

# CONTRACTING WITH MONSTERS

**This is not the subject of a procurement manager's nightmares but a description of the common experience of entering into a commercial agreement with another entity that is much, much, bigger than you.**

This can be experienced by £bn turnover companies contracting with government just as much as a £1m company dealing with a large retailer or bank.

Strangely when the large company is supplying the smaller one the contracts tend not to be questioned (do you try to change the bank's or Microsoft's standard agreements?) but when smallco supplies bigco there is often a contractual negotiation even though the bigco provides the contract. This contradicts the old saying "I will sell in your language but I only buy in mine".

The reason for this is that a big supplier has carefully crafted its contracts to cover the goods or services that it supplies but it is less able to do that for the huge variety of goods and services that it buys.

What it generally has are standard terms for the purchase of each of goods and services. These tend to be "framework" terms setting up a framework for not only the current transaction but also future repeat business. This means that all that is required next time around is an order which, if accepted, will incorporate the terms already set out in the framework agreement. That may not be appropriate for a one-time supply.

Of course contracts between un-equals may not only be for the supply of goods or services. They could be for an investment or a joint product development. Except that bigco is unlikely to have standard forms for this, and won't involve procurement, similar principles will apply.

Bigco is likely to have a procurement dept. They have standard form documents produced by their legal dept and processes to follow. Those processes often include a prohibition on changing the documents without the involvement of legal dept. They generally don't want to do that. The documents are often supplied as un-amendable pdfs rather than Word documents to discourage attempts to amend them. If the deal is complex they may involve their lawyers, but again they will start with standard forms and discourage too much change.

Smallerco has a particular interest in getting the documents right. If a dispute ever arises they are greatly disadvantaged by unclear wording. They are less prepared to argue (and less able to afford to argue) over wording that could have several different meanings. Half changing documents that were not designed for the transaction in question is a recipe for no clarity.

Smallerco often has its own standard document for dealing with these transactions. One tactic is to append that document (or at least its key operative provisions) to bigco's document with wording that says in effect: "any conflict between our doc and yours, ours wins". This sometimes

allows procurement managers to accept the substantial amendments thus made as it does not involve actually changing the “sacred” wording of their standard contract but just their meaning. Schedules are generally within their area of discretion.

If, however, this is not available the contract itself will need to be changed.

Most importantly try to get some plain English “heads of terms” agreed, setting out in some detail what the parties (that is their respective commercial people) think that the contract will be covering. Try to get your lawyers involved in this. Theirs probably won’t be. The agreed heads can be used as a yardstick against which to test the contract.

When you see the contract, first find some typographical errors in it and suggest corrections. This forestalls any argument that “We never amend our standard contracts”. Second find some obvious areas where use of their wording would be obviously and factually wrong in the circumstances of your particular transaction or doesn’t reflect the heads of terms. Even procurement managers will eventually concede the need for change if eg you are supplying a cloud computing solution and their document (produced five years ago) assumes you will be attending at their premises and installing software on their servers.

Once you have achieved acceptance that change is necessary, suggest your changes and then be persistent in getting them accepted. That may be a long and tedious process. If possible avoid making actual changes to their wording (time consuming and expensive) until they have accepted that change is inevitable.

If all else fails fall back on a side letter signed by both parties and stated to clarify or amend the contract. Like your terms appended to their contract this can be used to explain the parties’ intentions and override unsuitable wording in the contract. It risks creating contradictions and less clarity but is again something that organisations will agree to signing as a way of avoiding involving their lawyers. Side letters should be produced by your lawyer even if they look as though you wrote them.

Finally remember that if things go wrong at bigco the consequences can be very expensive and pay particular attention to the provisions which do, or should, limit your liability to them. Liabilities that go beyond your ability to insure may be limited if you point out that any such claim would wipe you out leaving you unable to put anything right.

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