

## **GUIDANCE NOTE**

### **Contract Negotiations: Key Issues**

**February 2012**

This guidance note highlights the key issues to consider when negotiating contracts on behalf of your business. You should always take legal advice if you are negotiating a large or unusual contract.

**1. Who is the other party to the contract?**

- Do you know the other party? Have you done business with it before?
- Consider doing a credit check if you haven't dealt with the other party before.
- If the other party is based abroad, make sure that you take legal advice to ensure that you are properly protected if things go wrong.

**2. Is the identity of the other party important to the performance of the contract?**

- Are there specific individuals who you want to perform the services?
- Are you happy to 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, this must be made clear in the contract.
- If the other party is a company, would you mind if ownership changed, for example, if a competitor took control?

**3. What are you buying or selling?**

- The majority of contractual disputes relate to what services are to be performed or goods to be delivered.
- Describe the goods and services as clearly and accurately as possible to avoid risk of disputes.
- Any important issues and assumptions should be confirmed in the contract – do not rely on verbal assurances or points agreed during negotiations.

- List what the other party should and should not be doing.

**4. What is the price and how is payment to be made?**

- Is it a fixed sum – if not, how is it to be determined.
- Are delivery costs included in the price and/or installation?
- How is payment to be made? For example, cash, electronic bank transfer or bankers' draft.
- When is payment due? Is it a single lump sum or by instalments.

**5 What happens if things go wrong?**

- What could go wrong with the deal and what loss could you suffer as a result? Consider all possible consequences.
- If buying, try to ensure that the seller is responsible for all possible losses (including consequential losses) and that liability is not limited in any way.
- If selling, 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.
- Take legal advice before agreeing any clause that seeks to limit liability under a contract.

**6. Is the deal time critical?**

- When do you want the work done or goods delivered?
- A clear timetable is essential, especially if price is tied to delivery or performance dates.
- Do you want to be able to end the contract or to impose a financial penalty if work or goods are delivered late?

**7. In what circumstances might you want to pull out of the contract?**

- How long do you want to be tied to the contract?
- Can you set a fixed period of time or do you need to include a right to terminate by giving notice to the other party?
- Are there any circumstances in which you would wish to terminate the contract immediately? For example, if the other party damages your reputation or goes bust.

**8. Are there any brand, copyright or other intellectual property issues?**

- Is the other party creating something specifically for you? For example, an advertisement.
- Are you going to use their brand or vice versa?
- Make sure you take legal advice to ensure that the correct formalities are followed otherwise valuable assets may be lost.

**9. 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 person giving them. If they have no money it will be very difficult to get any compensation. Consider requiring security (for example, a guarantee or retention).

**10. Are you dealing on standard terms?**

- Most companies have standard terms of business drafted in their favour. If your terms conflict with the other party's, you will need to make sure that yours apply rather than theirs.
- Be wary of purchase orders or delivery notes. These can have a party's standard terms of business included on them. By signing a delivery note, you may inadvertently commit yourself to the seller's terms.
- Always be clear about the terms on which you are dealing. If in doubt, take legal advice.

*The comments in this guidance note are of a general nature only. Full advice should be sought on any specific problems or issues*

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