Responding to Negotiating Lines/
Find the Flaws™

WWEMA 2019 Finance & Contract Administration Council Meeting

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Responding to Negotiating Lines
In Many Instances, Responding to Negotiating Lines May Require Using the QELEC Method to Resolve Issues

- The **QELEC** method involves the following:
  - Questions
  - Experience
  - Logic
  - Examples
  - Compromise if necessary
Negotiating Lines

- There are countless negotiating lines that a party may use to try to convince you to immediately concede an issue.

- The following pages include some of those negotiating lines, and for all of them we will discuss two things:
  - Why they often work
  - How to respond to them
Negotiating Lines

This provision is standard in the industry. Therefore, there is no reason to change it.
Negotiating Lines

These are our standard terms and conditions. We simply can’t change them.
Negotiating Lines

Your request is a deal-breaker.
If that is your position, then I think we are done here.
Negotiating Lines

Your requested change is a non-starter.
Your request is contrary to our policies. Unfortunately, our policies don’t permit us to make that change.
Negotiating Lines

The concern you are raising is already addressed in the agreement. If we added anything more, it would be redundant.
Negotiating Lines

The issue you raise involves a scenario that will never happen. Therefore we don’t need to address it in the agreement. It simply won’t happen.
Negotiating Lines

You are the first person to ever raise this issue.
Negotiating Lines

You have too many redlines.
Some Things to Look for When Analyzing Agreements

OUR SALT MINE
OUR

- Overbroad language
- Unduly narrow language
- Risk exceeds benefits
SALT

- Silence (e.g., as to timing, who pays the costs, who performs the task, or other material information)
- Ambiguous language
- Loophole words
- Toothless RYNOs™ (i.e., rights yet no obligations)
MINE

- Misdirection
- Internal inconsistencies
- Non-standard language or location
- Endless Trouble
When you are reviewing agreements, you may want to keep in mind the following phrase:

Assume Nothing, Absorb Everything
It is Time to Play
Find the Flaws™
Problematic Provisions

Exercise 1

1. Indemnification

Each party shall indemnify and hold harmless the other for a breach of confidentiality or a claim for infringement of a third-party’s rights. Customer shall also indemnify and hold harmless Provider for any breach of this Agreement by Customer or any persons to which Customer resells the Services, provided that Customer is notified promptly of the action, Provider has not reached any compromise or settlement of such action or made any admissions in respect to the same, and Customer receives all reasonable assistance to defend and settle the same.
Problematic Provisions

Exercise 1, cont’d

2. Limitation of Liability

Neither party shall be liable to the other party for consequential damages except that this limitation shall not apply to claims for violation of a party’s IP rights. Each party’s aggregate liability for any and all claims brought at any and all times during the term of this Agreement shall not exceed the greater of (1) $100,000, or (2) the amounts paid under this Agreement during the twelve months immediately preceding the commencement of the claim. The foregoing shall not apply to any breach by Customer or its customers of the use restrictions under this Agreement or its confidentiality or other obligations herein or the breach by Provider of obligations in connection with confidentiality, data privacy, data security, or other data-related matters.
Problematic Provisions

Exercise 1, cont’d

3. Termination

Either party may terminate this Agreement if the other party commits a breach and fails to timely cure within thirty (30) days after receipt of notice. For the avoidance of doubt, under no circumstances may Provider terminate this Agreement, or a service order, except where otherwise permitted to do so under this Agreement or where continued performance is illegal, impracticable, or violates a third-party’s rights. Upon such termination, Customer shall have no further rights under this Agreement, and Provider is authorized to delete all Customer Data within sixty (60) days.
Problematic Provisions

Exercise 2

1. Your Responsibilities

You are solely responsible for (i) your actions, (ii) your content, (iii) any use of the Services that occurs under your passcode, and (iv) your users’ compliance with these terms. If you become aware of any user’s violation of these terms you must immediately terminate that user’s use of the Services. The term “Services” means any services, products, or offerings referenced on our website or on any other material that we may provide.
Problematic Provisions

Exercise 2, cont’d

2. Modifications

We may modify these terms or any additional terms that apply to the Services to, for example, reflect changes to our Services. Changes will generally go into effect no sooner than ten (10) days after they are posted. However, changes made for legal reasons will be effective immediately. In addition, we may modify the Services at any time but you shall have a right to terminate your use of such Services if any such changes negatively impact your use in a manner that was not foreseeable.
Problematic Provisions

Exercise 2, cont’d

3. Rejection
We will remove, modify, or reject any content of yours or of any of your users which we believe is unlawful, violates these terms, could subject us to liability, or is otherwise inappropriate in our view.

4. Use of the Services
You may use the Services for your internal business purposes. All such use must be in strict accordance with any documentation we may make available regarding proper use of the Services.
Problematic Provisions

Exercise 2, cont’d

5. Additional Restrictions
You shall not, nor shall you permit any other person to, (i) interfere with anyone’s use of the Services, (ii) seek to use the Services in a manner not expressly authorized by these terms, or (iii) engage in any activities that may harm us, our affiliates, or others.

6. Disciplinary Action
If you or a user is in breach of any of these terms or if we have reasonable grounds to believe that this is occurring, we may take such disciplinary actions as we deem appropriate, including (i) suspending or terminating your or your users’ Services; (ii) restricting or downgrading your Services or any other services you receive from us; and (iii) imposing any other discipline or penalties we may deem appropriate.
Problematic Provisions

Exercise 3

1. Term of Agreement and Conflicts

This Master Service Agreement (“Agreement”) commences on the Effective Date and terminates when the last SOW entered into by the parties expires. If there is a conflict between the terms of this Agreement and the terms of any SOW, the terms of this Agreement shall govern. Unless the parties otherwise agree herein or in an SOW, no SOW shall be executed after the term of this Agreement expires.
Problematic Provisions

Exercise 3, cont’d

2. Initial Site Visit

Contractor will visit Customer’s offices to commence analyzing the systems for which Contractor will be providing consulting services. The parties will then execute an SOW, and Contractor will begin providing its consulting services to Customer. No consulting services will be provided during the initial site visit, and no consulting fees will be charged other than in connection with the travel-related costs incurred by Contractor. Any other fees owed by Customer to Contractor shall generally be set forth in the applicable SOW.
Problematic Provisions

Exercise 3, cont’d

3. Limitation of Liability
Except where otherwise provided in this Agreement, throughout the term of this Agreement either party may be liable to the other party for any indirect, consequential, incidental, punitive, or exemplary damages.

4. Confidentiality
Throughout the term of this Agreement, Contractor will protect all confidential information of Customer from being disclosed to unauthorized third parties except where permitted by Customer or governing law. Customer shall not disclose to Contractor any of its personal data. Each party shall be liable to the other party for a breach of this Section 4.
Problematic Provisions

Exercise 3, cont’d

5. Miscellaneous

This Agreement, including all SOWs attached hereto, constitutes the entire agreement between the parties. Unless the parties otherwise agree in writing, this Agreement may not be amended.

6. Definitions

- Contractor means XYZ Corp. and Customer means ABC Corp.
- Effective Date means the date that the first SOW goes into effect.
- SOW means any Statement of Work executed by the parties and which incorporates by reference the terms of this Agreement.
Information about Alan

Alan Fishel

Alan is the chair of the Communications & Technology practice at Arent Fox. Alan is nationally recognized for his transactional skills. Alan handles a wide variety of transactional matters, including helping many companies revise their form agreements and assisting numerous clients in connection with drafting and/or negotiating some of their complex contracts. While he prepares and negotiates many technology agreements, he is also involved in drafting or reviewing numerous other types of contracts. He also frequently provides interactive workshops and webinars to companies and associations regarding how to most effectively draft and negotiate agreements, how to train legal and/or business teams on a variety of issues, and how to ensure better cooperation and coordination between legal and business teams. He also presents a free interactive webinar on a regular basis based on the game Find the Flaws™, which helps attorneys enhance their contract drafting and issue-spotting skills in a matter of minutes.

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