

Supplier Leverage Opportunities - Importance of Written Contracts

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Leverage and the Law: Introduction

- Tension in supply chain has resulted in increased litigation
 - JIT /sole-source / PPAP: everything's an emergency
- Whatever the crisis du jour (raw material costs increase, volume crashes, etc.), OEMs can't raise vehicle prices, so who gets stuck?

Leverage and the Law

- Everything in law is subject to larger business concerns:
 - Buyer can't shut down customer
 - Suppliers will only go so far with buyer
- Contracts are, at bottom, risk allocators when something can't be worked out commercially, open the file and see what the contract actually says

Contract Leverage for Salespeople: What Really Matters?

- Content of LTA or PO
- Terms & Conditions
- Actual performance
- E-Mails
- Duration term
- Quantity term
- Quotes
- (Way down there) Who said what to whom

T&C: they matter

- Terms and Conditions
 - from the PO?
 - from the invoice?
 - from a website (yes, they are incorporated)?
 - from somewhere else? (“battle of forms”)
 - You can’t ignore: can’t plead ignorant if not attached, defined, etc.
 - Boilerplate” is enforceable, even if you are weak, and even if it’s “adhesion”
 - Foamade v. Visteon: make an issue in writing

Actual Performance Matters

- How you actually live the contract, the unobjected-to performance, is a sign of assent to that performance
- Course of dealing – other contracts
- Course of performance – this contract
- Industry custom matters
- Keep good records, e-mail folders, etc.

E-mail Matters

- Buyer whispers sweet nothings on the phone, but won't confirm by e-mail. Why?
- Generally, can contract by e-mail: Electronic Signatures in Global and National Commerce Act (2000) in 48 states; Dow Chemical v. GE
- Seton v. Lear: \$20M judgment based on “life of program” e-mail from buyer to seller.

Now, suffix to every Company e-mail:

- “No employee or agent of [] Company or its subsidiaries (the "Company") is authorized to conclude any legally binding agreement by email. Agreements with the Company are those expressly confirmed in writing as part of a definitive agreement signed by a duly authorized representative of the Company or purchase orders issued by the Company. In addition, please note that all Company purchases are governed by the Company's Purchase Order Terms and Conditions available at _____ and that all unit or sales volume numbers provided to suppliers are estimates only and are not commitments by the Company. Be advised that the Company reserves the right to terminate any and all purchase orders for convenience pursuant to the Company's Purchase Order Terms and Conditions.”

Duration Matters

- Do the contracts have a termination date?
- If termination date, supplier often stuck
- If not, contract of indefinite duration and can terminate on “commercially reasonable” notice
- Costs ↑: suppliers want out; customers want to extend
- Costs ↓: buyers market-test; suppliers try to hang on to margin

Duration Matters (Cont).

- Suppliers want long-term commitment, but only at right price
- Customers want suppliers to commit long-term to program but still be able to terminate for convenience at any time [date, not marry]; will only commit long term if annual price-downs
- Dana to bankruptcy court: supply agreements end in three months, right?

Volume / Quantity Matters

- All contracts must have a quantity term except requirements contracts
- Courts will insert most other terms, even price, but not quantity
- But how can I list a quantity, when I don't know how much I will need, because I don't know how many vehicles the OEM will sell on this program . . .

Volume

- Supplier's quote: "the binding price pieces are based on annual quantities and the planned total volumes."
- Customer's T&C: "We do not guarantee volumes, and supplier understands that: 1) any indicated estimates are just that, estimates; and 2) the prices are guaranteed regardless of volume"
- Actual volume = $\frac{1}{2}$ estimate; what happens?
- Actual volume = 2x estimate; what happens?

Quotes Matter

- Does your quote:
- incorporate your T&C of sale?
- reject the T&C of purchase?
- make your performance “expressly conditional” on the customer’s acceptance (for battle of forms)
- state that customer has validated design and material, and disclaim liability for product meeting customer specifications?

Supplier Leverage Opportunities:

- Multiple POs, One Expiring: supplier can refuse to accept one PO extension [a/k/a amendment or revision] unless the customer renegotiates all the Pos
 - Customer's response: "you're not negotiating in good faith"
 - Supplier's hardball – unless there's an LTA, supplier has no obligation to accept a new PO or PO extension
- Each PO is its own contract, legally speaking, so if taking a loss leader, ensure you cross-pollinate the many POs on a single program with something enforceable
- Changes: EWOs (GM), ECRs (Ford), CN (Chrysler), etc. [but watch the T&C]

Supplier Leverage Opportunities (Cont.)

- PO expiring before customer can re-source
- Fear of what competitors may do – is it really justified?
Think and look hard
- Existing supplier has “the misunderstood power of incumbency”
- Entanglement
- Complexity
- Value
- Inertia

Negotiations

- What's best alternative to a deal (“BANTA”)?
- Supplier's worst case is often the status quo, continuing to ship at current price
- Buyer's worst case is as bad as it gets: shutting down its production lines and that of its customer
- Buyers often have upper hand, legally speaking, but more to lose, practically speaking

Negotiations

- All of price increase at one end of spectrum, none at the other, negotiations over the delta
- “Iron fist in the velvet glove”: firm but businesslike, no tie-pulling
- Suppliers must follow through: asking for price increase, then dropping it, can be deemed acquiescence
- “Negotiating skills in the trenches biggest differentiator”
- IRN’s Supplier Survey

- Finance: “Increase the price.”
- Sales: “But if we increase the price, they might go somewhere else.”
- Finance: “Where?”
- Sales: “To our competitors, silly – A, B, or C.”
- Finance: “But A has bad quality, B’s prices are higher than ours, and C is on no-quote list.”
- Sales: “Hmm . . . ”

Negotiations

- Match up your players
- Have your front-line sales talk to front-line buyer and purchasing manager
- Have your VP of Sales talk to VP Purchasing, C-level to C-level
- Resist temptation for your C-level to talk to their front-line buyer
- Save the heavy hitters for the short strokes

Negotiations (Cont.)

- Buyers trying to buy time: delay, delay, request info, then more info, then more delay
- Examples:
 - other buyer out on medical leave,
 - another supplier Chapter 11,
 - new buyer assigned,
 - manager out of the country,
 - organize sock drawer, etc.

Negotiations (Cont.)

- Suppliers with legal upper hand have decide how hard to push – let front-line buyer save face internally, or play your hand to the last card?
- The best time to negotiate raw materials is when they aren't spiking
- Deadline-driven by when contract ends (duration, duration, duration)
- Lawsuits hurt customer relations

“Battle of Forms”: an actual rubber stamp

<p style="text-align: center;">CONFIRMED</p> <p>We hereby acknowledge and accept this order subject to the terms and conditions as stated on our formal quotation. Our standard terms and conditions apply unless they have been modified in writing by one of our officers. Please visit www.██████████.com for our standard terms and conditions.</p>	By
	Date
	Sales Order #
	Approximate Ship Date

Terms Salespeople Should Seek:

1. No termination for convenience
2. Raw material price adjust mechanism
3. Currency fluctuation mechanism
4. Warranty obligations cap
5. No consequential damages
6. Acknowledgement of quote no. in PO
7. Arbitration can limit emergency relief

Conclusion: Summary of Legal Tips for Salespeople

A contract is more than a price and a spec, one of your integral duties is to ensure that you are protected on terms
You are “contracting,” every day, with every PO, and every e-mail

Watch the boring stuff: POs, LTAs, T&Cs, SOWs, SQMs, etc.

Conclusion: Summary of Legal Tips for Salespeople (Cont.)

- Keep copies of all contract documents
- E-mail counts – save it or print it out
- Respond in writing to anything objectionable
- Do not ignore customer requests
- When you even sniff a customer dispute, rope in your boss and legal



Thank You



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