

Negotiations

State agencies may negotiate terms and conditions in some solicitations and not in others. For example, the competitive sealed bid method does not allow negotiations, while the competitive sealed proposal and Request for Offer methods do allow negotiations. Unless specifically authorized by statute, state agencies may not negotiate the price, specifications, terms or conditions when using a competitive bid process. Competitive proposal and qualification processes generally contemplate and allow a certain amount of negotiation. The best practice is to read the requirements of the applicable procurement procedure to verify that negotiation is permissible.

Note: A request for a respondent to clarify an offer is not the same as negotiation of the specifications or terms and conditions so long as the request to clarify does not afford one respondent an advantage over another.

Negotiations are not authorized to use technical leveling and/or technical transfusion techniques. Technical leveling is helping a respondent to bring their proposal up to the level of other proposals through successive rounds of discussion, usually by pointing out proposal weaknesses. Technical transfusion is the disclosing of technical information or approaches from one response to other competitors in the course of discussion. a practice which is prohibited by statute.

Prohibited disclosures include:

- 1) disclosing competing respondents' cost/prices (even if the disclosure is made without identifying the vendor by name); and
- 2) advising a respondent of its price standing relative to other respondents.

Even in competitive proposal or qualification processes, care should be taken to avoid inadvertently changing the stated contracting objectives. If the contracting objectives are changed through the negotiation process, the members of the pool of contractors who may have been interested in submitting an offer will no longer be on an equal level. Additional pool members may have competed, had the changed objectives been in the original solicitation. Whenever it appears that contracting objectives may have been changed, legal counsel must be consulted before proceeding further.

Similarly, care should be taken when determining negotiation strategy whether to include, as a part of that strategy, giving the vendors a cost or price that must be met to obtain further consideration. Suggesting a cost or price could deprive the competitive process from generating the cost or price that is the best value to the state. Also, be mindful that the above prohibitions still apply, i.e., disclosing competing respondents' costs or prices is not allowed, even if done without tying the cost or price to the specific vendor; and respondent cannot be told its price standing relative to other respondents. Negotiation strategy should be tailored to suit the particular facts and circumstances of the specific competition. In all events, agencies may continue with negotiations until the best interest of the state is achieved and an award to one or more respondents is made.

Negotiation Strategies

Negotiation is based on the willingness of each party to compromise. In any agreement, there are usually terms or conditions that each party may be willing to relinquish. Agencies must identify those terms or conditions that are essential, desirable, subject to negotiation or relinquishment.

Like other parts of the contract management process, planning is essential to conducting a successful negotiation. Planning allows the agency to know which terms and conditions are essential and which are negotiable. The best practice is to meet with members of the contracting team and divide the terms and conditions into groups. Identify the terms and conditions that are essential to the agreement. These are the terms or conditions upon which the agency is either unable or unwilling to compromise. Then identify and prioritize the terms and conditions that are desirable, but not essential to the agreement and which the agency is willing to compromise or relinquish.

Negotiation Techniques

There is not a single approach to negotiation and the following discussion is just one method to facilitate a successful negotiation effort.

Designate a lead negotiator to establish an organized and controlled negotiating environment that ensures the contract management team's effort is efficient, coordinated and unified. The lead negotiator should control the meeting and ensure everyone is hearing and discussing the same issue. Side discussions are distracting and may inadvertently provide information to the contractor to the disadvantage of the entire contract management team. If available, provide a private side room for the negotiation team to use for private conversations or to "caucus" during negotiations.

Do not provide the list of essential or other prioritized issues to the respondent because the list will offer a negotiating advantage. On the other hand, before meeting with the respondent, if objections to terms and conditions were not a part of a complete response, request a list of the respondent's objections to any contract terms and conditions that explains why the respondent is objecting to each term or condition.

Be prepared to explain why a particular term or condition is essential or objectionable and place the burden on the respondent to identify an alternative solution that meets agency needs. Do not feel pressured to agree or disagree to a single term or condition without considering the impact of the entire group of negotiated terms and conditions within the context of a final agreement. When the entire group of negotiated terms and conditions is completed, consider any new risks, costs or benefits. Take frequent breaks to discuss suggestions, options or alternatives outside of the presence of the respondent. Write down or use a laptop to record the exact language of any proposed or alternative terms and conditions, so that the team evaluates the exact language that will be included in the contract.

Negotiations can reach an impasse over conflicting terms thought to be essential to each party. The three question approach used to assist an agency in identifying the contracting objectives may be useful to assist the parties in clarifying and harmonizing potentially divergent objectives and interests. The three questions are:

1. What does your agency want, *specifically*?
2. What will having what your agency wants, *specifically*, do for your agency?
3. How will your agency know, *specifically*, when your agency has received what it wants?

The second question, “What will have what your agency wants, *specifically*, do for your agency?” may provide common ground to explore options to meet the needs of both parties. If an agreement is not reached consider beginning negotiations with the next respondent or re-soliciting the opportunity.