

PSM2107 PROCUREMENT BUSINESS NEGOTIATION AND CONTRACTING

LECTURE 02: The Negotiation Process

Facilitators

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Outline

- Stages of the procurement negotiation process
 - Pre-negotiation (planning, preparing for negotiation and developing a BATNA)
 - Actual Negotiation
 - Post-Negotiation
- Ratification in (procurement) negotiations
- Question and Answers

Pre-negotiation

- **Planning** for a procurement negotiation
 - Identify your alliance objectives in general terms, and identify your personal objectives in general terms, and solve any conflicts internally.
 - Do detailed analysis to understand potential trade-offs as seen by your side, and by the other side.
 - Devise a simple scheme to quantify the multiple items being negotiated, so you can quickly assess the trade-offs being made during the negotiation.
 - Assess the individual strengths and weaknesses of each negotiator or each team (or teams)—in case of more than two parties. After looking at each individual sources and limitations of power, consider the composite team's strengths and weaknesses. Do each side in turn—on the other side, and then on your side.
 - Size up the personal and organisational motivations and desires of each side. Note coinciding and conflicting interests.

Pre-negotiation

- Decide what must be specified to get a deal done. When the negotiation is completed, in other words, what must be agreed on?
- Identify your needs for additional information and collect it.
- Identify areas of common ground. Enumerate all the win-win aspects of the negotiations. Whereas zero-sum trade-offs are win-lose, non-zero-sum trade-offs are win-win, for example:
 - Sharing risks
 - Using contingent rights—think of trigger clauses, such as “such and such will happen”—e.g. the money will be transferred, “if and only if, the certificate of title has been changed to the names of the buyer”; as normally is the case in the purchase of land (or other transferable property/asset).
 - Developing measurable performance incentives and rewards
 - Postponing unforeseeable issues or contested points to future negotiations—sometimes they are handled as escalation clauses in a contract or clauses calling for arbitration to resolve disputes.

Pre-negotiation

- Non-monetary and intangible benefits (e.g., in patent licensing agreements)
- Flexibility of commitments and timing: the timing of when money or people are expected to be committed to the alliance, depending on if other events happen first
- Acceleration or deferment of major capital expenditures, depending on the achievement of certain predefined milestones
- Use of convertible securities and other options to enable future flexibility for financing unforeseen events.
- Decide on a strategy of negotiation including an **initial position**, **target position**, and **walk-away position (or the best alternative to a negotiated agreement [BATNA])**. The **zone of potential agreement (ZOPA)** needs to be discerned by carefully listening to the other side and asking questions to obtain more information and identify issues.
- Resolve differences within your own team.
- List and prioritize your concessions.

Pre-negotiation

- Carefully consider possible bargaining strategies of the other side. Role-play their likely moves and prepare countermeasures. Rehearse the language you are likely to use to get them from a win-lose mentality and to a win-win frame of mind.
- Have a tentative agenda ready at the opening or else a plan to deal with the other side's agenda.
- The pre-negotiation phase often times is split to comprise planning for negotiation, preparation (preparing for negotiation), relationship building, and information gathering, and using the information.
- Note: The information gathered at pre-negotiation is also useful for the actual negotiation and so often even for post-negotiation activities.

Actual Negotiation

- **A1. Opening moments:** exchange first impressions and size up the other party. The main goal of these opening moments would be to:
 - Obtain and give information
 - Identify problems and issues
 - Establish an agenda
 - Establish negotiating ranges and initial offer positions
- **A2. Opening moments in a different cultural context**—in a an unusual cultural context, the space of the negotiation might be entirely different, and the initial goals might be more relationship oriented, for instance:
 - Develop rapport
 - Establish trustworthiness
 - Tie into the network. Mention and talk about the “matchmaker” who brought the two parties together.
 - Test the sense of interest or commitment of the other party
 - Seek information from the other side.

Actual negotiation

- **B. subsequent encounters leading to the hard bargaining phase.** Most often, the negotiations might move rapidly into a hard bargaining phase. In unusual contexts, the pace might be much slower and involve more entertaining and allowing the parties to get to know each other socially before moving into the hard bargaining phase.
- During the hard bargaining phase, it is advisable to focus on accomplishing the negotiating objectives:
 - Solve problems. Sometimes if different problems are bundled together, it makes sense to disentangle the pieces and seek new ways to rearrange the modules
 - Create creative bundles of options so that both sides win. In a two-party distributive negotiation, the overriding goal typically is to claim value (take the lion's share of the pie) in a win-lose mentality. However, in longer-term integrative negotiations, where multiple rounds and long-term relationships are at stake, win-win should be the goal. The negotiator should try to combine value creation with value claiming.

Actual negotiation

- Use recesses or time-outs to give yourself and the other side time to think, digest, and accept the proposals. Consider multiple rounds of negotiations among the parties.
- Maintain a positive, cooperative attitude.
- Seek to understand the interacting levels of negotiation both within and among organizations or parties to the alliance, particularly for joint ventures and multiple-party alliances.
- See the linkages in webs of negotiation rounds, especially if the negotiation involves different but overlapping groups of negotiators
- Keep perspective.

Post-negotiation

- Formalize the agreement into a contract
- Conduct a post-mortem analysis with your team on what went right and what went wrong during the negotiations. Write down the lessons learned so as to improve next time around.

The Negotiation Process according to the Chartered Institute of Procurement and Supply

CIPS adopts Jarvis-Grove's (2020) model, suggesting that the negotiation process comprises 7 main stages.

Stages of Negotiation



(SOURCE: JARVIS-GROVE, 2020)

The 7 stages of the negotiation process According to CIPS

- **Stage 1. Preparation**

Arguably the most important step is preparation. Without thorough preparation including research, knowing the objectives, understanding the concessions and having a BATNA, the negotiation is unlikely to reach the optimum outcome.

---see negotiation preparation and checklist

Negotiation Preparation



(SOURCE: JARVIS-GROVE, 2020)

Negotiation preparation checklist

Check	Yes √	No X	Notes
A BATNA is in place?			
At what stage is the professional relationship?			
Awareness of tradeables?			
Awareness of budget?			
Awareness of concessions?			
Can the buyer afford to walk away?			
Can the specification be amended?			
Does the buyer have the required authority?			
Does the supplier's representative have the required authority?			
Have KPIs and SLAs been reviewed (if appropriate)?			
How has the supplier performed (if established relationship)?			

Negotiation preparation checklist

How important is the contract to supplier?			
Is the negotiation a team or sole process?			
Is the specification performance/conformance?			
Is there a time limit for the negotiation?			
Are the “must haves” known?			
Market research has been conducted?			
What approach will be used?			
What are the exchange rates?			
What is the minimum/maximum order quantities?			
What is an acceptable lead time?			
What type of pricing mechanism is preferable?			
What volumes are required?			

The 7 stages of the negotiation process According to CIPS

- **Stage 2. Opening**

This is where both parties explain what they want as a result from the negotiation.

- **Stage 3. Testing**

This stage is where parties try and understand what is really important to each other and where concessions could be made.

- **Stage 4. Proposing**

This is where each party puts forward their proposals of what they would like to achieve having heard the opening stage and been involved in the testing.

The 7 stages of the negotiation process According to CIPS

- **Stage 5. Bargaining**

This takes place where each party offers to give up something in return for something back i.e. tradeables. If one party has to give something up but receives nothing back in trade, this is known as a concession.

- **Stage 6. Agreement**

Once bargaining has been completed it is expected that an agreement can be made. Agreement has to have acceptance from both parties to be legally binding.

- **Stage 7. Closure**

The final stage is closure. This stage includes the documentation of what has been agreed, whether that is a contract or minutes from a meeting. Closure is an important stage – without the documentation the agreement is open to interpretation. This stage includes ensuring that both parties have access to the written agreement and then calling the negotiation strategy complete.

RATIFICATIONS IN (PROCUREMENT) NEGOTIATION

- To **ratify** means to approve or enact a legally binding act that would not otherwise be binding in the absence of such approval.
- **Ratification** is a principal's approval of an act of its agent that lacked the authority to bind the principal legally.
- According to the Legal Dictionary, **ratification** means confirmation or adoption of an act that has already been performed. A principal can, for example, ratify something that been done on his or her behalf by another individual who assumed the authority to act in the capacity of an agent.
- **Ratification** is confirmation of an action, which was not pre-approved and may not have been authorised, usually by a principal (employer) who adopts the acts of his/her agent (employee)

RATIFICATIONS IN (PROCUREMENT) NEGOTIATIONS

- Ratification puts the act in the same position as if it had been originally authorised. For example, the confirmation or ratification by a principal of an unauthorised contract entered into by his agent.
- Ratifications are either explicit or implicit, express or implied. Explicit or express ratifications are made in direct terms of assent. For example, the Principal writes or signs assenting. Implicit or implied ratifications are such as the law presumes from the acts of the Principal; for instance, if John buys goods for Paul, and the latter, knowing the fact, receive them and apply them to his own use.
- By ratifying a contract a manager adopts the agency, altogether, as well what is detrimental as what is for his benefit.

RATIFICATIONS IN (PROCUREMENT) NEGOTIATIONS

- As a general rule, the principal has the right to elect whether he will adopt the unauthorized act or not. But having once ratified the act, upon a full knowledge of all the material circumstances, the ratification cannot be revoked or recalled, and the Principal becomes bound as if he had originally authorized the act.
- The ratification of a lawful contract has a retrospective effect, and binds the principal from its date, and not only from the time of the ratification, for the ratification is equivalent to an original authority, according to the maxim, that omnis rati habitio mandate aequiparatur.
- As such, ratification will, in general, relieve the agent from all responsibility on the contract, when he would otherwise have been liable.

RATIFICATIONS IN (PROCUREMENT) NEGOTIATIONS

- An infant is not liable on his contracts; but if, after coming of age, he ratify the contract by an actual or express declaration, he will be bound to perform it, as if it had been made after he attained full (majority) age.
- The ratification must be voluntary, deliberate, and intelligent, and the party must know that without it, he would not be bound.
- However, a confirmation or ratification of a contract, may be implied from acts of the infant after he becomes of age; as by enjoying or claiming a benefit under a contract he might have wholly rescinded; and an infant partner will be liable for the contracts of the firm, or at least such as were known to him, if he, after becoming of age, confirm the contract of partnership transacting business of the firm, receiving profits, and the like.

RATIFICATIONS IN (PROCUREMENT) NEGOTIATIONS

- Signing Versus Ratification—the difference between signing and ratification is that signing signals the intent to comply with something (e.g., contract); ratification on the other hand, seals the deal, and makes the document legally binding.
- Ratification makes a negotiated contract valid by signing it—i.e., giving the negotiated contract formal consent.
- Ratification occurs when parties to a negotiated agreement/contract actually sign the contract. The signing of the contract makes it official, and it can be enforced by law should the need arise.

You may listen to the content in the below indicative explanatory YouTube videos.

- Negotiations tips
 - <https://www.youtube.com/watch?v=0z2Z3Vgknm8>
- Negotiation Process
 - <https://www.youtube.com/watch?v=4B054r6SNoE>

Summary

- Negotiation process has three phases
 - Pre-negotiation
 - Actual negotiation
 - Post negotiation
- CIPS adopts Jarvis-Grove's (2020) model, in explaining the negotiation process. According to Jarvis-Grove's (2020), negotiation involves 7 stages/activities—preparation, opening, testing, proposing, bargaining, agreement, closure.
- Ratification –a process of approving a legally binding act, which would not otherwise be binding without such an approval.
- Next lecture covers contracting process.

End of the lecture presentation

Thank you for your attention

Lecturer 03

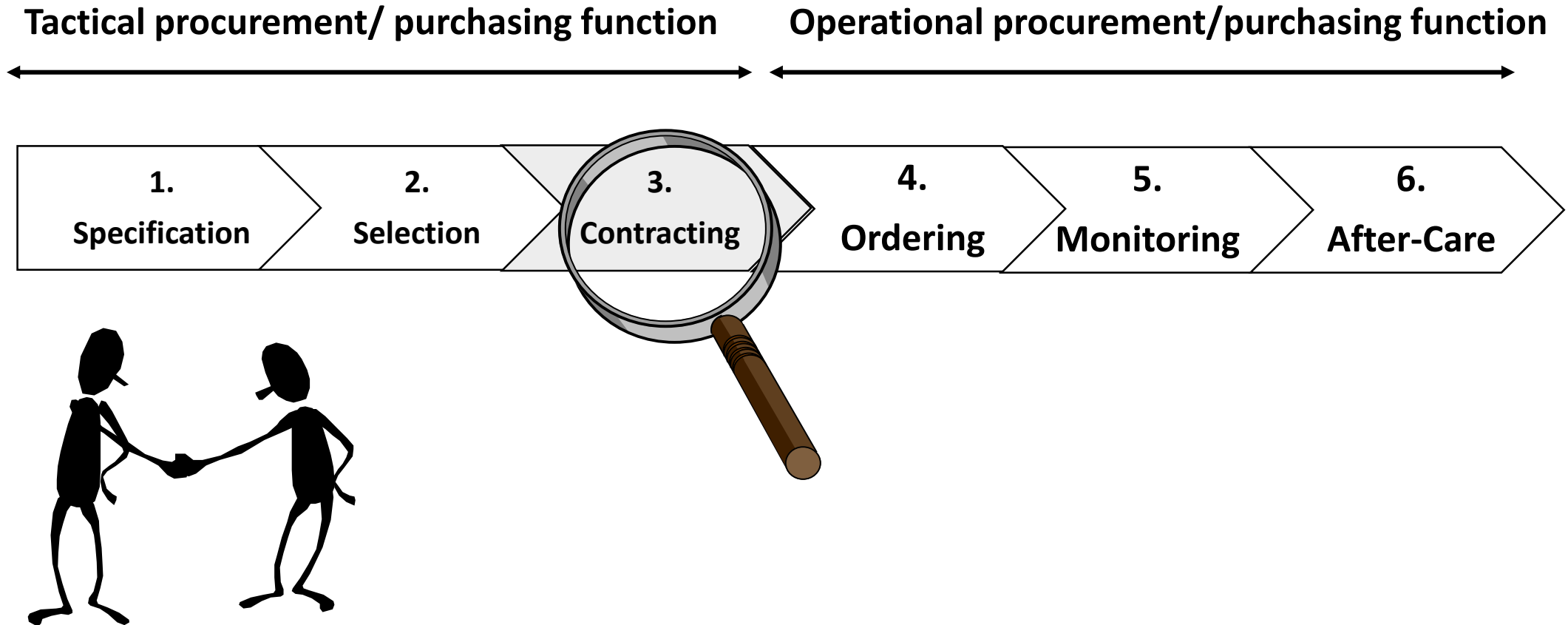
**Procurement contracting process &
aspects concerning developing contracts**

Outline

- The (procurement) contracting process
 - Phases of the (procurement) contracting process
- Types of procurement contracts
- The need for effective procurement contracts
- Essential elements of a procurement contract
- QAs

REVIEW: Negotiation & Contracting in the procurement process

- Negotiation a part of contracting?



The (procurement) contracting process

- The contracting process begins when evaluation has been completed.
- The evaluation committee/team submits the evaluation report and notice of the best evaluated bidders/tenderers is published (to the general public).
- Accepting the best evaluated bidder/tenderer notice as confirmation to the contract.
- **Recall:** negotiation is (though not always) part of the procurement contracting process.
- In circumstance where negotiation is part of contracting, once negotiation is concluded (i.e. an agreement is reached), contracting begins with recording of the full details of what has been agreed (and confirming these by the concerned parties/stakeholders)

The (procurement) contracting process

- Phases of the contracting process
 - ✓ Planning and scoping
 - ✓ Developing the contract
 - ✓ Negotiation and signing of the contract
 - ✓ Performance monitoring and contract end

Types of procurement contracts

- Fixed price contracts
- cost re-imbusement contracts
- Time and materials contracts
- Lump sum contracts

The need for effective procurement contracts

- Many buyer organizations treat the procurement contract as a ‘set-it-and-forget-it’ operation.
- However, hands off approach to procurement can trigger disruptive and costly consequences.
- When problems arise, the procurement will succeed or fail based on the strength and comprehensiveness of the original contract.
- Thus, buyer organizations (and so other stakeholders interested in the procurement) should value well procurement contracts, and ensure effective procurement contracts are arrived at.

Key elements in an effective procurement contract

- Full consideration of sourcing process
- Robust and comprehensive negotiation (s)
- Detailed contract management requirements
- Precise definition of key contract terms and conditions
- Stakeholders should be aware (or made aware of) all terms and conditions governing the contract
- Strategies for ongoing contract management once the bid/tender is completed and contract performance is underway.

Negotiating a contract

- When negotiating a contract there will be:
 - Issues or preferences that are important for the supplier (no penalties for late delivery)
 - Issues or preferences that are important to for purchaser (ownership of goods ASAP)
- *Terms will therefore vary from contract to contract according to the outcome of negotiations*

Written Contract

- Benefits of a written contract include:
 - Accurate record of the agreement
 - Clarify purchaser's rights against the supplier
 - Clarify buyer's obligations to supplier and vice versa

Essential elements of a contract

- The essential elements of a contract are;
 - ✓ Offer
 - ✓ Acceptance
 - ✓ Consideration
 - ✓ Intention to create legal relations
 - ✓ Authority and capacity
 - ✓ Certainty

Review Question.

In view of typical procurement contracts, Identify and explain the essential elements of a valid contract

Offer or Invitation to treat

Offer

- Provides details of the offer
- Offerer indicates willingness to enter into an agreement
- Legally binding

Invitation to treat

- Provides information
- Invites negotiation but does not express willingness
- Not legally binding

Offer

- Offer must be communicated to the offeree
- If it is not communicated it is incapable of being accepted
- Unilateral offer – to the world in general
- Bilateral offer – to individual or company

Termination of offer

- Rejection
- Acceptance
- Counter-offer
- Revocation
- Time

Acceptance

- Unconditional acceptance leads to agreement
- Acceptance must be communicated verbally or in writing to the offerer
- If posted acceptance is taken from the point of posting, otherwise when received

Framework agreements

- Used for situations where parties anticipate doing business in the future but do not want to agree terms for the future
- Specifies detailed terms and conditions for future contracts
- Fixed term, fixed quantity or ‘insurance’

Call offs

- Purchase orders submitted by the purchaser against the framework agreement
- Relatively simple, so is often made by a junior member of staff
- If the offer is accepted a contract is formed (frameworks do not show contractual commitment)

Consideration

- There is no contract if one party promises to do something but the other party promises nothing in return – no ‘bargain’ has been struck
- Consideration is something of value (in the eyes of the law) that is given or accepted in return for a promise
- Consideration must be sufficient but not necessarily adequate – the law is not concerned with how ‘good a deal has been done’

Consideration

- Insufficient consideration
 - If the consideration is insufficient there is no legally binding contract
 - Consideration may be insufficient if the alleged consideration is something that the party is already obliged to do – such as carrying out an existing contractual or public duty, part payment of debt
 - Consideration may not be related to past actions
 - A contract can only be enforced by someone who provides the consideration

Intention

- Both parties must intend to enter a legally binding contract
- In *social/domestic agreements* the law presumes no intention to create a legal relationship unless there is evidence
- In *business/commercial agreements* presumption is that the parties intended to create a legal relationship

Right to sue

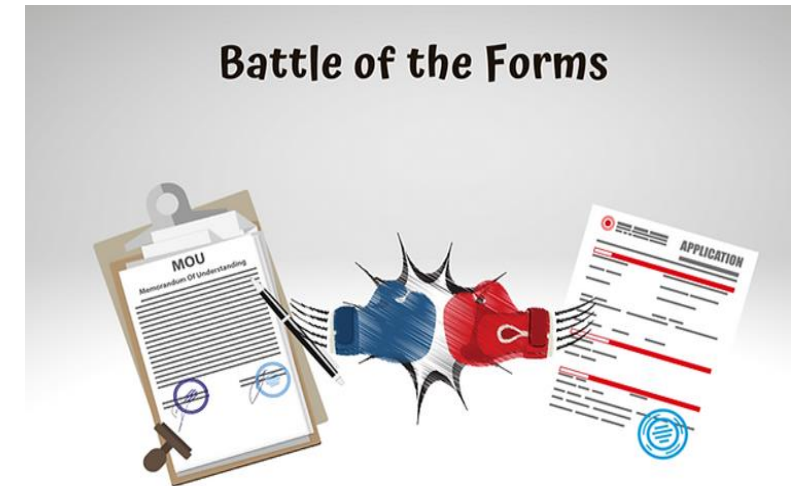
- Only a party to a contract may sue to enforce that contract or be sued on it (doctrine of privity)
- Purchaser may not sue a subcontractor or third party if the contract is with the main contractor – purchaser in a strong position may be able to insert a clause that holds main contractor liable for any breaches by a third party

Capacity

- Problems arise when one party does not have the capacity to meet the requirements of the contract unknown to the other party
- Law distinguishes between sole traders and partners and companies – former are treated as individuals

Battle of the forms

- Occurs when both parties to a contract try to ensure their standard terms and conditions will govern that contract
- In a battle of forms situation acceptance often takes place when the purchaser accepts the goods
- Has your organisation been involved in a battle of forms? What should be done to prevent this happening?



Battle of the forms—Illustrative example

A sends its form offer to B → an offer

B 'accepts' on B's form → A counter offer (restatement)

A 'acknowledges' acceptance on A's form → another counter offer

B 'acknowledges' the acknowledgment on B's form → another counter offer

Everyone proceeds with the transaction as though there is a contract,
“Acceptance” by performance

WHOSE FORM CONTROLS?

B's form → it was the LAST SHOT

Summary

- The (procurement) contracting process involves the following;
 - Planning and scoping
 - Developing the contract
 - Negotiation and signing of the contract
 - Considerations for effective performance (contract execution to contract end)
- Need for effective procurement contracts—contracts that deliver
- Essential elements of a procurement contract: offer, acceptance, consideration, intention, capacity and certainty
- Next Lecture will be about support tools for negotiation and contracting.

QAs

End of the lecture

Thank you for your attention