Common Mistakes to Avoid When Negotiating Technology Contracts

Jim Steinberg and Andrew Head

Daily Report

January 26, 2015

When negotiating technology transactions, such as software licenses, cloud transactions and outsourcing deals, as well as any other type of contract, negotiators will obtain better results with careful preparation and by following a thoughtful script.

In our practice, we see negotiators making small but important mistakes on a daily basis. This article describes several of the most common mistakes.

Independent Negotiations

In our previous article (Daily Report, Dec. 29, 2014), we described how a buyer can use a multivendor RFP process to obtain better terms and conditions. Since the RFP process enhances your leverage and threatens providers, particularly incumbents, they will often attempt to short-circuit the process by directly appealing to their champions within the company. Such maneuvering is often particularly intense where an incumbent provider believes it is at risk of losing an account.

If these outside overtures are not prohibited, they can undermine the RFP process. Therefore, the RFP rules should expressly forbid such back-channeling and make it clear that bidders will be excluded from the RFP process if they violate the rules.

To enforce these bans on unsanctioned negotiations, the contracting process must enjoy buy-in across a party's organization, particularly the executive suite. If the entire organization does not abide by these rules, then the RFP negotiating team can find itself being undercut, and the buyer will not obtain the best deal available.

Inconsistent Messaging

A large part of effective negotiation is the ability to make the other party see what you want it to see. An effective contracting team will always project a united front and avoid voicing internal disagreements in front of the other party.

Displays of dissention can encourage the other party to dig in its heels on an issue and press its perceived advantage, hoping that the team may internally resolve the issue in its favor. The team should also ensure that the information provided to the other party is consistent with the team's overall game plan, as inconsistent disclosures can undermine a party's stated position on an issue.

Going Off Script

In many ways, negotiation is similar to acting, as each team member assumes a defined role and the team as a whole projects a consistent message for the consumption of an "audience" (the other party). Any messaging that does not align with the "script" for a negotiation can undermine your position.

Effective examples of this type of negotiation include ripping up the other party's latest draft at the beginning of a negotiation and telling them to try again, or walking away from the negotiating table.

Failure to follow the script can undermine your position. During a negotiation a few years ago, we witnessed the damage caused by a deviation from this type of negotiation script. There were several significant issues still open, and each party was under intense internal pressure to close the deal. The buyer decided to present a package offer on these issues as a "take it or leave it" offer; anything other than acceptance by the seller would cause the buyer to walk away and go home.

As anticipated, the seller rejected the package, and the buyer's team forcefully told the seller it was going home and nothing more could be accomplished. However, as the buyer's team was leaving the room, one individual asked his counterpart when the team could expect a response and disclosed that his superiors had threatened to fire him if the deal was not completed the following week.

Unplanned Concessions

Negotiation is a give-and-take process. As such, parties should avoid giving any material concession without obtaining a corresponding concession from the other party.

Even if a party is willing or plans to concede on a particular issue, it should not grant the concession until it has received something in return. Often, this may mean that a team over-emphasizes the importance of an issue to the other party, so that, when it finally "gives in," the other party will perceive it as a significant concession and be more likely to give something of corresponding value in return.

Selling Past the Close

We have often observed negotiators make the mistake of continuing to discuss an issue after the other party has conceded the point. If the other party accepts your position during the negotiation, there is no use in continuing the conversation; stop talking and move on to the next issue. You can only lose ground by continuing the discussion.

Asking a Question Without Receiving an Answer

Asking questions allows a team to learn about the other party's position. It can also frequently reveal that the changes made in a draft agreement go much farther than what the other side intended or really wants.

Parties should ask questions strategically, with an eye not only to gaining knowledge, but also to exposing weaknesses or contradictions in the other party's position. However, this strategy cannot work if the other party is allowed to avoid answering the questions.

When posing a question, the team should always wait to receive an answer before moving on to the next issue, and it should not allow any know-it-all team member to interject or answer for the other party.

Questioning the other party is only an effective negotiation strategy insofar as it forces the other party to provide a rationale for its positions. Letting the other party off the hook by moving on or interjecting defeats the purpose of asking a question.

One way parties often attempt to avoid answering questions is to focus their answer on one aspect of a question and leave another part unanswered. To prevent this, the team should pose simple questions to the other party, such as "What are our remedies if you breach the warranty?"

On the other hand, compound or complex questions allow the other party to look forthcoming, while avoiding answering all of your questions.

For example, a question like "What is your company's repair commitment for products that do not conform to the warranty and, if the repair commitment is not met, what are our remedies?" could allow an adept salesman to focus on his company's product repair program without addressing the available remedies.

Jim Steinberg, a partner at Kilpatrick Townsend & Stockton, focuses his practice on complex commercial transactions and general corporate matters for telecommunications, financial institutions, health care providers, technology and other companies. **Andrew Head**, an associate at Kilpatrick Townsend, focuses on technology and business process outsourcing, technology licensing, and strategic alliances and joint ventures.