



# Restructuring Contracts in Stressful Times: Strategies for Successful Contract Negotiation

Can redoing your contracts provide shelter from the economic storm?

By John R. Trentacosta

Many things have changed completely as a result of the economic recession and the unprecedented credit crunch. Contracts that you entered into years ago may now make no sense whatsoever.

One example is your lease. The amount of space your organization needs today may be a fraction of what you thought necessary in 2007.

As a result, you have good reason to evaluate your contractual relationships in light of the new economy. If you decide it's necessary to change a contract, there are some steps you can take.

## First, a Cold Fact

You must face a cold truth at the outset. Unless there's a provision in a contract that provides otherwise, you must adhere to the terms despite the change in the economy. Using the lease example, the fact that you now have 25 employees instead of 50 doesn't mean you're entitled to reduce your rent by 50%. Negative economic conditions don't create an automatic right to relief from contractual commitments.

## Steps that Will Help

The first step is to review the contract itself. Are there any provisions that allow for an adjustment of one or more terms? One argument often made involves a provision known as a *force majeure* clause. Most contracts con-

Contracts that you entered into years ago may now make no sense whatsoever.

tain such a clause. A *force majeure* clause excuses you if your nonperformance is caused by an "act of God" (such as an earthquake, fire, or storm). Unfortunately, *force majeure* clauses aren't triggered by an economic downturn.

Unless someone thought to include an "economic adjustment clause" when the contract was negotiated, there's likely no provision that allows for nonperformance due to a change in the economy. Thus, you'll probably need to negotiate a contract change by convincing the other party to do so. Your chances for renegotiating a contract are best if you follow these strategies:

**1. Be honest.** The first step is to deal honestly with the situation. Explain to the other party the true nature of your organization's difficulties. Don't hide facts. Don't overstate or understate the problem.

**2. Open your books.** Be prepared to open your organization's books and show that the impact of the economic crisis is real and threatens the viability of your enterprise.

**3. Propose a specific plan.** Proactively develop a detailed plan. Your plan must include the specific changes you're requesting in the contract. In business plan form, explain why such changes are necessary. Make the case to the other party that without these changes

your organization's survival will be in serious question.

**4. Offer something extra.** You can enhance your plan's attractiveness if you propose something for the other party beyond what's already in the contract. Creating additional value can entice a party to agree to a contractual change. Recall the old song: A spoonful of sugar helps the medicine go down.

**5. If you and the other party agree to change your contract,** be sure to put this agreement in writing, and have both parties sign it.

Don't overstate or understate the problem.

## Three Positive Realities

There are three realities that will help you with the above negotiations:

• **Litigation is expensive.** The other parties to your contracts will realize that it's better to negotiate with you than to file a breach of contract lawsuit.

• **Most people** (except the truly evil) don't want to sue a nonprofit organization. The negative publicity of such a move will likely offset any economic benefits.

• **If your organization** will go out of business without a change in contractual terms, the other parties won't receive any of their benefits under the contracts. In most cases they'd rather receive a portion of their benefits than none at all. ■

*John Trentacosta (jtrentacosta@foley.com) is a partner in the Detroit office of Foley & Lardner and is a member of the firm's Automotive Industry Team.*