



Contract negotiation strategy

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Negotiation is part of the fabric of society. It is a response to a conflict that arises when one party's interests are incompatible with the interests of the other party. This article provides strategies for success, for those in the construction industry that are involved in negotiations for, or on behalf of the business.

When are negotiation tactics crucial?

There are 2 main scenarios in the construction industry where negotiation tactics and strategies are critical for success:

- Tender negotiations
- Contractual disputes

In today's competitive construction industry, it is more than likely that a company will be involved in a tender negotiation process before they win the job. You can learn more in our blog, ["Best practice guidelines for tendering in construction"](#).

With contractual disputes, having an understanding of the reasons for a dispute is as important as the knowledge and skill required to settle that dispute. You can learn more about disputes in our blog, ["Top 6 causes of construction disputes"](#).

Top 4 strategies for successful contract negotiation

Construction contracts typically contain a clause that requires both parties to try to resolve disputes before going to arbitration or to court.

Negotiation experts have identified 4 strategies that are widely used as a means to achieve successful negotiated outcomes:

1. People: separate the people from the issue
2. Interests: Focus on the motivations behind the position taken by the other party
3. Options: think about a variety of options before reaching a decision
4. Criteria: use objective thinking

1. People: separate the people from the issue

As a negotiator, it is important to separate people (the individual and their personal views, traits, character) from any issues in dispute, during the negotiation. Problems with a project can often present themselves as an opportunity for people to release their tensions or anger.

For example, in a tender situation, the party negotiating the head contract may be tense and overworked due to an extended tender process and the stress of meeting the target dates in the project. By the time it comes to negotiating with you as the preferred tenderer, they are already under a tight timeframe and will usually want to express this frustration from the outset.

Similarly, in a contract dispute, there is bound to be one (or more) person who is angry about the circumstances.

The key is to engage in active listening which really means pausing and letting the other person speak, without interrupting or interjecting. Don't take things personally! Stay calm and focussed on the issues, not the person.

If you are negotiating a tender and the customer's project manager is frustrated, allow them the opportunity to speak about the frustrations of the project. Then acknowledge the person and their authority and competence and try to build a working relationship with them.

If you are dealing with a contractual conflict, once the person has spoken, acknowledge the points they made and if necessary, apologise without capitulating or making unnecessary concessions.

2. Interests: focus on the motivations behind the position taken by the other party

Successful negotiation requires you to focus on the motivation behind the words a person is speaking. One way to do this is to put yourself in the position of the other person and ask yourself why they would be taking such a position. You will often note that the underlying interests might be like yours.

If you are negotiating a dispute, it is important to also think about the interests or needs of those parties who will be affected by the situation. For example, subcontractors who may be a neutral party, may be required to perform extra work because of a dispute between you (the contractor) and the customer.

Strategies you can use to help you to focus on interests include:

- developing an agenda of issues or questions that need to be answered;
- ensuring you have the right people on your team to help you, rather than a cast of many who might not bring value to the negotiation;
- identifying all the stakeholders as mentioned earlier. This may include other parties who will be affected by the outcome of the negotiation.

3. Options: think about a variety of options before reaching a decision

Strategic contract negotiations require negotiating parties to explore different options to achieve the desired outcome.

A simple strategy to follow is to perform the following steps:

- Explore the best alternative to a negotiated agreement (“BATNA”) and worst alternative to a negotiated agreement (“WATNA”); commonly referred to as “best case scenario” and “worst case scenario”);
- Generate options for dealing with the BATNA and WATNA;
- Enter the negotiation stage.

In a contract dispute, exploring options through the BATNA and WATNA exercise is a critical strategy for any decision-maker in the business. It can show a willingness to explore options not originally considered. There should be an internal meeting held by the management team where all options are put on the table before negotiation with the other side can begin.

In a tender negotiation, if there is a contract clause that needs to be revised, exploring the BATNA and WATNA scenarios can help you with generating options for drafting changes.

4. Criteria: use objective thinking

One easy way to describe objective thinking is to define the opposite term – “subjective criteria”. Using subjective criteria in a negotiation is when you solely base your focus on your own individual perspective.

Using objective thinking criteria is not necessarily the easiest thing to do. It involves:

- using logical data, for example, the data collected in your past construction projects or data collected from the market, so that it is independent of either side’s position;
- applying the data to both sides for fair play; and
- being practical about what should be considered in the negotiation.

In tender negotiations, the customer should be comparing “apples with apples” when entering into negotiations with the shortlisted tenderers. If you are the tenderer, then it is important to understand the market that you are competing in before you negotiate the contract. You also need to be practical about how to achieve the changes you want in the contract.

In a dispute situation, gather all the relevant data in preparation for a negotiation. The data should speak for itself. It is often a good idea to circulate this data to the other side in advance of the actual date of the negotiation. This is not only practical but it could help both sides to understand the dispute better and help you to negotiate more productively.

These four general strategies are the basic ingredients required by a good negotiator.

Negotiation by way of exchanging marked-up contract documents or face-to-face with the other side can be daunting. Having a negotiating strategy in place or having a key resource in your back pocket to assist with negotiations, is critical for you to be a successful negotiator and for you to be able to win repeat business.

Get help

Wambeti Legal can assist you with negotiations by:

- providing advice on contract drafting and appropriate terms to use in your contract;
- providing advice on negotiation strategies based on BATNA and WATNA;
- mediating disputes; and
- providing overall guidance and support in preparing for a negotiation for a tender or contractual dispute.

Contacting Wambeti Legal

[0423 825 235](tel:0423825235)

hello@wambetilegal.com.au

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