CPSP

CERTIFIED PROCUREMENT AND SUPPLY PROFESSIONAL OF KENYA

PART 1

CONTRACT LAW AND NEGOTIATION

STUDY TEXT

PL1.05.2: Introduction

This module is intended to equip the trainee with the necessary legal knowledge, skills and attitudes that will enable him/her to manage commercial agreements and negotiations in procurement and supply

PL1.03.2: General objectives of the course

At the end of the course, the trainee should be able to:

i. Recognize the main legal issues that relate to the information of legal relationships in supply chain.
ii. Interpret implied and expressed contractual terms that impact on procurement and supply
iii. Appreciate the contractual agreements and their impacts on relationships among different parties in procurement and supply
iv. Demonstrate an understanding of the causes for breach of a commercial agreements and the recourse available to the injured party
v. Apply the legal implication of contractual non-performance and termination of contracts in procurement and supply
vi. Demonstrate an understanding of the benefit of contract negotiation, its approaches and techniques
vii. Appreciate negotiation resources, process and relationships
viii. Apply effective communication skills and conflict resolution in contract negotiation
ix. Address ethical issues in contract law and negotiation
x. Appropriately respond to emerging issues in contract law and negotiation.

COURSE OUTLINE

PL1.5.01: CONTRACT FORMATION BETWEEN SUPPLIER AND PURCHASER

Competence

The trainee should have the ability to assess the legal issues that relate to creation of commercial agreements.

Content

Theory

1. Key terms used in contracting
2. Essential elements of a valid commercial agreement: invitation to treat / negotiate; offer; acceptance; consideration; intention; and capacity to contract
3. Void and unenforceable contracts
4. Duress and undue influence i. Misrepresentation ii. Mistake iii. Void, voidable and illegal contracts

5. Format for commercial agreement
6. Oral, written contracts and electronic contracting
7. Precedence of legal terms that apply in contracts

Practice

1. Discussion of the essential elements of a valid commercial agreement

PL1.5.02: THE EXPRESS AND IMPLIED TERMS THAT RELATE TO CONTRACTS IN PROCUREMENT AND SUPPLY

Competence

The trainee should have the ability to apply the express and implied terms that relate to contracts in procurement and supply

Content

Theory

1. Definition of express and implied terms
2. The express terms that are commonly applied in contracts in procurement and supply
3. The implied terms that relate to contracts in procurement and supply of goods
4. Standard terms of contract
5. The implied terms that relate to contracts in the procurement and supply of services

Practice

1. Discussion of the importance of the express terms relating to the time of performance, price, testing, inspection, acceptance, contract variation and extension/renewal
2. Compare and contrast between the implied terms in contracts for supply of goods and contracts for supply of services.

PL1.5.03: CONTRACTUAL AGREEMENTS AND THEIR IMPACT ON RELATIONSHIPS AMONG DIFFERENT PARTIES IN PROCUREMENT AND SUPPLY

Competence

The trainee should have the ability to advise which type of contractual agreement would be appropriate for a particular procurement and the related impact on relationships.

Content

Theory

1. Types of contractual agreements
    i. Blanket, cal-off and systems contracts
    ii. Framework agreements iii. Service contracts
    iii. Hiring and leasing
    iv. Sub-contracting and outsourcing
2. Creation of agency
    i. Rights and obligations of the parties
3. Features of bailment in relationships
4. Doctrine of Privity of contracts and exceptions there-to
5. Assignment and sub-contracting
    i. Novation
    ii. Negligence: product liability and defective goods
    iii. Consumer Protection Act
6. Tort of negligence and remedies thereof
7. Intellectual property rights regulations in contracts for procurement and supply
    i. Patent Act
    ii. Trademark Act
    iii. Copyright Act
8. Confidentiality and Non-disclosure agreements
9. Competition, bribery and corruption
    i. Competition
    ii. Enforcement of competition law
    iii. Free trade agreements
    iv. Codes of practice on completion
10. Bribery and corruption
    i. Nature of bribery and corruption
    ii. Bribery, gifts and hospitality
    iii. Ethics and Anti-corruption Commission (EACC)
11. Money laundering

Practice

1. Discussion of the circumstances under which money may be laundered and state the specific measures which all the business are required to adopt to prevent the same
2. Discussion of the main features of each type of arrangement

PL1.5.04: TERMINATION OF CONTRACTS IN PROCUREMENT AND SUPPLY

Competence

The trainee should have the ability to identify and advise on what constitutes termination of contracts in procurement and supply

Content

Theory

1. Circumstances under which contracts may be terminated
    i. Performance
    ii. Previous agreement
    iii. Breach
    iv. Frustration
    v. Misrepresentation
2. Remedies for breach
3. Penalty clauses
4. Limitation of liability
5. Contractual provisions for performance
6. Clauses for default
7. Legal consequences of terminating contracts

Practice

1. Discussion of the contractual provisions for non-performance
2. Discussion of the remedies available in the event of breach

PL1.5.05: CONTRACT NEGOTIATION

Competence

The trainee should be able to explain the meaning, scope and importance of contract negotiation

Theory

1. Definition of the terms used in contract negotiations
2. Importance of negotiation
3. Setting objectives in contract negotiations
    i. Best Alternative to a Negotiated Agreement (BATNA) and the Breaking points in negotiations
4. Factors influencing negotiation
5. Theories of negotiation
    i. Game theory
    ii. Prisoner's dilemma theory
6. Types of negotiations
    i. One time negotiation
    ii. Ongoing negotiations
    iii. Commercial negotiations
7. Characteristics of effective negotiation
8. Challenges and barriers to effective negotiation

Practice

1. Discussion of importance of contract negotiation in supply chain management

PL1.5.06: APPROACHES AND TECHNIQUES IN CONTRACT NEGOTIATION

Competence

The trainee should be able to compare the different approaches and techniques in contract negotiations

Content

Theory

1. Approaches to negotiation:
    i. Win- Win integrative approach
    ii. Win-lose distributive approach
    iii. Lose-lose approach
2. Techniques of negotiation:
    i. Gathering information
    ii. Conducting the negotiations through mediator
    iii. Using experts
    iv. Communicating persuasively
    v. Self-expression: Aligning intent and impact

Practice

i. Discussion of the approaches and techniques in contract negotiations.

PL1.5.07: NEGOTIATION RESOURCES, PROCESS AND RELATIONSHIPS

Competence

The trainee should have the ability to effectively manage the resources, processes and relationships in contract law and negotiation.

Theory

Content

1. Location – Home, away and neutral
2. Negotiators
3. Tools of communication
4. Layout and surroundings

5. Stages of negotiation
6. Relationship spectrum
7. Key elements in effective supplier relationship in contract negotiations
8. Open book negotiations – merits and demerits
9. Repairing relationships in contract negotiations
10. Situational and institutional approaches to relationships in contract negotiations

Practice

1. Choice of resources required for contract negotiation
2. Outlining of the contract negotiation process
3. Discussion of the effective supplier relationships in contract negotiations

PL1.5.08: EFFECTIVE COMMUNICATION SKILLS IN CONTRACT NEGOTIATION

Competence

The trainee should be able to communicate effectively in contract negotiation.

Content

Theory

1. Communication skills
    i. Types of questions asked
    ii. Effective listening
    iii. Push and pull behaviors
    iv. Non-verbal communication
2. Influence of culture in contract negotiations

Practice

1. Discussion of the various types of questions used in negotiation

PL1.5.09: DISPUTE RESOLUTION IN CONTRACT LAW AND NEGOTIATION

Competence

The trainee should have the ability to analyze the main mechanisms for dispute resolution in contract law and negotiation.

Theory

1. Circumstances under which contractual disputes arise
2. Approaches to dispute resolution

   i. Negotiated settlements
   ii. Litigation
3. Alternative dispute resolution mechanisms
   i. Arbitration
   ii. Adjudication
   iii. Mediation
   iv. Conciliation
4. Styles of handling conflicts
   i. Competition
   ii. Accommodation
   iii. Avoidance
   iv. Compromise
   v. Collaboration
   vi. Changing a conflict to mutual problem solving process

Practice

1. Discussion of the alternative conflict resolution mechanisms used in contract law and negotiations

PL1.5.10: ETHICAL & LEGAL ISSUES IN CONTRACT NEGOTIATION & INTERNATIONAL CONTRACTS

Competence

The trainee should be able to demonstrate understanding of the ethical and legal issues relating to contract negotiations in international procurement and supply.

Content

Theory

1. Meaning and purpose of ethics in contract negotiation
2. Steps in ethical negotiation
3. Reasons for unethical behavior in contract negotiations
4. Consequences of unethical conduct in contract negotiations
5. Legal issues in contract negotiations
6. Features of international procurement and supply contracts
7. Challenges associated with international contracts of purchasing and supply
8. Different legal systems
   i. Common law systems
   ii. Civil law systems
   iii. Muslim law system

Practice

1. Discussion of unethical behavior in contract negotiation.
2. Discussion of the specific challenges associated with international contracts of procurement and supply

PL1.5.11: EMERGING ISSUES & TRENDS IN CONTRACT LAW & NEGOTIATION

Competence

The trainee should have the ability to cope with the emerging issues and trends in contract law and negotiation.

Content

Theory

1. Emerging issues and trends in contract law and negotiation
2. Challenges and opportunities posed by the emerging issues and trends in contract law and negotiation.
3. Coping with or adopting to the emerging issues and trends in contract law and negotiation

Practice

1. Discussion of the challenges and opportunities posed by the emerging issues and trends in Contract Law and Negotiation

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TOPIC 1

CONTRACT FORMATION PROCESS BETWEEN SUPPLIER AND PURCHASER

Introduction

A contract: A contract intends to formalize an agreement between two or more parties, in relation to a particular subject. Contracts can cover an extremely broad range of matters, including the sale of goods or real property, the terms of employment or of an independent contractor relationship, the settlement of a dispute, and ownership of intellectual property developed as part of a work for hire.

The law of contract imposes an obligation to the parties involved to see that they have performed their promise, failure to do so attracts legal implications. This usually involves compensating the aggrieved party once the party responsible has been found liable for the act or omission.

KEY TERMS USED IN CONTRACTING

- **Offer:** an unequivocal and clear manifestation by one party of its intention to contract with another.
- **Unequivocal:** clear, definite and without doubt
- **Invitation to treat:** This is a mere invitation by a party to another or others to make offers or bargains. The invitee becomes the offeror and the invitor becomes the offeree. A positive response to an invitation to treat is an offer.
- **Acceptance:** This is the external manifestation of assent by the offeree.
- **Revocation:** This is the withdrawal of the offer by the offeror.

- **Consideration:** It has been defined as "an act or promise offered by the one party and accepted by the other party as price for that others promise."

- **Estoppel:** It a doctrine that is to the effect that where parties have a legal relationship and one of them makes a new promise or representation intended to affect their legal relations and to be relied upon by the other, once the other has relied upon it and changed his legal position, the other party cannot be heard to say that their legal relationship was different.

- **Conditions:** This is a term of major stipulation in a contract. If a condition is breached, it entitles the innocent party to treat the contract as repudiated and to sue in damages.

- **Warranties:** This is a minor term of a contract or a term of minor stipulation. If breached, it entitles the innocent party to sue in damages only as the contract remains enforceable and both parties are bound to honour their part of the bargain.

- **Merchantable quality:** Fit to be offered for sale. Reasonably fit for the buyer's purposes

- **Privity of contract:** This doctrine is to the effect that only a person who is party to a contract can sue or be sued on it.

- **Void:** Lacking legal force.

- **Voidable:** Capable of being rescinded or voided.

- ***Caveat emptor:*** It literally means "buyer beware" This is a Common Law principle to the effect that in the absence of fraud or misinterpretation, the seller is not liable if the goods sold do not have the qualities the buyer expected them to have.

- ***Quantum meruit:*** This literally means "**as much as is earned or deserved".** This is compensation for work done. The plaintiff is paid for the proportion of the task completed.

- **Breach of contract:** A failure to perform some promised act or obligation

- **Frustration of contract:** A contract is said to be frustrated when performance of the obligations becomes impossible, illegal or commercially useless by reason of extraneous circumstances for which **neither party** is to blame.

- **Damages:** it is a monetary award by court to compensate the plaintiff for the loss occasioned by the breach of contract.

- ***Ex-gratia* Sum:** - a free-sum, one not required to be made by a legal duty

- ***In futuro:*** - in future:

- **Unilateral Mistake*:*** This is a mistake as to the identity of one of the parties to the contract. Only one party is mistaken and the mistake is induced by the other party.

- **Misrepresentation:** This is a false representation. It is a false statement made by a party to induce another to enter a contractual relationship.

- **Duress:** - actual violence or threats thereof

ESSENTIAL ELEMENTS OF A VALID COMMERCIAL AGREEMENT

The essential elements of valid contract as follows:

1. **Offer and acceptance-** There must be a 'lawful offer' and a 'lawful acceptance' of the offer, thus resulting in an agreement. The adjective 'lawful' implies that the offer and acceptance must satisfy the requirements of the Contract Act in relation thereto.

2. **Intention to create legal relation-**There must be an intention among the parties that the agreement should be attached by legal consequences and create legal obligations. Agreements of social or domestic nature do not contemplate legal relations, and as they do not give rise to a contract e.g. an agreement to dine at a friend's house or a promise to buy a gift for wife are not contracts because these do not create legal relationship.

TOPIC 3

CONTRACTUAL AGREEMENTS AND THEIR IMPACT ON RELATIONSHIPS AMONG DIFFERENT PARTIES IN PROCUREMENT AND SUPPLY

TYPES OF CONTRACTUAL AGREEMENTS

BLANKET PURCHASE ORDER

A blanket order is a purchase order the customer makes with its supplier which contains multiple delivery dates over a period of time, often negotiated to take advantage of predetermined pricing. It is normally used when there is a recurring need for expendable goods. Blanket orders are often used when a customer buys large quantities and has obtained special discounts. Based on the blanket order sales orders (release orders) and invoice items can be created as needed until the contract is fulfilled.

Having a blanket order prevents the customer from having to hold greater than necessary amounts of stock and avoids the administrative expense of processing frequent purchase orders, while favoring discount pricing through volume commitments or price breaks.

A blanket order is set at a fixed priced contract for a period of time. The buyer looks for the best pricing among competing supplier bids. After the best one is chosen, the prices of goods are fixed, and also quantities of each products are given to the supplier to prepare stock for on requested delivery.

Forecasted quantity is provided by the buyer as full usage quantity recorded historically few years or as needed for quantitative analysis. The supplier may give a condition of quantity to supply for this [contract]. For example, 80% of the forecast quantity must be bought at the end of the contract, which may be one or two years.

The blanket order will charge the delay delivery if the supplier could not supply the products in the contract on time. Anyway, since the supplier has already kept the stock for ready delivery for the first year or agreed period, if the buyer could not fulfill the contract's conditions, such as "must buy 80% of forecast quantity within a year," the contract may be extended, or the delay charge could be no more, or no other charges requested by the buyer.

Realistically, at the end of the blanket order contract, the buyer would not buy at forecasted quantity as agreed in the contract say, 80% of the demand sent to the supplier. The buyer will also allow the supplier to sell the products in the contract to reduce the quantity. The supplier also has to talk and inform the buyer the quantities of goods kept in order that the buyer could know the status of the stock. Before the buyer issuing the purchase order to supplier, the buyer

must ask the supplier first about stock availability to avoid the problem from no stock availability.

The blanket order is very useful for the buyer. The most difficult part of having a contract is determining the forecast quantity arranged by the user of the product. As the forecast quantity can be difficult to get, the supplier must be aware of the quantity to keep in stock. An easy way to do this is to discuss with the buyer what quantity to keep in stock. For example, they might keep only 20% in stock in the first 6 months, so that the supplier and the buyer are able to review the quantity and adjust it appropriately. This reduces the stock burden of the supplier during the contract period and might help the buyer at the end of the contract if the stock doesn't move as quickly as anticipated. The contract might be extended year after year, but it can be adjusted each time as more relevant forecasting history will predicate the need to decrease or increase stock requirements. Such purchasing Agreements:

A blanket order system offers seven important benefits:

1. It requires many fewer purchase orders and reduces clerical work in purchasing, accounting, and receiving
2. It releases procurement professionals from routine work, giving them more time to concentrate on value-added activities
3. It permits volume pricing by consolidating and grouping requirements
4. It can improve the flow of feedback information because of the grouping of materials and suppliers
5. Because some suppliers stock materials for prompt delivery, this system may reduce the buyer's lead times and inventory levels
6. It allows the supplier to plan and buy more effectively, reducing the buyer's price
7. It develops longer-term and improved buyer-supplier relationships

Summary on BPO

A Blanket Purchase Order (BPO) is a long term agreement that includes a description of the items needed, unite price, and contractual provisions. Although a single blanket purchase order number is only set up one time, it can allow multiple releases against it at different times throughout a set time period. A "release" occurs each time a blanket purchase order quantity is fulfilled and invoiced against.

A BPO is conducted in a Blanket Order System (BOS). A BOS is a system where a store comes into an agreement with a supplier to supply small quantity items repetitively. This type of system solves the problem for the thousands of items a store can't carry in inventory due to space, time and cash flow. The BOS increases efficiency by eliminating repetitive data entry and multiple one-time purchase orders.

CALL-OFF ORDER

A Call-off Order is an order created to cover multiple supplies or deliveries from a single company. A Call-off order may be applied in the following circumstances:

1. For a medium / long / regular term supply of the same services from the same supplier
2. For regular, multiple deliveries to a range of dispersed sites
3. An unknown future delivery schedule 4. Where precise volumes or values are not known until after delivery
4. Where delivery and packing charges or supplier discounts, regularly affect final prices
5. A different legal contract exists with the supplier and the order is raised internally for control purposes only
6. Where there is a proven need to reduce document processing (reduce quantity of invoices through consolidated billing etc)

An order of this type can only be placed after the appropriate procurement requirements have been satisfied.

Typical applications

Typically a Call-off order could relate to the following categories of supply :

- Construction, building or repair work
- Servicing or maintenance contracts (e.g. plant or equipment)
- Call out services (e.g. envisaged emergency work)
- Service / License agreements paid in installments (e.g. monthly / quarterly)
- Supply of low value, high volume consumables (materials, food, scientific gases)
- Critical supplies (order /approval system may not enable a quick re-supply)
- For supplies that need to be recharged to a range of cost centers

FRAMEWORK AGREEMENTS

A framework is an agreement with suppliers to establish terms governing contracts that may be awarded during the life of the agreement. In other words, it is a general term for agreements that set out terms and conditions for making specific purchases (call-offs).

Frameworks are freestanding documents which set out agreements to provide goods and/or services on specified terms. They are used in situations where the parties anticipate doing business with each other in the future, but they want to agree the terms now and on which the A framework agreement is an ‘umbrella agreement’ that sets out the terms (particularly relating to price, quality and quantity) under which individual contracts (call-offs) can be made throughout the period of the agreement.

In framework arrangements, there is no contractual commitment for a particular quantity, nor is there even any commitment to purchase at all. Usually, the framework arrangement includes any agreed specifications, prices, delivery arrangements and terms and conditions of contract that would apply to any contract entered into in the future. In a framework agreement, however, you would have a contractual commitment to purchase a particular quantity or value of goods and/or

services although this could be set out as a specified range that is no less than the minimum specified and no more than the maximum specified.

Framework arrangements or agreements can be fixed term, fixed quantity or "insurance". Fixed term arrangements usually give an estimate of the goods and/or services to be supplied. Fixed quantity arrangements give greater reassurance that the estimated quantities of goods and frequency of services will be required. Insurance arrangements deal with services with a fixed annual cost regardless of the frequency of the service required.

Call-offs or call-of contracts are the names commonly given to the purchase orders submitted against framework arrangement or agreement. The purchase orders (call-offs) are offers made by the purchaser. The supplier then has the choice of accepting the offers and supplying the goods/services ordered according to the terms and conditions already agreed in the framework agreement. If the supplier is no longer willing to abide by the terms agreed in the framework agreement, he can reject the offer no contract will be formed.

What are the benefits of a framework over a simple contract?

A framework agreement will generally allow a purchaser more flexibility around the goods or services contracted for under the framework, both in terms of volume and also the detail of the relevant goods and services. A multi-supplier framework allows a contracting authority to select from a number of suppliers for its requirements, helping to ensure that each purchase represents best value.

What is commonly procured using framework agreements?

Framework agreements are typically used where the authority knows they are likely to have a need for particular products or services, but are unsure of the extent or schedule. So framework agreements are commonly set up to cover things like office supplies, IT equipment, consultancy services, repair and maintenance services etc.

How are call-offs awarded under a framework agreement?

If the framework agreement is awarded to one provider, then the purchasing authority can simply call-off the requirement from the successful supplier as and when it is needed. Where the framework is awarded to several suppliers, there are two ways in which call-offs might be made:

a) Where the terms laid out in the framework agreement are detailed enough for the purchasing authority to be able to identify the best supplier for that particular requirement, then the authority can award the contract without re-opening competition.
b) If the terms laid out in the framework agreement are not specific enough for the purchasing authority to be able to identify which supplier could offer them best value for money for that particular requirement, a further mini-competition would be held between all the suppliers on the framework agreement who are capable of meeting the need.

What are the advantages of framework agreements?

1. The main advantage to a purchasing authority of using a framework agreement is that they do not have to go through the full tendering process every time the requirements arise. Having to go through the tender procedure once rather than several times, will obviously reduce tendering costs. It also means there is less downtime between identifying the need and fulfilling it, which considering how lengthy the tendering process can be, could be a considerable benefit. There are also further potential savings to the purchasing body because of economies of scale, which may prompt suppliers to offer more competitive prices.
2. Secondly, the reduction to tendering costs will also apply to suppliers, as going through the tender procedure is costly and time-consuming for suppliers too.

TOPIC 5

CONTRACT NEGOTIATION

DEFINITION OF THE TERMS USED IN CONTRACT NEGOTIATIONS

contract negotiation

This is an action of two (or more) parties consulting about a possible arrangement of partnership. Their goal is to make an agreement that will be advantageous for all parties involved. Talks may go on between the parties till they come to a mutual agreement about all points. The final aim is an agreement which is impartial and fair to all parties.

Negotiated contract

Contract awarded on the basis of a direct agreement with a contractor, without going through the competitive bidding process. It is also called negotiated agreement.

WHY PARTIES CHOOSE TO NEGOTIATE

The list of reasons for choosing to negotiate is long. Some of the most common reasons are to:

- Gain recognition of either issues or parties;
- Test the strength of other parties;
- Obtain information about issues, interests and positions of other parties;
- Educate all sides about a particular view of an issue or concern;
- Ventilate emotions about issues or people;
- Change perceptions;
- Mobilize public support;
- Buy time;
- Bring about a desired change in a relationship;
- Develop new procedures for handling problems;
- Make substantive gains;
- Solve a problem.

WHY PARTIES REFUSE TO NEGOTIATE

Even when many of the preconditions for negotiation are present, parties often choose not to negotiate. Their reasons may include:

- Negotiating confers sense and legitimacy to an adversary, their goals and needs;
- Parties are fearful of being perceived as weak by a constituency, by their adversary or by the public;
- Discussions are premature. There may be other alternatives available--informal communications, small private meetings, policy revision, decree, elections;
- Meeting could provide false hope to an adversary or to one's own constituency;
- Meeting could increase the visibility of the dispute;
- Negotiating could intensify the dispute;
- Parties lack confidence in the process;
- There is a lack of jurisdictional authority;
- Authoritative powers are unavailable or reluctant to meet;
- Meeting is too time-consuming;
- Parties need additional time to prepare;
- Parties want to avoid locking themselves into a position; there is still time to escalate demands and to intensify conflict to their advantage.

Objectives of Negotiation in procurement & supply chain mgt

Several objectives are common to all procurement or sales negotiations:

- To obtain the quality specified
- To obtain a fair and reasonable price
- To get the supplier to perform the contract on time.
- To exert some control over the manner in which the contract is performed
- To persuade the supplier to give maximum cooperation to the purchasing company.
- To develop a sound and continuing relationship with competent suppliers.
- To create a long-term relationship with a highly qualified supplier.

ADVANTAGES OF NEGOTIATION

a) The advantages of negotiation are that it limits the number of players to those involved in the dispute. This allows for a focused approach to problem solving.
b) Arbitration allows a third party to resolve disputes between two or more parties. The advantage of this system is that it allows a neutral party to decide on a resolution to the matter presented which is binding upon all parties.
c) Mediation has the advantage of allowing a neutral third party assist in helping find a resolution to conflicts. In short a mediator cannot force parties to accept a resolution but he or she can guide the parties to work from points of mutual agreement.

Disadvantages of negotiation

- The disadvantage is that if the viewpoints of the parties are too distant then progress is difficult to achieve.
- A particular negotiation may have a successful outcome. However, parties may be of unequal power and the weaker party/parties may be placed at a disadvantage.
- Where a party with an interest in the matter in dispute is excluded or inadequately represented in the negotiations, the agreement's value is diminished, thereby making it subject to future challenge. In the absence of safeguards in the negotiating process, the agreement could be viewed by a participant or others outside the process as being inequitable, even though the substance of the agreement may be beyond reproach.
- A successful negotiation requires each party to have a clear understanding of its negotiating mandate. If uncertainty exists regarding the limits of a party's negotiating authority and the party will not be able to participate effectively in the bargaining process.
- The absence of a neutral third party can result in parties being unable to reach agreement as they be may be incapable of defining the issues at stake, let alone making any progress towards a solution.
- The absence of a neutral third party may encourage one party to attempt to take advantage of the other.
- No party can be compelled to continue negotiating. Anyone who chooses to terminate negotiations may do so at any time in the process, notwithstanding the time, effort and money that may have been invested by the other party or parties.
- Some issues or questions are simply not amenable to negotiation. There will be virtually no chance of an agreement where the parties are divided by opposing ideologies or beliefs which leave little or no room for mutual concessions and there is no willingness to make any such concessions.
- The negotiation process cannot guarantee the good faith or trustworthiness of any of the parties.
- Negotiation may be used as a stalling tactic to prevent another party from asserting its rights (e.g., through litigation or arbitration).
- The disadvantage is there are often differences with regard to who the arbitrator will be and as a result it introduces a new set of conflicts. Additionally, the personal bias of the arbitrator may lead to a ruling which is not fair but none the less binding upon all parties.

Good preparation and planning have a significant impact on the outcome of a deal:

Without adequately defining your objectives, preparing your case and planning your strategy, your chances of achieving your ideal objectives in a negotiation are minimal. If one party has spent time before a meeting, defining the desired outcome, planning how they will

dictate the agenda, including how they will open their case and tackle some tricky questions, they will always outperform the person who has given no prior consideration to it.

The initial phase should incorporate objective setting, preparation and planning. Preparation is about researching your own precise requirements and latitude for movement, the market, the other party's strengths and weaknesses, and making some (educated) assumptions about their ideal and fall-back positions.

1. Manage your time:

Negotiation is a performance; it is during the planning phase that the stage is set and expectations managed. Effective negotiators spend more time considering areas of common interest between the parties.

Average negotiators discuss item A then B, followed by C and D. If the business is in any other order, they are thrown off balance. Effective negotiators are able to discuss items in any order, enabling flexibility in their approach.

When preparing for a negotiation remembers to:

- Consider the impact on the business.
- Consider how attractive this business is to the other party.
- Select the location for the negotiation.
- Plan the opening, testing and moving phases of the negotiation
- State assumptions.
- List questions to test the assumptions.
- Be creative – the longer and more creative the list of variables, the more flexible your strategy will be.

2. Prepare open questions:

Closed questions can be answered with "yes/no" or a short phrase, whereas open questions demand more information – for example, "Will you innovate for us?" versus "How will you innovate for us?"

If we ask open questions, it is difficult for the other party to evade and therefore puts the asker in a position of control. Many people believe that talking gives you control. In fact, it is the person asking the open questions and listening to the responses who will be in control.

If you talk too much and are under-prepared, the other party will put you on the spot with a wellchosen question. If you have planned properly, you will know what information you require and what assumptions you have made concerning you, your business and the other party. Proper use of questions allows you to check out all of this preparation before you move into the next phase of the negotiation.

3. Design a strategy route map:

A negotiation has clear phases and these must be planned. Avoid entering one without having drawn up a careful map of the direction and destination of the meeting and any subsequent events. The route may not be completely sequential – you may have to backtrack – but at

least you will be prepared. Skilled negotiators will be in a better position to manage time more effectively, which will result in delivery of a better deal.

4. Consider style and personality:

Personality type, negotiating styles and interests are all key factors in building rapport and managing behaviour during a negotiation. It is important these areas are considered in the planning stage.

It is important to be unpredictable within a negotiation to prevent the other party reading you too well. And if they are skilled, they will also be unpredictable.

You need to prepare and plan for a plethora of tactics, approaches and questions because not all techniques will work all of the time on every one. So, when you're planning, consider the responses the other party is likely to give.

5. Define your targets:

Another part of the strategy should be setting well-defined targets for each issue or variable. The research showed that negotiators often lose sight of their objectives. Keep these in mind and set well-defined goals from the outset. If we don't know where we are going, how will we know when we've arrived?

Setting objectives from 'ideal' and 'realistic' to 'walk away' is paramount. It will help to control the extent to which you move from your ideal settlement point and to understand the cost implications of any movement.

Skilled negotiators know the specific objectives for each variable: what must they get? What might they achieve in an ideal world? And what is realistic? Make sure that the ideal is a stretching objective and that you have clear targets for each variable.

The longer and more creative your give and take list of variables, the more flexibility you will have in your negotiation.

6. List your tactics:

There are more than 75 tactics that are used during negotiations. Some will work on certain personality types, but not on others. Skilled negotiators are unpredictable in their use of different approaches. If you continue to use a pattern of the same tactics in each negotiation, the other party will prepare to counter them next time. It is important, therefore, to list and carefully plan the tactics you will use in each negotiation.

7. Rehearse your opening statement:

A clear, well-defined and well-rehearsed opening statement is crucial. The first thing you say should condition the other party and manage their expectations.

Skilled negotiators rehearse their opening statement several times before entering the negotiating room. Rehearse and then ask yourself: "If I heard this statement would it encourage me to walk towards or away from my ideal objective?" This will help you check you're managing the expectations of the other party positively towards your ideal.

Without doubt, what you do or don't do in preparation and planning will determine the outcome of all negotiations. The more you plan and prepare, the more efficient you will be as a negotiator.

Discussion of importance of contract negotiation in supply chain management

Negotiation in the purchasing process covers the period from when the first communication is made between the purchasing buyer and the supplier through to the final signing of the contract. Negotiation can be as simple as trying to obtain a discount on a case of safety gloves through to the complexities of major capital purchases. A purchasing professional must aim to be successful in their negotiations with suppliers to obtain the best price with the best conditions for every item that is purchased.

Smaller Supplier Base and Long-Term Contracts

The negotiation process has become a more important sector in the supply chain process as companies look to reduce their expenditure whilst increasing their purchasing power. This means that purchasing professionals have to negotiate increasingly better rates with suppliers whilst maintaining or increasing quality and service. In the past companies had a long list of suppliers who they would purchase different items from which required purchasing resources to spend limited time on negotiating the lowest prices. The best solution available was to compare list prices from catalogs and select the vendor based on that information. The trend over the last decade has been to rationalize the supplier base and enter into long-term agreements with single sourcing. This offers companies the ability to negotiate significantly lower prices for items that they were purchasing from a number of separate vendors.

Vendors Are Partners

The emphasis in negotiation moved away from lowest price scenario to negotiating with fewer vendors to obtain the lowest price with the best service, quality and conditions. The aim for companies were to reduce overall spends rather than negotiate lowest price with a large number of vendors, which did not give the best overall result. The negotiated long-term contracts with a smaller supplier base have produced more of a partner relationship between buyer and supplier. The relationship can become less adversary which benefits buyer and vendor. In a partner type or relationship the buyer will encourage the vendor to increase quality and service and the vendor knows that by doing this the partnership will continue with a renewed contract with guaranteed sales.

TOPIC 8

EFFECTIVE COMMUNICATION SKILLS IN CONTRACT NEGOTIATION

TYPES OF QUESTIONS ASKED

The following are the most productive types of questions to ask in a negotiation. When you are attempting to elicit information, you need to phrase your question with the objective that you will obtain a beneficial and productive response that you can use to you advantage.

1. **Open-ended questions**
   These are the kinds of questions that require a detailed answer in a negotiation and cannot be simply replied to with a '*yes*' or '*no*' response. They consist of using **who, what, where, when, why,** and **how**. The respondent has no alternative but to provide some detail.
   Example - ' *How did you arrive at that particular price?*'
2. **Open opportunity question**
   This form of question invites the person to participate and offer their views.
   Example - ' *What do you think of this option as a solution?*'
3. **Leading Question**
   Just like it sounds, you try to guide the person to your point of view in a persuasive manner.
   Example - ' *With all these advantage I've pointed out, don't you think that this package benefits us both and is the best way to go for both of us?*'
   Or, another form of leading negotiation question simply tails off and invites the other person to fill in the blanks.
   Example - ' *And after we provide those documents that you just mentioned, you will....?*'
4. **Low key question**
   This is a gentle way to ask a question and not trigger an emotional or hostile response.
   Example - ' *How much more will this cost if we chose this additional feature?*'
5. **Sequential questions**
   Sometimes, it can be very good strategy to ask a series of questions to lead up and achieve a particular result conclusion. Generally, it might be a good idea to plan these in advance.
   Example - ' *And after you complete the first delivery, how long will it take for you to have the second shipment ready and sent to us?*'
6. **Flattery question**
   This is an effective means to be both complimentary to your counterpart while eliciting information from them, both at the same time. Everyone responds well to a friendly compliment.

Example - ' *Could we draw upon your particular and specialized expertise to add some input into this particular issue?*'

7. **Probing deeper question**
   When you need to gain a better insight into a person's thought process to further illuminate their rationale or position.
   Example - ' *Could you provide us with more detail in how you analyzed the data that you just described and how you reached your conclusion?*'
8. **Emotional thermometer**
   There are occasions when you will sense that something might be starting to boil beneath the surface. This might be a good time to address a pending emotional response that might de-rail the negotiation by simply checking out how the other person feels about certain issues. **Example** - '*How do you feel about that aspect of settlement package?*'

EFFECTIVE LISTENING

Listening is the ability to accurately receive and interpret messages in the communication process.

Listening is key to all effective communication. Without the ability to listen effectively, messages are easily misunderstood. As a result, communication breaks down and the sender of the message can easily become frustrated or irritated.

Why is listening such an important part of the negotiation process and how can someone develop good listening skills?

Successful negotiations are based on the ongoing exchange of information. It is a **process** and therefore **takes time**. You can't expect the other side to blurt out everything up front, just like you wouldn't show all your cards at the outset either. The key throughout the entire negotiation is to ask questions and, more importantly, listen carefully. The information you obtain will tell you about the real interests involved in the negotiations and assist you in creating options, solutions and win-win agreements.

Here are six ways to develop good listening skills:

- **Never interrupt** – good listeners never interrupt when the other side is talking. If you have a question or need clarification, write it down and continue to give them your undivided attention. You can address your queries when they have finished if they haven't answered them already (which they often do). Stopping the flow of information is very risky because they may be about to reveal everything you need to know.
- **Speak with the body** – maintain **eye contact**, **nod** every so often and occasionally **smile**as they are speaking. This shows the other person that you are paying attention and makes them feel comfortable about revealing more information.
- **Paraphrase** – this indicates to the other person that you have understood what they said. It basically involves **summing up** what you have heard in your own words.

- **Clarify** – **ask questions** about what the other person has just said. For example, 'I'm not sure what you mean by…' It's a further indication that you are paying attention.
- **Acknowledge them** – this does not mean you have to agree, it just shows the other person that you **value** their point of view. Be sincere when you acknowledge them and always look them in the eyes, even if they are angry or threatening. Once they have been heard, you can go on to show how your point of view is also valid.
- **Agree as often as possible** – agreeing to what the other person is saying creates a very positive negotiating environment. Find little things to affirm and you will not only set a pattern of agreement but also make the other person more confident about sharing information with you.

By listening attentively you will also notice the things that the other person does not say and this could tell you a lot. For example, they may be very quiet about their reasons for a particular settlement date, which could indicate that they are under more pressure than they want to let on. When listening, try to **maintain objectivity** and **keep an open mind**. Make every effort to understand what the other party is really trying to say – **read between the lines**! Determine whether the words they are saying match their body language. And always remember the golden rule: **listen more than you talk!**

TOPIC 10

ETHICAL & LEGAL ISSUES IN CONTRACT NEGOTIATION & INTERNATIONAL CONTRACTS

MEANING AND PURPOSE OF ETHICS IN CONTRACT NEGOTIATION

What do we mean by ethics?

Ethics are broadly applied social standards for what is right and wrong in a particular situation, or a process for setting those standards. And ethics grow out of a particular philosophies which; define the nature of the world in which we live and prescribe rules for living together.

THE IMPORTANCE OF NEGOTIATION ETHICS

Commonly held assumptions reflect negatively on the ethics of the negotiation tactics of car salespeople, lawyers, horse traders, and other people who have a reputation of trying to influence folks into reaching agreements by misrepresenting facts. This kind of stereotyping has attached itself to people from different countries, ethic groups, or even as reflected in the expression from the 60s 'Don't trust anyone over 30'.

Negotiation is about many things; one of its central elements is convincing others to accept the accuracy or reality of information that will influence their decision. Most negotiators know that it is, indeed, possible to influence people by lying to them. But good negotiators also realize that when other parties find out they have been on the receiving end of lies, the lying negotiator's credibility goes down to tubes.

There is an old expression 'If you cheat me once, shame on you. 'If you cheat me twice, shame on me.' People who have been taken in by dishonestly resent it; if they are able, they try to get out of deals where there's been misrepresentation.

In general, a general negotiator must make positive misstatement to be held liable fraud. First, when the negotiator makes a partial disclosure that is; or becomes, misleading. Second, where the negotiator acts as a fiduciary. Third, when the negotiator has important information about the transaction not accessible to the other side. Fourth, where required by statue.

On the other side we can say that negotiation is not a competitive sport. In competitive sports, the object is to end up winning the game, the race, or the event. Negotiators who focus on treating other parties as opponents run the risk of ending up with reluctant counterparties to whatever agreements may be reached. Unless all the parties are fully committed to their agreement, it may well fall apart; in those circumstances the negotiation has failed.

The ethics of negotiation should be based on several understandings;

- Reluctant partners make undependable partners so treating negotiation partners with respect and honesty simply makes common sense.
- Negotiators need to recognize up front that the only reason to use negotiation to resolve a conflict, agree on a project, or conclude a sale because other parties may be able to add value an individual or a single company cannot do acting alone.
    - Transparency in the negotiation process is more likely to bring about buy-in than hidden agendas or tricky maneuvers.
- Other parties have feelings.

Last understanding is the Golden Rule of treating others as you would wish to be treated has the bottom line value of increasing other parties' enthusiasm about negotiating with you as well as their enthusiasm about the ultimate agreement.

Good negotiation ethics: honesty, transparency, respect for others are all genuinely pragmatic approaches to use. A negotiator's reputation is not unlike that of a restaurant; if you have bad meal, you are not likely to return. And a negotiator with whom others don't want to deal is effectively out of business.

Negotiator also should understand four major approaches to ethical reasoning: end-result ethics, or the principals of act utilitarianism; rule ethics, or the principle of rule utilitarianism; social contract ethics, or the principles of community-based socially acceptable behaviour; and personalistic ethics, or the principles of determining what is right buy turning to one's conscience. Each of these approaches may be used by negotiators to evaluate appropriate strategies and tactics.

Consequently we can say that negotiation ethics is more important for negotiator that's why negotiator should recognize ethics carefully. Also unethical behaviours are most important to the negotiator. Because when he or she faced with unethical behaviour he or she should find the reasons for unethical behaviour.

Factors That Affect A Negotiator To Behave Unethically:

Demographic Factors: One factor that affect people to behave ethically or unethically is demographic factors, major demographic factors that affect people's ethical behavior are; age, gender, nationality and cultural background, and past experience. People in different age groups may differ in their opinions of what is ethical and what is not. A behavior that is ethical for one country's culture may not be ethical for another country's culture.

Personality Differences: Major personality traits that affect people to behave ethically or unethically are; being a team oriented or self oriented individual, being cooperative or competitive, being a high mach or low mach (machiavellist) and locus of control. (Internal or External) People who are more team oriented, more cooperative, lower mach and who has an external locus of control tend to have more strict ethical rules and live their lives according to those rules. For example Japanese people fits very well with this example they value ethical rules very much, they are team oriented and cooperative individuals and they have an external

locus of control so they believe in their destiny. Whereas American people are more self oriented and competitive individuals they believe that what is ethical for them is ethical for everybody.

STEPS IN ETHICAL NEGOTIATION

1. DETERMINE whether there is an ethical issue or/and dilemma. Is there a conflict of values, or rights, or professional responsibilities?

2. IDENTIFY the key values and principles involved. What meanings and limitations are typically attached to these competing values? (For example, rarely is confidential information held in absolute secrecy; however, typically decisions about access by third parties to sensitive content should be contracted with clients.)

3. RANK the values or ethical principles which - in your professional judgment - are most relevant to the issue or dilemma. What reasons can you provide for prioritizing one competing value/principle over another? (For example, your client's right to choose a beneficial course of action could bring hardship or harm to others who would be affected.)

4. DEVELOP an action plan that is consistent with the ethical priorities that have been determined as central to the dilemma. Have you conferred with clients and colleagues, as appropriate, about the potential risks and consequences of alternative courses of action? Can you support or justify your action plan with the values/principles on which the plan is based?

5. IMPLEMENT your plan, utilizing the most appropriate practice skills and competencies. How will you make use of core social work skills such as sensitive communication, skillful negotiation, and cultural competence? (For example, skillful colleague or supervisory communication and negotiation may enable an impaired colleague to see her/his impact on clients and to take appropriate action.)

6. REFLECT on the outcome of this ethical decision making process. How would you evaluate the consequences of this process for those involved: Client(s), professional(s), and agency (ies)? (Increasingly, professionals have begun to seek support, further professional training, and consultation through the development of Ethics review Committees or Ethics Consultation processes.)

REASONS FOR UNETHICAL BEHAVIOR IN CONTRACT NEGOTIATIONS

There are several major dimensions of human conduct and the business system that motivate unethical conduct. Missner (1980) suggest four: profit, competition, justice and generating wants (advertising). While the strategies and tactics of negotiating have little to do with advertising