Contract Negotiation & Drafting
Part 1

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Contract Life Cycle

- Procurement
- Negotiation
- Management
- Execution
- Drafting

You are here
Negotiation

Give a thumbs down if you feel uncomfortable negotiating?
What is Negotiation?

• Contract negotiation is more than merely haggling over price.
• It’s a series of exchanges in order to obtain more favorable terms in your contract.
  ▪ You give me that, I’ll give you this
  ▪ Just giving away things is conceding, not negotiating
• “In business as in life, you don't get what you deserve, you get what you negotiate.” Chester Karrass
• What you negotiate is memorialized in the final, signed contract.
Barriers to Negotiation

• Which parts of a contract are up for negotiation?
• We don’t want to lose the deal
• We want to be “nice”
  • The Vendor is our friend
  • The Vendor is a long-term Vendor
  • We don’t want to offend
• We don’t have experience in formal negotiation
Reasons to Negotiate

• Don’t assume the terms of a vendor’s contract are fair, even if it is a reputable company
• Don’t assume that the first offer made by a vendor is their best offer
• Minnesota State employees are guardians of taxpayer and student dollars
  ▪ It is our responsibility to make sure that money is wisely spent
  ▪ What could your department do with the savings?
  ▪ What could you do with more deliverables for the same amount of money?
• One of the best ways to avoid a contract dispute is to have a well-negotiated, clearly-written contract
Negotiation Skills

• Communication
• Listening
• Planning
• Persuasion
• Creativity and Flexibility
• Emotional Understanding
We Negotiate Daily

• Deciding where to go for dinner
• Making vacation plans
• Trying to get kids to cooperate
• At a flea market
• Buying a house or a car
• In team meetings
• Even with yourself
Do Your Prep Work

• Set Targets
  ▪ Maximum Position (best)
  ▪ Your goal (satisfied)
  ▪ Bottom line (worst outcome you will accept under pressure)

• Make Lists
  ▪ Concessions you will make
    • Rank them
    • Decide what you must get in return
  ▪ Concessions you will not make

• Identify your BATNA – and theirs
  ▪ Best Alternative to a Negotiated Agreement
  ▪ i.e., what happens if you can’t reach a deal?
    ▪ Find another company
    ▪ Changing specifications
    ▪ Not going ahead
    ▪ Doing it internally
How To Negotiate Well

Know what you need/want
- Budget, features, deadlines, who is the decisionmaker, etc.

Psych yourself up
- Acknowledge most of us feel uncomfortable
- Reflect on past successful negotiations
- Negotiation is more about preparation and practice than any special talent

Know your worth
- We are the largest system of higher ed in Minnesota and the fourth largest in the United States. You are negotiating for more than your department. We are a big deal for many vendors.

Research the vendor and their offerings and/or needs
- Knowledge is power

Figure out what their interests are
- Deadlines, sales quotas, entry into higher education market

Plan
- In person? Telephone? By email?
- Consider the order of items to negotiate
How To Negotiate Well (2)

Establish a relationship
- Build trust and it may help you get insight into their goals
- Don’t bluff - if you don’t know the answer to a legal or business question, take a break and find out
- Collaboration without emotion likely to give the best results

Ask a lot of questions
- Vendors are more open to sharing before negotiations begin

Be creative and open to non-traditional solutions
- Especially ideas that don’t cost you anything

Listen more than you talk
- Embrace the awkward silence

Don’t take anything personally

Emphasize points of agreement
- Places where you can say “You’re right” or “I agree”.
How To Negotiate Well (3)

Make a reasonable first offer

Don’t bid against yourself
  • Give them time to respond

Negotiate all items at once
  • Avoid doing business terms first and then getting legal review

Allow time for the negotiation process
  • Don’t give up quickly
  • The “quick” deal may cause more pain in the future

Be willing to walk away
  • The “win” might be in no deal at all
How To Negotiate Well (4)

Allow time for the negotiation process
• Don’t give up quickly
• The “quick” deal may cause more pain in the future

When you compromise, clearly identify that you have done so
• Labeling a concession invites reciprocity

Make concessions in installments
• $10,000 followed by $5,000, rather than one $15,000 concession

Get legal approval before reaching a tentative agreement
• Avoid doing business terms first and then getting legal review
Negotiation Phrases

If You Need to Buy Yourself Time ...
- That’s a good question, let me think about that
- Let’s set that aside for now and come back to it later
- That’s more than what I was expecting, let me think about it
- We’ll have to discuss this internally
- I’d like to consult with my superiors before making a decision

If You Are Looking for a Better Price ...
- How far are you willing to compromise on this price?
- Can you do any better? Is that your final offer?
- How about 20% off?
- I’m afraid we can only go as high as _______
- For us, an acceptable price would be _____

If you need to hold firm ...
- I think that’s a fair offer
Negotiation Phrases (2)

If You Need to Say No ...

• I’m afraid we can’t agree to ____
• We understand your position, however we would prefer ______
• That’s a deal breaker for us
• State law prohibits us from _____________
• As an alternative, we propose ______
• We appreciate the effort you’ve made to ______, but unfortunately we are going to go in a different direction
• Well that’s a good starting point, but ______
• No, that’s not an option

If You Need to Ask for More Value ...

• We propose that _____
• Would your team consider _____?
• How flexible are you on ___? Is there any wiggle room on ____?
• Is _____ a deal-breaker?
• If ______ is resolved, are you happy with everything else?
• ______ is in line with industry standards. I’m only asking for what’s fair.
Negotiation Phrases (3)

If You Are Looking to Compromise ...

• What I might be willing to consider is _____?
• We feel there has to be a trade off here. If we ____________, can you ____________?
• We’d be prepared to ____________
• In exchange for _____ would you agree on _____?
• We are ready to accept your offer, however there would be one condition ____________
• It is going to be a struggle to balance our budget with this price, but we can make some adjustments. We expect that you are now in a better position to offer ________________.
• A fair solution might be ____________.
Negotiation Phrases (4)

If You Need More Information ...
• Could you clarify one point for me?
• Are you saying _____?
• If I understand you correctly, __________

When You Are Ready to Say Yes ...
• I’m comfortable with that
• That’s acceptable to us
• I think we have a deal
• Let me go over what we talked about
• Here’s what I think we’ve agreed to: __________
• I think that’s a fair offer
• Sounds like we have a deal, I need to run it past counsel before I can give the official okay.
Negotiation Phrases To Avoid

Don’t undercut yourself. Don’t say:
  • “If that’s ok with you?”
  • “What are your thoughts on that?”
  • Don’t ask questions of the vendor where “no” seems an acceptable answer
  • Let silence hang

Use firm numbers and quantities (and not your top dollar)
  • You wouldn’t go to a car dealer and say my budget is $30,000
  • Don’t say to a vendor, “We’re looking to spend between $10,000-$15,000 on this project” – you’ve automatically conceded $5,000

Limit the realm of acceptable responses
  • In many ways, like dealing with a toddler:
    ▪ Don’t Ask: “Do you want to wear your red shirt today?”
    ▪ Ask: “Do you want to wear your red shirt or your blue shirt today”?
  • “If you’ve got a solution that addresses our need for a lower price while still maintaining quality, I’d be happy to discuss it.”
What is Negotiable?

- Everything
  - All business terms (except what you’ve deemed a deal-breaker)
  - Most legal terms (except where not allowed by law)
Terms That Should Be Negotiated

All Business Terms

- Anything in the “Duties” Section of a P/T Contract
- Total Price or Rate
- Other Payment Terms
- Quantities
  - Price Breaks at Certain Quantities
- Timing of Completion
- Length of Contract
- Quality of Product
- Check-in/Check-out Times
- Termination Notice or Other Breach Terms
Other Areas for Negotiation with OGC Assistance

- Intellectual Property Ownership
- Warranties
  - **Unfavorable warranty:** While the Licensor has tried to ensure that the Software Product is accurate and free from defect, it is provided “as is” without warranty of any kind. The Licensee and its Affiliates assume the entire risk as to the results and performance of the Software Product.
- Limitation of Liability
  - **Unfavorable limitation of liability:** To the maximum extent permitted by law, in no event will Vendor or its suppliers be liable (whether under contract, tort, strict liability or otherwise) for any special, incidental, indirect, or consequential damages arising out of the use of or inability to use the Product
- Indemnification
- Choice of Law
Keep Track

It’s important to keep track of all the items you have negotiated – in a spreadsheet, word document, or series of emails:

• Price
• Scope of Work
• Warranties
• Length of agreement
• Services or Products to be provided
• Other terms and conditions

And check that list against what is in the draft contract

• Contract may have new provisions you never discussed
• Price or quantity or length terms may not match your “handshake” agreement
A Quick Word About 16A
What is 16A?

- 16A is a chapter of the Minnesota Statues regulating all purchasing & contracting by State Agencies.
- 16B and 16C are also statutes on procurement & contracting but only apply to Minnesota State if we are specifically listed or opt in by policy.
A payment may not be made without prior obligation. An obligation may not be incurred against any fund, allotment, or appropriation unless the commissioner has certified a sufficient unencumbered balance or the accounting system shows sufficient allotment or encumbrance balance in the fund, allotment, or appropriation to meet it. The commissioner shall determine when the accounting system may be used to incur obligations without the commissioner's certification of a sufficient unencumbered balance. An expenditure or obligation authorized or incurred in violation of this chapter is invalid and ineligible for payment until made valid. A payment made in violation of this chapter is illegal. An employee authorizing or making the payment, or taking part in it, and a person receiving any part of the payment, are jointly and severally liable to the state for the amount paid or received. If an employee knowingly incurs an obligation or authorizes or makes an expenditure in violation of this chapter or takes part in the violation, the violation is just cause for the employee's removal by the appointing authority or by the governor if an appointing authority other than the governor fails to do so....
16A.138

Officials Not To Exceed Appropriation

When there has been an appropriation for any purpose it shall be unlawful for any state board or official to incur indebtedness on behalf of the board, the official, or the state in excess of the appropriation made for such purpose. It is hereby made unlawful for any state board or official to incur any indebtedness in behalf of the board, the official, or the state of any nature until after an appropriation therefor has been made by the legislature. Any official violating these provisions shall be guilty of a misdemeanor and the governor is hereby authorized and empowered to remove any such official from office.
What does all that Legal Jargon Mean?

Funds must be encumbered prior to making an obligation
Four Ways 16A is Violated

• No Encumbrance
• No Fully Signed Contract
• Unauthorized Pre-Payment (limited exceptions in 16A.065)
• Agree to Pay Attorneys’ Fees, Penalties, Liquidated Damages, and Indemnification
  • All of these are promises to pay an unknown amount of money at an undetermined time in the future without an encumbrance to cover it.
Opinion of the Attorney General’s Office (AGO) Regarding Indemnification

Minn. Const. Art. XI §1 states that no money may be paid out of the treasury expect pursuant to an appropriation.

Minn. Stat. § 16A.15, subd. 3 prohibits any incurrence of an obligation without an encumbrance against an appropriation.

Minn. Stat. § 16A.138 states that it is unlawful to incur any indebtedness of any nature on behalf of the state until an appropriation for it has been made by the legislature. An undertaking to indemnify a third party is by its nature not known and this is not an obligation to which a state agency can agree.
Opinion of the AGO Regarding Indemnification (2)

An indemnity is a promise of an indeterminate amount of money for an indeterminate reason at an undetermined time in the future.

As such, there is no appropriation or encumbrance available for such a contingency and not available for other purposes.

In addition, the State has not waived its tort immunity for damages exceeding the limits found in Minn. Stat. § 3.736, so it cannot promise to indemnify for costs and damages that exceed those statutory limits.
Risk of Violating 16A

**Personal**

- An employee authorizing or making the payment, or taking part in it, may be liable to the state for the amount paid.
- A knowing violation of Minn. Stat. Ch. 16A.15, Subd. 3, is just cause for the employee's removal.
- An official incurring indebtedness beyond an agency’s appropriation shall be guilty of a misdemeanor.

**Minnesota State**

- Reputational Risk
- Compliance Risk
Documents show Minnesota state agency broke law on contracts, committing millions of dollars without approval

The Department of Human Services had more than 200 violations of state contract law within the past year, according to records.

By Glenn Howatt and Chris Serres Star Tribune staff writers

NOVEMBER 6, 2019 — 11:20 AM
Minnesota lawmakers blast agency heads for sloppy contracting

Special hearing follows disclosure of contract violations at Department of Human Services.

By Glenn Howatt and Chris Serres Star Tribune staff writers

NOVEMBER 14, 2019 — 5:08AM
Politics and Government

Report: Records show DHS violated state contract law

MPR News Staff  November 6, 2019 7:34 a.m.
What If I’m in Violation of 16A?

System Office
If a system office employee obligates Minnesota State to a payment without an encumbrance, an MS16A.15 Form must be completed by the Division/Unit, and approved by the VC – CFO, prior to processing the encumbrance or payment by the Business Office.

- **System Office MS16A Guidelines**
- **16A.15 Form**

Colleges and Universities
Check with your business/procurement office
What If...
Work started prior to an executed contract being in place?

What should I do?
Work started prior to an executed contract being in place?

What should I do?

• Provide written notice to Contractor to stop work until there is a valid contract specific to such services for the specific time frame.

• Find out all the details
  • Make a list of what services were provided, the dates for each of those services and the break-down of the dollar amounts of what is owed (the exact dates, and the exact dollar amounts).

• Contact OGC with the exact details to draft an amendment

• Complete 16A form
Work is continuing after the contract expired

What should I do?
Work is continuing after the contract expired

What should I do?

• Provide written notice to Contractor to stop work until there is a valid contract specific to such services for the specific time frame.
• Find out all the details
  • Make a list of what services were provided, the dates for each of those services and the break-down of the dollar amounts of what is owed (the exact dates, and the exact dollar amounts).
• Contact OGC with the exact details to draft a new contract
• Complete 16A form
Services were provided without a written contract and the vendor sends an invoice

What Should I do?
Services were provided without a written contract and the vendor sends an invoice

What Should I do?

- Contact OGC to get a contract in place ASAP
- Complete 16A form
- Additional training & supervision
Next Week: Drafting 101

• How to write clearer contracts, with a focus on how to improve the duties sections & payment terms
• How to avoid common ambiguities
• Interactive exercises – bring a friend!
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