

Art of Procurement Podcast Transcript

Episode 173

Lessons Learned in Contract Negotiations from a Trial Lawyer, Mediator and Contract Coach w/
Jeanette Nyden

Jean: [00:01:45] So, deal junkie. I really like negotiating agreements. When I hesitate because the contract is one part of the agreement, the relationship particularly a business relationship becomes more complex with suppliers and customers. I really enjoy the whole atmosphere of getting the relationship right, getting the contract right, having all the tools in place to be able to successfully establish a great customer-supplier relationship. That's all I do. That's all I've been doing for a really long time.

[00:02:26] Where does the passion come from? I think it comes from my experience as a mediator. So, if we go back a little bit, I have an eclectic background. At one point I chose to do a professional mediation course as part of my continuing legal education. I liken it to a long-time smoker who suddenly quit smoking and sees the light of day. I was a litigator in Chicago which is a real bare-knuckled brawl kind of place. Even in the federal court it's very contentious. It can be very -- strong types of leverage are used in the negotiations. And so, I moved to Seattle and I take this course for my continuing legal education and I learned an entirely different way of being able to reach an agreement/negotiate an agreement. I became the converted. Sort of like picking all the cigarettes out of my litigator friends' mouth saying "Do you know what you're doing to yourself? Do you know what you're doing to your clients?"

[00:03:35] I think the passion for me is that I can spend the entire spectrum of negotiation from the most muscular core leverage judicial proceeding kind of hardnosed bare-knuckle brawl kind of negotiating all the way to helping parents write a parenting plan about who gets which is a very gentle inclusive very soft approach to negotiating in the best interest of the children. I really combine that in my work.

Philip: [00:04:19] There is a few things I actually want to drill down into, but I just want to jump off that comment to start with, and that's like is there... There's no such thing as a one size fits all in so many things that we do. Obviously negotiating and contract negotiating is no different from that, but do you find that most favorable outcomes typically occur when you are thinking about a relationship being part of that agreement versus those times when it's been all about the fight, it's been all about the power dynamics, it's who's got most leverage over the other. Are there times when that's necessary that you have to take that approach?

Jean: [00:04:47] You know I'd say it's a 30/70 split. 30% of the time you do need some muscle to move another party who is perhaps hiding information, being disingenuous, being dishonest. 70% of the time people show up and want to do a really good job for their organization and it's simply their organization's perspective

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point of view and business' objective don't know align with what you think their business objectives point of view ought to be. And that's where that collaborative process of communicating comes helpful because if you use a really adversarial style, that is not going to necessarily change the other party's point of view perspective or business objective, it's only going to entrench them. What we do know from research is that suppliers and/or customers who are consistently bullied retaliate and/or find themselves in a financially perilous position.

Philip: [00:06:11] Yeah, they either take it and take what's not necessary best for them or you dig in your heels, don't you, and actually make it. I think we do that in all walks of life. If you have somebody who takes that approach you kind of want to make it harder for them to get what they want than if they actually come with a more collaborative relationship driven kind of purpose.

Jean: [00:06:34] Yeah. I was just watching something, an FBI negotiator from... actually the late 90s was being interviewed. I know that there's a book FBI negotiation tactics out there right now but the name of it doesn't come to the top of my head.

Philip: [00:06:50] Is it Chris Ross?

Jean: [00:06:51] It might be. But the point is that the harder you make it for someone to say yes to the position that you're taking through force, the harder you make it for them to say yes because of the force that you use. So, you perpetuate a cycle. The more that you try to use leverage to force the other party to an agreement that they don't feel is in their best interest, the more force you need to use. The more likely they're not going to feel it's in their best interest, the more force you're going to use. And that cycle to use an example from the auto industry from years back really put a supplier such as ACDelco into financial straits when the economy is dead, and they suddenly did not have the profits and the volume to sustain themselves. It almost brought down one of the major automakers because of their dependence on this one particular auto supply manufacturer that had been divested from them. This idea of forcing because you've got a lot of leverage, a business deal under someone that isn't in their best interest could and usually does come back to haunt you in some way.

Philip: [00:08:09] Yeah. You mentioned the auto industry, that's where I started in my career. I started with the component supply that just been spun out from its parents. We would often take that similar approach and that's actually where I learned that this doesn't seem right. It doesn't feel like we should be using power and leverage as

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much as we do because the supply base is so dependent on one, two, or three different suppliers, and they are never going to say no.

[00:08:35] I don't think I saw that at the time but as I grew and mature you start thinking ethically. Is that the right thing to do? Should you be asking for everything even if you know they're going to ask it? Sorry, even if you know they're going to give it. But also, is that sustainable for them? They kind of got to look out for their own best interests. So, for their interests in service of the success of the contract you are trying to negotiate.

Jean: **[00:08:59]** I think that the difference between how I look at it as a deal because I include the relationship and thoughts around sustainability for the duration of the contract is different than how old school buyers learned how to negotiate. The people that I encounter who have that experience of buying in the late 80's, early 90's maybe even in the early 80's, so they're at the end of their career, have a perception that the suppliers are marking parts up 55 to 85%. Everybody is rolling in dough. And if you don't take a muscular attitude towards price you're going to get taken advantage of.

[00:09:45] But the circumstances of the supply chain in the last, let's say 40 years have so dramatically changed that that price conversation in those margins are out of context anymore. What I mean by that is its price and its compliance in a global supply chain. It's price and its sustainability around the developing world and can we continue to count on parts coming from other parts of the world through their supply chain and their logistics organization.

[00:10:25] And so, this whole idea about price and margins and that there's just the candy on the table to be discussed and divvied up is not as accurate. You might need more of a mark up on one kind of part because of the way that it's manufactured and for sustainability and for research and development for the next generation of the part. Other parts may not need very much of a markup and you're simply paying for the logistical chain to get it from one part of the world to another part of the world. Those are very complex conversations that don't really lend themselves to a really easy muscular sharpen-your-pencil-and-give-me-your-best-price kind of attitude.

Philip: **[00:11:10]** Yeah. That's right. And often we... Again, this is probably how I was brought up in the early stages of my career is that the number is everything. It's the price. We don't really look behind the price because it was easy to say it should be a

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different amount, it should be a lower amount because nobody's got anything to argue back on that, but it is just... it becomes a game. You're not negotiating based on fact but you're also asking for unrealistic things often from suppliers and maybe that's because you have a reason internally. You have margins to hit. But like you say, it's not very sustainable.

[00:11:49] I want to touch on a couple of your background. You talked about your experience as a mediator and also as a trial lawyer. I can only imagine the human element that's kind of necessary for being successful both as a trial lawyer but also as a mediator. It's not just about facts and data. It's about influence and persuasion and storytelling. I just wonder if you could share perhaps some of the things that you took from those experiences that procurement professionals you think could really kind of learn from.

Jean: **[00:12:22]** There are a lot of different aspects. I hesitate because I'm trying to narrow it down. The two things that come to my mind is yes, absolutely persuasion and storytelling. For example, I have an entire section in my training manuals and in my first book *Negotiation Rules* about making the message attractive, and the timing of the message. That all comes from my trial experience. How do you when you give jurors and sometimes judges these facts that are sort of out of sequence based on when a witness is available and all these sorts of things so they get all these various facts and then you have to pull it together at the end, how do you make that a persuasive argument? What's the timing of how you make the message?

[00:13:16] So, from a trial perspective do you make it in a motion? Do you make it when you go to trial, etcetera? I was in court for seven years, four out of five days of the week so I really got very good at that concept. And so, then I bring that to the purchasing organization in particular. I think sales does this a little bit better is how do they even use these techniques when working with stakeholders?

[00:13:43] Purchasing is a facilitator and that's the mediator part of my background that I really draw on. I've got this persuasion messaging timing of release of information that I'm very deeply steeped in. And then I've got this but I'm a facilitator, it's not my decision. So, when I'm a mediator it is not my decision. I'm not an arbitrator or a judge. I'm there to facilitate a solution.

[00:14:09] Purchasing and sourcing from what I can tell from my colleagues who are now leaders in those roles - CPO, sourcing directors, and things like that - they are saying even with the biggest of agreements I am one part of the decision-making

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process. There are multiple PNLs that are touched by this decision. We all have to be happy with this agreement. I'm not a buyer anymore making a decision based on a spreadsheet price. That skill is not necessarily being drilled into the purchasing team as a whole. Some organizations do a better job at this idea around facilitation that you are there to facilitate the best or deal with the organization not necessarily what you personally think is the best deal because you have to take in to account other stakeholder's perspectives, business challenges, timing and things like that. So, those are two very strong skills that I bring from both the trial lawyer and from the mediator.

[00:15:14] The other thing from the trial lawyer background that I teach, and I really teach this. For people who get this, it can really change how they negotiate. That's the technique from being in the trial in the courtroom and that's called looping. So, how do you take an answer that someone just gave you and loop in the follow one question in a way that makes sense but is not random. It's to phrase the question to lead the witness to a particular point.

[00:15:48] Now, I don't know how many hours of practice and continuing legal education, mock trial, symposiums where we practice and practice. And as I said I was in court for seven years about four out of five days, so I practiced it and failed and got successful at it. But the idea is that if you want someone in the negotiation who's a counterpart to see your point of view and you don't believe that they are seeing your point of view, you need to ask them questions that'll lead them to at least an understanding that your point of view is different from theirs, has a legitimate business reason, and ought to be considered by them as a legitimate business reason with a request.

[00:16:34] Now, whether they choose to accept it or not you can't control that, but you can control the conveyance of the message. And what I teach is how do you use your questioning to lead to that realization this is a legitimate business request with a legitimate business reason and I can take it under consideration by my organization.

Philip: **[00:16:57]** What will be some of the questions be that you would encourage listeners to the show to actually ask when they when they are wanting to do that kind of research or finding, I guess, of what the other party wants and what they are thinking.

Jean: **[00:17:14]** It's not research as much as it's open ended questions. Some people when they find out I was a trial lawyer... I had one engineer who I was coaching who

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negotiated the technical specifications in aerospace, and he said, "Can you teach me how to cross-examine?" Then I said "No!" Because that's the exact one thing. I know how to cross-examine people and unfortunately my teenage daughter gets a little bit too much of it sometimes. "What do you mean you've been at the store?" But my purpose is actually a direct examination. And by direct those are the open-ended questions where people get a chance to tell their story. They're telling their story to the decision maker, the judge, or the jury, and you as the attorney are there to create the roadmap so you know going up what your questions are and how they're laid out and you've got it in your binder at the podium and you're ready to go.

[00:18:16] But it's a conversation. So, you ask the witness the first question and then they say something, and you pick up on it. "Let me follow up with you on that Philip." "Let me ask you this particular detail." The way you did about the trial work let me drill down and let me get deeper into it. Overtime if you're a trial lawyer, you have your question typed up ready to go in your trial binder at the podium so that any given moment you can look down and see where do I need to go next with this expansive conversation, right? It's got a purpose. it's got a direction.

[00:18:51] For negotiation, I often try to... When I'm mentoring... In mentoring, as I sit side by side with a someone at the bargaining table and negotiate the contract terms with the permission of sourcing and the legal team. I'm there as someone who's doing this particular kind of work either as an example. So, watch me - Sally or Bob - watch me lead these next several sections of the conversation to see if you can do it. Or let's look at how you've established your roadmap for the conversation for this particular conversation and let's see if you can do it. By being at the table it's a real time learning. My clients have gotten significant promotions as a result of being able to establish their ability to handle very big complex deals and then now lead a team and things like that. It's a very specific process to the negotiation.

[00:19:55] What I will say though is I touch on it in my first book *Negotiation Rule* where I talk about developing two kinds of strategy. Negotiators will pick up the big strategy. We need the best possible price and the best possible delivery and the best possible quality. That's likely going to be either a European manufacturer or a US manufacturer if we stay within manufacturing. So that's their strategy and then they're ready to go. But what people are not doing is developing the strategy for the individual meetings and calls that matter. So, the three-hour call to discuss certain provisions. They don't have that strategy. They don't have the strategy to how to kick off the negotiations when everyone may be meeting for the first time in coming into

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the room. I don't want to start with a definition and we often do. I advise all of my clients against it.

[00:20:51] Most of them chickened out but the most successful negotiations are a roadmap. Let's sit back and let's tell you what our buying objectives are, why we selected you, why we think that you're going to be a great partner for us. And then you start weaving in, but we've got these concerns here, and we've got these concerns here, and I see you've got some concerns that you've noted. You create the conversation so that you lead them to where you want them to be at the end of the conversation.

Philip: **[00:21:22]** How do you determine how much information to share? What's too much? What's too little? Because I imagine you want to give them enough that they feel as though this is a transparent and a fair ethical process but there's still that piece of you that doesn't want to give them everything that they can turn and use against you.

Jean: **[00:21:41]** Yeah, that's the legitimate fear is that information will be used against you. The third book that I coauthored with Kate Potasik and David Fringier talks about the six guiding principles. We talk about autonomy. We talk about honesty as two separate principles. These come into play with transparency which is a core principle for establishing trust. And that is autonomy is the supplier and the customer are autonomous independent business organization likely held by shareholders and as a result they have a fiduciary responsibility to their shareholders to return a profit.

[00:22:28] You have to see them as separate from you and not as a subdivision of yourself, whether you're the supplier or the customer, that you can just sort of tell them what to do and they have to agree to it. But what we drill down on in autonomy is, but you can't really make good decisions from an autonomous business perspective if people are not giving you the information that you need. And so, there's always this tension. Now, with obviously what we decided to focus on from our experiences as negotiators particularly David and I, David and I really had the lion share of the thought and work around the principle because we sit at the table so much for so many years is you need to be accurate.

[00:23:19] Honest can have an objective and a subjective quality to him. We wanted to focus on the objectivity. We always wanted to focus on what's the part that you can control in a business organization. Can your information be accurate? Can your observations be accurate? Can your requests be accurate requests? You can control

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that. You can then control the fact that you are presenting information that helps this autonomous independent business organization make good decisions based on the accurate data that you're giving to them. That you can absolutely do.

[00:24:00] Now, with respect to transparency that's not always an individual decision. Meaning as a negotiator, and I learned this as a lawyer very clearly, I'm an agent. This is not my business when I'm a lawyer. I'm just a lawyer, right. Somebody else is making the decision. The decision of the business or the business unit or the business subdivision such as a subdivision of sourcing that might be working on indirect spend, it's their decision about how much to reveal about strategy, purchasing, acquisitions of units, divestitures of units, things that could potentially impact the negotiation.

[00:24:46] With privacy laws and trade secrets and heavy competition in industry it's not our decision when we're in the role of a negotiator to second guess that our boss may not have given us permission to reveal that we might be divesting a unit which could dramatically impact the results of the negotiation. It could happen. It could not happen. Until that the ink is dried on that deal we can't necessarily reveal it in this deal. That's really hard for people who are not deeply steep in the role of being a facilitator and an agent because when you're steep and I'm here to facilitate the best possible resolution and I'm an agent then you carry the message and you really can't second guess it because you probably don't have all the facts.

Philip: **[00:25:44]** There's a couple of things I wanted to just jump in on that you talked about. One of them was about facilitation. You just brought it up again that... You said very early on that the role of procurement, I couldn't agree more, the role of procurement whether it's changing, whether it's always been like that, maybe there's just more acceptance that this is our role is absolutely a facilitator. We're not making sourcing decisions. We can make recommendations based on data but we're always spending some deal's money. It's them then ultimately making the decision of who they want to use, what they want to pay is that in service with their objective and the outcomes that they are trying to get through engaging with that supplier.

[00:26:24] You mentioned that you see some organizations who have been more successful than others in actually taking that mindset and using that approach when they're working with their stakeholders. I just wondered if you could share what are some of the things that you've seen that those organizations who have been more successful in taking that approach, are there other things that they've done that

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enabled them or increased their chances of success over others that are having more difficulty in doing that?

Jean: [00:26:55] A couple of things. One is I think it's organic as a result of the change in the business employee community. Meaning I'm seeing a lot more millennials coming into position where they naturally bring a facilitative and collaborative and highly analytical decision-making process to the business organization.

[00:27:23] The business organization isn't teaching them that, that's just a good fit because that's how they're taught in US schools and to some extent in European schools and they're comfortable in a situation where everyone is discussing, everyone's different needs and concerns. And because they don't have necessarily as much experience they are also comfortable with sort of a group consensus as opposed to thinking "I have to be the one to make the final decision" or "I don't have any authority."

[00:27:55] Some of it is just happening because the right hiring and the mindset that they're hiring for organizations that I think are successful are the ones where the CPO or the chief sourcing officers are openly developing a multi-pronged approach around this idea of facilitation. They're talking about it at conferences. They're giving keynotes. Royal Bank of Canada at the ProcureCon Canada event in last year - sometime in April, May, I think - discussed this very much that what they were seeing in terms of the retiring of the baby boomers but taking of the knowledge of all these years of working within purchasing and buying and then now sourcing. They were leaving the organization and they were very conscientious about developing negotiation skills, communication skills, facilitation skills. They were conscientious about providing training whether through their organization or through the International Association for Commercial Contract Management. They were very aware of the shift that technology was going to bring to the market. Meaning things that could be automated are going to be automated. The simpler purchases that perhaps are still being made by "buyers" will eventually be completely automated to the best of everyone's ability where you maybe have five buyers you might have one who's more of an administrative person to sort of check boxes and things like that. You don't need the other four to buy. Those four people are still incredibly necessary. They're necessary in these very complex deals and they're aware of it.

[00:29:42] I think that the organizations that are successful are taking the organic change in the market with the millennial coupling it with an understanding of

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technology and then creating the space for the organization to grow and change and adapt.

Philip: [00:29:59] Do you see that those kind of shifts the necessary? It's not just procurement, it's also a shift that is necessary perhaps culturally from a stakeholder perspective as well because ultimately you can lead a stakeholder to take to a certain path but if they're insistent on a certain approach then it's still going to be difficult to achieve that. And so, it's certainly more than just procurement having the mindset. It's also helping to educate those around us as business partners that this is probably a more effective way of going about things.

Jean: [00:30:33] Yes and no. I think that there are so many conflicting interests even within large organizations. You've got various stakeholders that have interests in business challenges and priorities that may trump another stakeholder's business interests and priorities. That's where it can get very complicated in terms of having a truly collaborative negotiation internally with stakeholders.

[00:31:09] A colleague of mine and I are hopefully going to present at the National Contract Management Association on this issue because she very clearly in a senior position has felt very... that she's been in very muscular negotiations with colleagues of equal stature but in other divisions. A big part of that is you can't take it personally. And some of it is... We can't possibly know all the pressures that are on these various business units. So, when they take a muscular position it isn't that we take a muscular position in return but it's how do we then use particularly these communication skills around having a road map for the conversation opening up a conversation to see if you can explore the information that is relevant knowing that there may be secrets, or maybe things that that person cannot tell you because it cannot get out into the general population about the strategic direction of that particular unit. And so, we have to keep this really complex environment in mind. Can we influence? We can certainly do better than starting it back with and were the gatekeeper.

[00:32:25] About three years ago I went in to analyze a small procurement organization but a lot of money, hundreds of millions of dollars for R&D. And they didn't understand why the PhD Engineers just literally went around procurement department. Well, the deck introducing the procurement philosophy of a gate in the Baby Boomer had said we are the gatekeeper, so we could do a better job of saying were here to help facilitate. This is how we can help. But can we really change the stresses that other business leaders have? We know we can only work with them.

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Philip: [00:33:02] There is something else and this may seem like it's out of kind of place before the interview but it's an important point I wanted to touch on from something you said earlier when you were talking about both your experience as a trial lawyer but also just in contract negotiations more generally. You talk about strategy, you know having strategy for individual meetings. You talked about having a binder of questions that are already kind of ready to go. I think a lot of times and I've been guilty of this for sure, you know you turning up to a negotiation and you kind of think you know what you know when you're going in and you winging it a little bit. You've got an idea of the outcome, but you are just going to kind of see how the conversation goes and maybe pull things out of your sleeve depending on how the conversation is.

[00:33:49] My question is how much time should we really be spending on preparation rather than the actual negotiation itself?

Jean: [00:34:00] Yes. So, I hear everyone's concerns and complaints really about the workload. I think that in the 15 years that I've been teaching I have seen a dramatic increase in the workload because what's left on the plates of the people who I train now are increasingly more complex bites. I don't teach buyers anymore about buying. The buyers that I'm teaching are getting promoted to negotiate master purchase agreements and some teaching in contract language in it. There is a real pressure on time.

[00:34:34] However, it's kind of that 80/20 rule. 80% of your time should be spent in a way that's going to get to the maximum result and the last 20% may not get you that much more of a result. But when it comes to preparation I think the whole... We don't realize the fires we put out at the middle and end of the negotiations by not being prepared. I don't think that people really realize how many 11th hour crisis's can in fact be overrated simply by being aware of what your own internal processes are for approvals and what you need to do now to get the conversation in a place where you can have a successful resolution without an 11th hour Fire Drill.

[00:35:31] Now, one of the tools that I use and one of my clients thought it was really important and tedious at the same time is a really... you know an action log tracker. I mean I just use a regular old spreadsheet because it was just so complicated between all the amendments, the scope of work which was an entirely separate hundred-page document and then 300-page master services agreement, but we had too many issues going out to too many different stakeholders internally at our

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organization besides what we needed to track. It's tedious and time consuming but we also had the deadline.

[00:36:15] We had to negotiate a 90 million dollar deal that we found out that part of the business unit was going to close radically impacting what the scope was going to look like but we didn't know at the time what that scope will look like so we had to negotiate scope decrease language and formulas and things like that because we couldn't know and we had four months to get it done because the money for this project was held up in budgeting. They gave it to us so late. We still hit the deadline. We hit the deadline not only because we had a great team but because Debbie and I, my colleagues, went to some extent. We were really good about keeping that action log up to date. And so, at any given moment if we were going to sit down and talk about insurance because our supplier was self-insured, and we had to really match our policies with their self-insured and that was more of a technical getting it together rather than a hardnosed negotiation that was just massaging it all into place. But still we had to keep track what provisions were still open, what were we still looking at all.

[00:37:22] "Oh, that's right. We were going to take on hazardous materials. That's right. We need to do that." I don't want to go through and have that conversation five times over four months. I want to be able to track it. That's something that we got permission internally to accept as a responsibility and get those provision in the contract, get the supplier to agree to it, get the insurance on our side to sign off on it and so that when we presented it to legal as a complete negotiated package they're really looking at how we dotted our eyes, and crossed our teeth. I think that we were able to do so much complex work 8-9 hours on the phone with the contract up on the screen because I had to couple different screens here at my office work in the spreadsheet. So, at any given time if someone were to say to me "Oh, where are we and such and such?" I could find that article and I could find that, and I could say "Oh you said last time that you guys were going to look into that."

[00:38:20] They had a copy. We always sent it to them. We kept that transparent. We did not put comments in there that we could not share with our counterparts and then we were able to share it, so they'd buy the second or third iteration version of this agreement. Now, they were on top of that. They came, and they would say these rules are ours we're still waiting. And then it was like boom. We have our roadmap. We know what we're going to talk about today because of the ten rules that they needed to come back to with us five are still outstanding we know what the five are. So, even though we didn't know what the five rules of action items that before 7:30 in

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the morning that we were going to address, at 7:30 in the morning we had a road map and we knew by keeping track where that conversation was going to go. That's the kind of thing I'm talking about. I'm just talking about organization. I'm talking about... You don't let the conversation go where you wanted to go. You'll talk about the same BS and go off tangent 40 times.

Philip: [00:39:24] Yes. Kind of bringing project management principles. Are you looking at the negotiation of a contract as a project? Not as something to do to consummate the deal. So many discussions I can remember where you just go off track and you look an hour backwards and think what did they already achieved? We just talked about the things that we already agreed. Or we talked about something for the tenth time because you hadn't actually kept a track of any record of all the discussions and all the agreements as you went through it.

Jean: [00:39:52] So a client of mine is a state government and I'm working on this project right now and when I got the RFP this summer, that was exactly the thing that struck me as they wanted a professional who could combine purchasing, contracting, and project management. That was the first time in my 15 years that I saw that in solicitation. A solicitation from the government is the most lagging indicator there possibly could be. It's just when you see that you think we've all caught up that there is a very much a project management approach and because I have a project management approach that I've been coaching and teaching for a while when I showed up at my interview with things like risk monitoring template, negotiation action log, tracking template, checklist for requirements, open ended questions because it all have to be detailed but the way that I connect well if you've got this particular issue then look at this acceptance procedure and then put it in your risk monitoring template because that's going to be something that could potentially be a risk. When they saw that kind of a level of organization, they openly told me that that's why they chose me and my company because it really is when you get into these big deals keeping track of all the moving parts.

Philip: [00:41:19] So in the time that we have left to talk today I just wanted to go into it like dig deeper into a contract and the clauses within a contract. And obviously a negotiating deal all the time you're working with procurement organizations all the time to help coach to facilitate, to mentor some pretty complex deals. I wonder if there's kind of clauses within a contract that you see procurement professional struggling with on a regular basis or perhaps what some wisdom or guidance you can give us of how we could possibly approach those where we maybe make them a little bit harder than they need to be.

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Jean: [00:42:00] And actually take a different perspective. It's not an individual clause, it's an emerging topic. My most recent client is hiring me to talk at the global summit about this and that's negotiating nontraditional clauses. So, they've got hires and they have longevity in their organization. Most of them have 15 years on average. They've seen the art of supply chain change but they're negotiating all kinds of compliance related issues which do not have the same negotiation arc as price delivery quantity quality.

[00:42:40] It's not that purchasing is struggling with a particular clause. I think that there are a lot of incredibly savvy purchasing professionals who work with contracts that know indemnification and limitations of liability as well as their colleagues in the corporate counsel's office, but I think that what's got everybody really concerned is how do we negotiate GDPR coming out of the European Union. So, you've got major companies - IBM, Microsoft - are on the stage at international conferences saying we are going to implement GDPR globally. Even in the United States. Even with our United States suppliers. That's where everyone is struggling. The stakeholders are struggling. The purchasing department is struggling. The legal department is struggling to explain the nuances.

[00:43:36] From my perspective, and so I've got clients who don't have GDPR but their state, so they've got a lot of regulatory issues and they're also highly regulated industries for the public good such as utilities, transportation agencies, electric utilities, things like that. Those clients are also struggling with the nuances and changes in the regulatory environment and you know sourcing was to sort of take an attitude or maybe even legal. Hey this is not negotiable. And then the supply base is saying then I can't be your supplier. And then the engineering team for one example is saying "Well, we don't have another qualified vendor." And that's where the bus stops because in my opinion everyone can take sort of a hard stance. A supplier can walk away and say "Well, we literally cannot meet these requirements." And the supply side purchasing department can say "We must have this. And the lawyer is saying "We must have that." But that stopping of the business is profound. It has a profound impact. We, I think, generally don't know how to see our way around that? How much do we give leeway for the supplier? How much is that a bluff? How much do they have to invest? Do we help them co-invest? Is that really our business to invest so that they can get their people certified to a certain level when that training isn't available? I mean it gets really very difficult very quickly.

Philip: [00:45:05] In your experience are those like roadblocks and I've been there as well. I worked in a financial services organization or an organization who became a bank

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holding company. We worked on bringing the organization into compliance with all the rules of being federally regulated and we won historically. And so, we would take a pretty hard line approach as well in terms of contracts that certain language had to be in a contract because we believed we took the position that it was a regulatory requirement and perhaps sometimes it wasn't but that was good leverage. We looked at using that as leverage perhaps.

[00:45:42] I guess my question is do you see that when those impasses happen, is it typically because... I mean is it real or is it typically because maybe the both sides of the deal that want the deal enough and so they use that as a reason as opposed to trying to think about creative ways of getting what everybody needs.

Jean: **[00:46:06]** I think that the parties are increasingly pressured and can't see a way out. I don't know financial, but I'll use the utilities and regulatory issues. Every regulation gets passed and the legal department feels that there is a tremendous amount of exposure and that the severity of the loss could be high as a result of not following this regulatory policy or lead. Then it gets passed down to everybody else and this must be implemented. You must now have this Exhibit H-1-A in your contract.

[00:46:45] It isn't really explained other than this must be. This is policy. This is regulation. This is what we're demanding, so there's pressure without a lot of understanding. On the other hand, you've got suppliers who are feeling increasingly squeezed. I think about that book *An Island of Green in a Sea of Red Ink* where there are places within suppliers and also buying companies businesses that are more profitable than others. And those profits prop up the not so profitable units. They could be consistently not profitable, or they could be just periodically not profitable.

[00:47:21] As a result they start looking and saying "Well, either we're already not profitable in this area. Now you're asking us to do something that could potentially make us less profitable. You're asking us to do something that we're not set up to do such as criminal background checks - which was a new thing a while back for one of my client that some of their smaller suppliers just couldn't do or it's too expensive. And so, the suppliers now feel pressured and say we can't do this. This is going to ruin my business. It's going to ruin my profitability, but they don't fully understand it either. They don't fully understand the numbers they don't fully understand the HR process. It's just that it's policy. We can't do this. We shouldn't be working for companies that require this. If these guys are going to require then let's go to another area that we are profitable or where we could be profitable.

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[00:48:12] And it doesn't leave much room for negotiation. It doesn't get to a place where you can negotiate and so there really isn't anywhere else to go. There are no other customers to work with or there are no other suppliers to work with. But then you have to get the right people at the table where sourcing and procurement now becomes the facilitator because you've got to get policy, people in the room to discuss the nuances because as long as it's being slowed down it's a must without an understanding of what can give that's not a negotiation because a negotiation has to have some back and forth, give and take.

Philip: **[00:48:48]** Yeah. Well, Jeanette I know it's about time to start wrapping up so first of all before I just ask the last question, I really want to thank you for joining me today. I loved kind of what you talked about one from a facilitation perspective but also that relationship as part of an agreement. We often lose sight of that, I think, when we just look at a contract and we look at the words and the numbers perhaps on the paper, but we forget what we're really trying to achieve and what is the outcomes that we're trying to drive towards. The contract is only a part of that. If we don't bring a relationship along with it, it really minimizes the chances of it being successful once it's in place. And I think those are things that... I mean they just really stand out to me, things that we as procurement professionals I think we do and we more likely we're increasing kind of how we think about that but it's so critical.

[00:49:40] What I wanted to ask and it's the easy question I always say it's the easy question at the end. It's really just to ask if listeners who have heard of our conversation today that it's resonated with them and they'd love to know a little bit more about you, find out a bit more about what you do or even reach out to you directly, where can they find you?

Jean: **[00:50:01]** Wow, thank you. My website is www.jnyden.com. I also have free learning lessons. The subscription is free it just means you get the 10-minute webinars when they come out. That's www.newrulesfornegotiating.com. The new rules for negotiating has articles and webinars and things associated with the webinar around contracting contract management contract negotiations. People can get a lot of really valuable information without having to spend a lot of time or a lot of money that will help supplement whatever they're doing in their daily work.

Philip: **[00:50:53]** Perfect. Well, thank you so much Jean. What I'll do is I will include those links. I'll also include the link to your LinkedIn profile. I'll put those on our show notes page for today's episode. That's going to be at artofprocurement.com/jeanettenyden.

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That's artofprocurement.com/jeanettenyden. One last time, thank you very much for joining me.

Jean: [00:51:15] Thank you.

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