

The background of the article header is a photograph of a green football field. A prominent red and white yard line runs diagonally across the frame. The number "20" is painted in white on the grass near the line. The text "Negotiation in the Red Zone: Excelling When It's Critical" is overlaid on the left side of the image in a white, serif font.

Negotiation in the Red Zone: Excelling When It's Critical

BY ELEISSA C. LAVELLE, ESQ.

The last 20 yards before the end zone on a football field, known as the red zone, is on the critical path to scoring a touchdown. In those final 20 yards, the importance of play-calling is amplified as options become limited and the defense digs in. Just as playing great red zone football is critical to winning the game, so is great skill in the last stage of a negotiation. Clean execution is crucial to achieving success and getting what you want and need from the opposition.

When negotiations take place during the course of a construction project, the need to resolve disputes fast is at a premium to avoid delay and keep a project moving. In the negotiation red zone, what started out as an enormous gap between demands and offers has been chiseled away so that the remaining gap is within sight but not quite within reach. Each move becomes more contested, sometimes accompanied by threats and insults. Apprehension of the

risk of no deal—potential delay, increased costs—intensifies the urgency, anxiety and frustration of the negotiators. No one wants to blink or cave, especially if a negotiator is concerned that looking weak or giving in will set a precedent in future negotiations. A negotiator rarely has an opportunity to recover from a fumble like reputational damage.

The key to success in the red zone starts before the negotiation begins and requires skill and patience as the endgame approaches. Here are four skills to increase effectiveness in the negotiation red zone:

1. Patience, Persistence and Perspective

Negotiators rarely become more complacent as the negotiation continues. One party blames the other for not negotiating in good faith (read: not offering what the accuser wants or refusing to match concessions). Angry accusations and threats of litigation, default termination and attempts

to go “pencils down” are exchanged. The result is escalation of hostilities that spiral out of control. Even if the negotiators appear to be maintaining their composure, they may nevertheless experience so much stress and frustration that their cognitive and creative capacities are blocked, causing productive conversation to end.

Although it is easier said than done, one side must break the cycle by stepping back to view the situation from a more calm and patient perspective, taking a break and de-escalating the situation, in order to resume the dialogue. A useful break in the action may be accomplished by changing the scenery.

An example:

When angry exchanges escalated between attorneys for a surety company that had taken over a project and representatives of a subcontractor who had made a payment bond claim, threatening to completely derail negotiation over disputed change orders, one

of the negotiators who had not been a lead negotiator in the discussion, but who had been paying attention to the dynamics in the room, recognized that if something didn't change soon, ultimatums would be delivered and everyone would pack up and leave. He suddenly invited one of the subcontractor reps out of the negotiation room for a cup of coffee, without a clue as to what he would say, but figured anything was better than watching the hostilities intensify at the negotiating table. That abrupt break in the action so surprised the other two disputants remaining in the room that they stopped yelling at each other and wondered together what was going on. After the coffee break, all of the negotiators had regained their composure enough to refocus on reaching a solution instead of making threats.



“The sure route to a poor outcome in the negotiation red zone is to lose your composure and make an unforced error.”

Patience, persistence and perspective, when anger and frustration threaten to derail a negotiation, can often place the negotiation back on track to achieve an acceptable agreement. No one makes a deal if either party stops talking. If the parties are unable to tear themselves away from the fight, a skilled mediator should be able to read the room, anticipate and manage disruptive emotions and conduct, and assist the negotiators by engineering a change of scenery or break in the action in order to resume constructive conversation.

2. Identify the Obstacles and (If Possible) Solve the Other Guy's Problem

One or more times in the negotiation, roadblocks develop that look like they're just too challenging to overcome. Negotiation is about persuading the other party to give you what you need and/or want. When arguing the obvious merit of your position hasn't convinced your opponent to give in, what do you do when he digs in his heels and just says no?

One way to overcome a stubborn negotiator is to diagnose the reason for his obstinacy by asking questions and listening to his responses. What's at stake for him? Why is a particular issue so contentious? Sometimes he'll just tell you if you ask directly why a particular demand is so important. Is there some other way to get him what he needs without hurting you? Other times, it may take some behind-the-scenes investigation or even an evaluation of the relationship between the parties.

Make it easy for the other side to give you what you need by solving their problem, if you can, but ensure that the cost to you is an acceptable trade-off.

All negotiators have blind spots, and often a negotiator can be his own biggest obstacle to progress. Always reflect on how your own behavior may be contributing to the roadblock. If it is, think about whether ac-

knowledging this to your opponent will be so disarming that it resets the way the parties communicate during the negotiation. If the other side's behavior is the problem, it will likely be useless to point this out, but once again, asking questions may reveal their motivations. The idea is to change the conversation to open opportunities to discuss creative alternatives and solve the other side's problem. If that can happen, the roadblock is removed. However...

3. Don't Be Exploited

Every negotiator, no matter how experienced, is concerned about leaving money on the table, being exploited or looking weak. Being cordial does not mean giving in. Success on this point depends on two processes:

- a.** Preparation before the negotiation begins should determine exactly what

goals you must achieve in the negotiation—a time extension, money, an agreed-upon protocol to streamline decision-making—and your “Plan B.” What will you do if there is no agreement, and how does your Plan B compare to each offer made by your opponent? In other words, what is your “or else?” What can you do independent of the deal either to benefit yourself or to affect your opponent?

b. Observe each concession and respond accordingly. Making a generous concession (provided that it is still within the range that you are willing to concede to make the deal) may elicit a generous response from your opponent. If you make a significant concession, you should expect a reciprocal response. It may sound obvious, but if your opponent refuses to play that game, don’t continue to be generous. Instead, simply go back to matching his response.

4. Be Willing to Walk Away

Sometimes an offense decides to go all in on fourth down instead of settling for a field goal. Successful negotiation is about knowing your objectives and getting what you need if you can. From the very beginning of the negotiation, clarity about your objective and whether your opponent’s final offer is just not acceptable is essential. This willingness to walk away if you can’t achieve satisfactory resolution in the negotiation conveys the strength of your conviction and shapes your approach to the negotiation from beginning to end. When agreement is just out of your grasp, the temptation is to compromise, or split the difference, either figuratively or literally. If doing so doesn’t violate your critical objectives, go ahead. However, as is often said, no deal is better than a bad deal. The challenge is to be absolutely clear about whether the other side’s demand is worse than your probable alternatives to no deal,

but also not to stop talking until you are certain you’ve squeezed everything possible out of your opponent.

The sure route to a poor outcome in the negotiation red zone is to lose your composure and make an unforced error. By paying close attention to what your opponent is revealing about his own objectives, while calmly and tenaciously maintaining absolute commitment to your own, you strengthen the prospect of a satisfactory result. ●



Eleissa C. Lavelle, Esq. is a JAMS neutral based in Las Vegas. With more than 30 years of experience as a respected litigator, appellate and transactional attorney, Ms. Lavelle mediates and arbitrates complex construction, real estate and other commercial disputes. She can be reached at elavelle@jamsadr.com.