATION OF LIABILITY / INDEMNIFICATION

BUYER

- Seller agrees to indemnify and hold Buyer harmless from and against any and all liabilities, costs, losses or expenses, including reasonable attorneys' fees, incurred or suffered by Buyer as a result of or in connection with Seller's breach of any of its obligations hereunder.
- Seller agrees to indemnify and hold Buyer harmless from and in respect of any damages, losses or expenses which Buyer may suffer or incur (including reasonable attorneys' fees) arising out of, relating to or concerning any claim, action or allegation.

SELLER

- In no event shall Seller be liable for (i) special, indirect, consequential, or punitive damages, including but not limited to labor costs incurred by the Buyer or (ii) any damages whatsoever resulting from loss of use or profits arising out of or in connection with the goods sold hereunder.
- In no event shall Seller's liability exceed the purchase price of the goods in question.

LIMITATION OF LIABILITY

SAMPLE NEGOTIATION

- THE SELLER WILL NOT BE LIABLE FOR ANY INCIDENTAL CONSEQUENTIAL, SPECIAL, PUNITIVE, STATUTORY, OR INDIRECT DAMAGES, LOSS OF PROFITS, REVENUES, OR USE, OR THE LOSS OR CORRUPTION OF DATA.
- THE TOTAL LIABILITY OF SELLER FOR ANY CLAIMS ARISING OUT OF OR RELATED TO THIS AGREEMENT IS LIMITED TO DIRECT DAMAGES NOT TO EXCEED THE AMOUNT PAID FOR THE SPECIFIC PRODUCT OR SERVICE THAT GIVES RISE TO THE CLAIM.
- THESE LIMITATIONS AND EXCLUSIONS WILL APPLY REGARDLESS OF WHETHER LIABILITY ARISES FROM BREACH OF CONTRACT, INDEMNITY, WARRANTY, TORT, OPERATION OF LAW, OR OTHERWISE.

CAS Indemnification

BUYER

- Seller agrees to indemnify and hold Buyer harmless to the full extent of any price or cost reduction effected by Buyer's customer, which may result from the failure of the Seller or its lower tier subcontractors to disclose and consistently follow applicable cost accounting practices and standards or otherwise comply with all pertinent sections of the regulations promulgated by the Cost Accounting Standards Board in effect on the date of award of the subcontract.

SELLER

- None
- Not in Buyer's Prime Contract

CAS Indemnification

SAMPLE NEGOTIATION

- Seller agrees to indemnify and hold Buyer harmless to the DIRECT COST IMPACT of any price or cost reduction effected by Buyer's customer, which may result from the failure of the Seller or its lower tier subcontractors to disclose and consistently follow applicable cost accounting practices and standards or otherwise comply with all pertinent sections of the regulations promulgated by the Cost Accounting Standards Board in effect on the date of award of the subcontract.

CHOICE OF LAW

BUYER

- This Agreement, and any dispute arising from the relationship between the parties to this Agreement, shall be governed by Virginia law.
- Any dispute that arises under or relates to this Agreement shall be resolved in XYZ County Superior Court.

SELLER

- This Agreement, and any dispute arising from the relationship between the parties to this Agreement, shall be governed by California law.
- Any dispute that arises under or relates to this Agreement shall be resolved in ABC County Superior Court.

CHOICE OF LAW

SAMPLE NEGOTIATION

- This Agreement, and any dispute arising from the relationship between the parties to this Agreement, shall be governed by _____ law.
- Any dispute that arises under or relates to this Agreement shall be resolved in _____ County Superior Court.

TERMINATION FOR CONVENIENCE

BUYER

- The Buyer may terminate performance of work under this contract in whole or, from time to time, in part if the Buyer determines that a termination is in the Buyer's interest.
- The Buyer shall terminate by delivering to the Seller a Notice of Termination specifying the extent of termination and the effective date.

SELLER

- The Buyer may NOT terminate any work under this contract in whole or, in part, without the approval of the Seller.
- The Buyer's will be responsible for Seller's termination costs.

TERMINATION FOR CONVENIENCE SAMPLE NEGOTIATION

- The Buyer may NOT terminate performance of work under this contract, UNLESS the Buyer's customer issues a formal Termination notice.
- The Buyer's termination is limited to the extent of the customer's termination.

TERMINATION FOR DEFAULT

BUYER

- Seller shall be deemed to be in default hereunder if it violates any of the terms hereof or fails timely to perform any of its covenants, duties or obligations hereunder.
- Or, if it performs or fails to perform any other act, whether pursuant to this Agreement or otherwise, which gives Buyer reasonable grounds to feel insecure with respect to Seller's future performance hereunder.

SELLER

- Buyer may not terminate or cancel this order without consent of Seller.

TERMINATION FOR DEFAULT SAMPLE NEGOTIATION

- Seller shall be deemed to be in default hereunder if it violates any SIGNIFICANT terms hereof or fails timely to perform the delivery obligations of the contract and fails to cure such deficiencies after a reasonable time from the receipt of Buyer's written notice.
- Or, is more than _____ Days late to the negotiated delivery schedule.

SHIPMENT & DELIVERY

BUYER

- Seller shall deliver the Materials F.O.B. to the place designated for shipment by Buyer in the Order.
- Any loss or damage, which results from Seller's improper packaging or crating shall be borne by Seller.

SELLER

- All shipments are F.O.B. our plant, and are;
- exclusive of all taxes, and freight charges, which shall be paid by the Buyer.
- It is the Buyer's responsibility to seek compensation from the carrier for damaged or missing freight.

SHIPMENT & DELIVERY SAMPLE NEGOTIATION

- All shipments are F.O.B. Origin or Destination as agreed to by the parties.
- Standard INCO terms will apply
- The agreed to FOB point shall determine which party bears risk of loss.

Warranty Provisions

BUYER

- Seller hereby warrants to Buyer that, in addition to any and all express and implied warranties allowed for under the Uniform Commercial Code.

SELLER

- There is no warranty express or implied and implied warranties provided under the Uniform Commercial Code do not apply
- The warranty will not apply to those goods that are damaged due to misuse, abuse, negligence or notification by any party other than Seller.

Warranty Provisions

SAMPLE NEGOTIATION

- Seller gives _____ days limited warranty unless otherwise specified, from the date of delivery.
 - *[POTENTIAL PRICE IMPACT!!!]*
- The warranty will not apply to those goods that are damaged due to misuse, abuse, negligence or notification by any party other than Seller.
- The following UCC Warranty Provisions do not apply: XXX

INSPECTION

BUYER

- Buyer shall have a reasonable opportunity to inspect the Materials after delivery to Buyer's premises. Buyer shall not be deemed to have accepted any such Materials until the expiration of such reasonable time for inspection.

SELLER

- Buyer shall have the right to inspect the goods on arrival and, within 14 days after delivery.
- Any rights of Buyer with respect to inspection shall be deferred until after payment of the purchase price.

INSPECTION SAMPLE NEGOTIATION

- Buyer shall have a reasonable opportunity to inspect the Materials, not to exceed _____ Days after delivery to Buyer's premises.
- Buyer shall be deemed to have accepted any such Materials after _____ Days.

ACCEPTANCE

BUYER

- Upon rejection or revocation of acceptance of any Materials, Seller promptly shall replace or correct, at Buyer's option, any unsatisfactory units at Seller's expense, including all shipping costs.

SELLER

- No Cash refund will be issued.
- For returns of goods tendered under this Sales Contract to be effective, the Seller must receive written notice of that return at its headquarters within 14 days after delivery.
- Returns are allowed only if nonconformity is substantial and noncurable.
- A "RETURN AUTHORIZATION" form obtained from Seller.

ACCEPTANCE SAMPLE NEGOTIATION

- Upon rejection of any Materials, Seller promptly shall replace or correct, or refund at Seller's option, any unsatisfactory units at Seller's expense.
- For returns of goods tendered under this Sales Contract to be effective, the Seller must receive written notice of that return at its headquarters within _____ days after delivery.

CHANGES CLAUSE

BUYER

- The Buyer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:
- (1) Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for the Buyer in accordance with the drawings, designs, or specifications.
- (2) Method of shipment or packing.
- (3) Place of delivery.

SELLER

- Any changes must be mutually agreed between Buyer and Seller

CHANGES CLAUSE SAMPLE NEGOTIATION

- If the FAR Changes clause is in the prime contract, the Seller will agree to incorporate it into the subcontract.
- Any changes to the subcontract will be limited to the scope of the changes in the prime contract.

ASSIGNABILITY

BUYER

- This Sales Contract shall not be assignable by the Seller without the Buyer's written consent.

SELLER

- This Sales Contract shall not be assignable by the Buyer without the Seller's written consent.

ASSIGNABILITY

SAMPLE NEGOTIATION

- Neither party shall assign its interest in this contract to a third party, without prior approval of the other party, which shall not be unreasonably withheld.
- Except in the case of a merger, acquisition, or sale of all or substantially all of a party's assets...

OTHER CLAUSES

- Contract Type
- Flowdowns
- Non-solicitation of Employees
- Non-competition
- Intellectual Property / Data Rights
- Dispute Resolution
 - Government claims
 - Arbitration vs. Court
- ...?

Title

- Q & A
- DISCUSSION

OTHER RESOURCES

- ❑ www.ndia.org
- ❑ Guide to Service Subcontract Terms and Conditions, American Bar Association, © 2008
- ❑ Guide to Fixed-Price Supply Subcontract Terms and Conditions (Fourth Edition), © 2005

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