

# NIGP

## Global Best Practice

### NEGOTIATION

*Note: Application of guidance in public procurement practices will depend on the laws, procurement codes, ordinances, trade agreements, and policies of each entity.*

### STANDARD

Negotiation, whether simple or complex, requires planning. Negotiation in a competitive environment begins with the establishment of policies and procedures consistent with relevant procurement legislation. Laws, procurement type and complexity, level of risk, and other factors will determine how negotiations should be conducted. Procurement should develop a negotiation strategy based on the project's required and desired outcomes in alignment with entity goals. Integrative (win-win, interest-based) negotiation is best practice in public procurement.

#### Definition

**Negotiation:** A process of planning, reviewing, analyzing, and conferring used by two or more parties to reach a mutually acceptable agreement in a contracting relationship.

*Note: This practice is presented in two parts. SECTION 1 covers THEORY and SECTION 2 covers PROCESS. Element numbering will reflect this division.*

### INTRODUCTION

Negotiations in public procurement occur in various contexts. Negotiation is used when obtaining funding and resources, and working in an environment where competing interests are involved. Negotiation is also a fundamental function of sourcing and contract administration. Procurement professionals should keep the desired outcomes in mind when first drafting plans or strategy for use in the negotiation process. The successful outcome of a negotiation, once negotiation policies and procedures have been established, is dependent upon planning, process design and execution, decisions, actions, and inactions. All aspects of a negotiation may be subject to public scrutiny.

A primary difference between private and public negotiations during public contracting is the overarching law and policy that exists in public procurement. Concepts like fair opportunity to compete, equal treatment of suppliers, and transparency do not serve as legal constraints in non-government negotiations in the same way. This practice will note key principles where they are relevant to negotiation planning and execution for public contracting.

*Professional judgment: The procurement professional utilizes discernment, experience, knowledge, skills, training, best practices, lessons learned, integrity, and ethics throughout the preparation and execution of a negotiation.*

Procurement professionals generally are involved in negotiations with multiple interests that must be accommodated, and creative exploration of solutions is often needed. While procurement professionals must learn the differences among and how to adapt to varying negotiation styles, the focus of this practice is on the more effective approach: Integrative negotiation.

### SECTION 1: THEORY

#### Element 1.1: Establish Policies and Procedures for Negotiation

Procurement policies and procedures are the foundation for a consistent, ethical, and transparent process for conducting negotiations. Entities should dedicate a section of their procurement policies and procedures to describe the authority, criteria, and process for engaging in negotiation.

Policies and procedures should address:

- The roles and responsibilities of the procurement professional and the negotiation committee.
- Who may hold negotiation authority and the process by which this authority is delegated.
  - Procurement professional, stakeholders, reviewers
  - Elected officials, governing board, senior management
  - Suppliers
- Legal requirements
  - Laws, regulations, codes, ordinances, policies
- Conditions for entering into negotiations
  - Complexity and type of procurement
  - Level of risk
  - Dollar value of procurement
  - Terms of a proposed contract

#### Element 1.2: Negotiation Strategy and Considerations

Solicitations that permit negotiations include:

- Request for Proposals (RFP) or Invitation to Negotiate (ITN) with Consecutive or Concurrent Negotiations.
- Invitation for Bids (IFB) (when low price is above budget)
- Request for Qualifications (RFQu)

##### Negotiation Strategy

A well-crafted and executed negotiation strategy contributes to achieving the best outcome for all parties. Procurement should develop a negotiation strategy in collaboration with internal stakeholders that addresses the entity's needs and objectives based on the required and desired outcomes. The procurement professional is an integral part of the negotiating team and should take the lead role in crafting the negotiation strategy. This strategy should include the identification of other team members whose participation may be necessary should negotiations occur. The team should be limited to those members with essential skills or knowledge and temperament necessary to reach agreement.

*The skills of eliciting information, listening, and understanding requirements must be applied both during the development of the solicitation and during negotiation to identify the needs of internal clients, end users, and suppliers.*

### Element 1.3: The Negotiation Committee

The procurement professional should serve as the chairperson of the negotiation committee and facilitate the process. The decisions and actions of the committee should be properly documented in the procurement/contract file.

It is the Chairperson's responsibility to ensure:

- Everyone is heard and that all viewpoints are discussed.
- No member is influencing the decisions or discussion of other members.
- The confidential nature of the negotiation process, content, and outcome until award.
- The overall integrity of the process.
- Compliance with communication protocols.

The negotiation committee composition and number of members should be based on the nature of each procurement, member expertise and authority, and available resources. The negotiating committee may include:

- Procurement
- Finance
- Project management
- Legal
- Technical Expert/Subject Matter Expert (SME)

Members must commit a significant amount of time and effort as advance planning is necessary for the efficient and proper execution of the negotiation process. Negotiation committee members should be vetted in advance by the procurement professional to ensure all members are free of bias or conflict of interest. This should include the requirement for committee members to sign non-disclosure or conflict of interest declaration forms prior to participation, if they haven't already done so for the project. Members should conduct themselves in a professional, ethical manner and not use their position to influence other members of the committee.

*Ensuring that the negotiation process is free of any bias or conflict of interest is important for all stakeholders, not just the negotiation team.*

Once committee members have been selected, roles should be identified, including the lead negotiator. While the lead negotiator may be the procurement professional, that role may be delegated to another individual based on the needs of the project and the points to be negotiated. If delegated, the procurement professional should provide the negotiation lead with a document, i.e., manual, describing the negotiation process and guiding principles.

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A live training session should be conducted prior to negotiation and the Chairperson should reinforce:

- Negotiation committee member roles and responsibilities.
- The negotiation process and steps to be followed.
- Purpose/goals of the negotiation from an entity/project standpoint.
- The timeline and expectations, including attendance and participation at scheduled meetings.
- Compliance with communication protocols, internally and externally, as well as confidentiality, including
  - Signature of relevant declarations, e.g., impartiality, confidentiality, conflict of interest
  - Identification of actual, potential, or perceived conflicts of interest

### SECTION 2: PROCESS

The negotiation process must be carried out in accordance with all applicable laws, the language outlined in the solicitation, as well as the principle of ethics, which includes accountability, impartiality, professionalism, service, and transparency. The entity must keep all negotiation information secure and must maintain confidentiality of proposals, subject only to applicable freedom of information or public record laws.

#### Element 2.1: Negotiation Types: Simple and Complex

There are two main types of negotiation, simple and complex.

Simple negotiations may be utilized in the following contexts:

- Invitation for Bids (IFB) or Request for Quotations (RFQ), when allowed
- Contract modifications and change orders
- Projects with few stakeholders
- Small dollar purchases
- Minimal risk procurements
  - Time may not be a critical factor
  - Technical requirements are easily identified and understood

Complex negotiations may be utilized in the following contexts:

- Requests for Proposals (RFP)
- Invitation to Negotiate (ITN)
- Projects with several internal or external stakeholders
- High dollar procurements
- High risk procurements
  - Several factors outside of price alone, e.g. supplier performance, are major considerations and need to be negotiated to obtain best value
  - Time is a critical factor
  - Heavy technical or functional criteria are involved
  - Complex legal issues are involved, e.g., international procurements

### Element 2.2: When and with whom to negotiate

When negotiations are anticipated, the procurement professional conveys the entity's intent to negotiate to the top-ranked proposer(s) and facilitates the negotiation process. The type of solicitation and selection rationale determine when and with whom negotiation is conducted.

During the procurement process:

- Conduct negotiations after the offer submission deadline and prior to award.
- Negotiations may be used for change orders, contract modifications, or prior to exercising contract options to renew.

Who to negotiate with will depend on the type of solicitation:

Negotiations during qualifications-based solicitations or Request for Proposals (RFP) with Consecutive Negotiations often take place with the proposer with the single highest scoring or lowest priced proposal based on solicitation selection rationale. If negotiations fail, then negotiations with the next most qualified or lowest priced proposer can begin.

When conducting a Request for Proposals (RFP) with Concurrent Negotiations aka competitive or negotiated procurements, negotiations often take place with all suppliers within the competitive range to not provide a competitive advantage to a single proposer.

Once proposals have been reviewed and a competitive range of suppliers identified, a best and final offer (BAFO) may be requested from each of the proposers in the competitive range. The competitive range may consist of a single supplier. Once the BAFO request is made and responses are received, in most cases, no further negotiations are conducted. The BAFOs are then ranked by applying the evaluation scoring criteria issued with the RFP for both technical and price-related factors, and an award recommendation is made to the top-ranked proposer(s). The evaluation of the BAFO should be recorded in the procurement file along with selection justification and use the same evaluation criteria as stated in the solicitation.

### Element 2.3: Procurement Professional Responsibilities

Simple negotiations are often handled by the procurement professional alone or with a single end user, as necessary.

During negotiations, the procurement professional's responsibilities include:

- Recording the activities related to the negotiation process.
  - Ensure all negotiated elements are captured for inclusion in the contract
  - The process for record-keeping should be documented and consistent for all negotiations
  - A repository of the negotiation documents should be established and maintained
- Serving as the designated single point of contact for proposers and management of negotiation communications.
  - All negotiation communications regarding the solicitation must be directed to the procurement professional managing the negotiation process to decrease the likelihood of:
    - Inappropriate sharing of information
    - The appearance of impropriety
    - The potential for a protest
- Managing, guiding, and facilitating the negotiation process
  - Prepare negotiation strategy
  - Ensure the negotiating team understands the objectives of the Best Alternative To A Negotiated Agreement (BATNA)
  - Obtain approval from authorized entity members

### Element 2.4: Planning and Preparation

Planning and preparation are key factors in successful negotiations. The procurement professional should determine the level of preparation needed. Simple negotiations may not require the same amount of preparation as complex negotiations.

When conducting a procurement, the solicitation document should state whether negotiation is permitted and what is or is not open to negotiation (e.g., scope, payment terms, jurisdiction, insurance, or other terms and conditions). Listing items that will or will not be negotiated allows suppliers to understand how best to formulate offers. Guidance should also be provided on the process to include exceptions/alternatives to the terms within the solicitation.

*The ability for proposers to take exception will vary by jurisdiction or entity. Best practice recommends proposers declare within their response any exceptions to the terms and conditions of the solicitation. Exceptions in some jurisdictions may result in a determination of nonresponsiveness.*

The negotiation team must agree on its objectives and ideal outcome. Considering the objectives allows the team to determine where they stand as they negotiate each point. A good negotiation strategy considers:

1. What the entity must have.
2. What would be good or great for the entity to have.
3. What the entity could do without, i.e., concessions.

Effective planning and preparation steps begin before engaging in negotiation and include the following:

- Procurement professionals should work with their entity's internal stakeholders to create a negotiation committee (if necessary) and a unified negotiation strategy.
  - Identify participants and their roles
  - Determine the level of negotiation expertise and skills of the entity's procurement and legal teams
    - If expertise is not available internally, it may be beneficial to consider supplementing the entity's expertise by engaging a negotiation consultant, subject matter expert, or investing in negotiation training
    - Temperament and personality types should be considered when building a team. Desirable traits include:
      - Ability to listen
      - Empathy
      - Ability to engage in respectful dialogue
      - Integrity
      - Patience
      - Flexibility
      - Objectivity
      - Responsibility
      - Fairness
      - Impartiality
  - Ensure everyone understands the technical requirements
  - A supervisor and a subordinate should not serve on the same committee, as it may consciously or unconsciously cause undue pressure on the subordinate

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- Identify the number of qualified proposers.
  - Negotiation process, e.g., short listing, interviews, concurrent, Best and Final Offer (BAFO)
- Conduct risk assessment, management, and mitigation.
  - Determine project risk exposure
  - Establish entity risk tolerance in areas of:
    - Health and Safety
    - Reputation
    - Politics
    - Operations
    - Strategy
    - Compliance
    - Finance
  - Determine risk tradeoffs vs. cost
- Conduct research.
  - Research the supplier and what is important to them
  - Determine the type of good/service and associated industry/market standards
  - Analyze market conditions
- Establish negotiation objectives.
  - Analyze price
    - Determine a target price range or items to be negotiated listed in order of priority
    - Obtain entity maximum acceptable budget range prior to negotiations
  - Establish a price objective for an agreement that is fair and reasonable through price or cost analysis
    - Total cost of ownership (TCO)
    - Pricing, both amount and structure
      - Compare to Independent (Government) Cost Estimate (IG)CE
    - Price escalation/de-escalation terms
  - Schedule
  - Delivery
  - Requirements
  - Key personnel
  - Terms and conditions
  - Potential for added value (sustainability, warranty, penalties, training)
- Develop questions that address each party's interests.
  - Identify the advantages and disadvantages of each party's position, for example, if time is a priority to the entity, that may present an advantage to the supplier
- Obtain a copy of any third party agreements
  - Service level agreement (SLA) for IT procurements
  - Separate maintenance agreements
  - Pop-up or embedded terms and conditions
- Focus on strengths, weaknesses, opportunities, and threats (SWOT) identified during evaluation, or in the quote or proposal.
- Determine the financial benefit of maintaining/supporting existing supplier relationships vs. the cost of changing suppliers.

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- Establish the BATNA, which could include:
  - Insourcing, i.e., the use of existing entity resources
  - Reduced quantities
  - Looking at alternative suppliers or solutions
  - Alternatives such as leasing vs. purchase
  - Rejecting agreements that would leave the entity worse off than the BATNA
- Rehearse and conduct a mock negotiation.

*Power in a negotiation comes from the ability to walk away from negotiations. Thus, the party with the best BATNA is the more powerful party in the negotiation.*

### Element 2.5: Integrative Negotiation

The procurement professional's goal is to negotiate towards a mutually advantageous agreement that creates value for all parties. Negotiations should be approached as an interest-based inquiry to find solutions and build mutually beneficial, transparent entity-supplier relationships.

In an integrative (win-win, interest-based) negotiation approach:

- The desired result is an unambiguous and equitable contract for both parties.
- The focus is on building relationships (spend as much time fostering relationships as on substantive issues).
- Collaboration, not confrontation, is invited (e.g., How can we come to an agreement? What steps can we take for both parties to achieve success?).
- Both parties take responsibility for generating options that create value to reach an equitable solution.

Negotiation Techniques:

- Anchor the discussion with a draft agreement.
- Create a detailed agenda for negotiation meetings.
- Let the offeror speak to their objectives first.
- Ask questions and listen to understand what each party perceives as valuable.
- Notice non-verbal cues.
- Observe the offeror's body language.
- Hold back entity concessions as long as possible.
- Give small concessions that have little or no value to the entity rather than one large concession. Avoid 'bundling' everything into a single deal.
- Take a break, regroup with the negotiation committee and discuss.
- Use positive statements.
- Reframe anxiety as excitement.
- Draw on the power of silence.
- BATNA: Know when to walk away and understand it is okay to walk away.
- Remember you are representing your entity and you must know/support entity goals.
- Be aware of and considerate of sensitive topics.



### Negotiation Considerations:

- Face to face (virtual or in person) meetings are ideal for conducting complex negotiations.
- Be certain the person you are negotiating with has the authority to make decisions on behalf of their entity.
  - If negotiating with a large organization, obtain written verification of authority
- Maintain fair and equitable competition, avoiding actions that could give an unfair advantage or raise questions about conflicts of interest. Maintain ethical behavior and standards.
  - Federal and state laws levy civil and criminal penalties for misrepresentation
- Maintain confidentiality of discussions regarding specific proposals or evaluations within the negotiation committee until the award or solicitation blackout period, i.e., cone of silence, has ended.
- Encourage suppliers to provide their most competitive pricing.
  - Avoid disclosure of other suppliers' pricing
  - Avoid specifying the price required to become eligible for award
- Ensure procurement process integrity by maintaining consistency with the solicitation requirements, including evaluation criteria.
  - Significant new data, information, or instructions should be supplied to all offerors in the competitive range without favoritism or bias

### Element 2.6: Negotiation Steps

Simple and complex negotiations follow similar steps. Depending upon the complexity, these steps may be abbreviated for best fit. For example, the test and evaluation steps may not be applicable to simple negotiations. Consider the different strategies that are applicable when negotiating in various contexts such as qualifications-based procurements, sole source contracts, amendments, and disputes, and adjust the steps accordingly.

1. Open: Each party provides objectives of the negotiation.
  - a. Explain the ground rules of negotiation.
  - b. Address points of negotiation (e.g., price, schedule).
  - c. Each party explains the desired outcome from the negotiation.
2. Test/Confirm: Each party tries to understand what is important to the other and where trade-offs could be made.
  - a. Ask questions.
  - b. Listen.
3. Propose/Discuss: Having heard each party's objectives begin addressing negotiation points such as:
  - a. Entity explanation of proposal deficiencies or significant weaknesses that could signal interests and possible value tradeoffs.
  - b. The impact of market factors, increase in quantities, and benchmarks.
4. Bargain/Counter: Each party points out a component they would like to address/ negotiate back and forth.
  - a. Parties exchange counteroffers.
  - b. Record concessions and gains.
    - During oral presentations, discussions, or at the time of negotiation meetings in RFPs, concessions or additional promises may not be in the proposal and should be documented by the proposer in the form of a revised proposal.
5. Evaluate: Once bargaining is completed, the supplier should submit a revised proposal, final offer, or BAFO based on the negotiation discussions.
  - a. The negotiation committee or internal stakeholders should consider the negotiated offer.
  - b. Include the evaluation or negotiation committee to determine if a BAFO is needed.
  - c. The final offer or BAFO should be evaluated based on the criteria as stated in the solicitation.

The above negotiation steps may be repeated as many times as necessary.

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### Element 2.7: Completion/Finalization

The procurement professional will document the outcome of the negotiations to be included in the final contract. Once agreement is reached, it should be reviewed by internal stakeholders, including legal if any terms and conditions were revised, as well as by the supplier.

Ensure all negotiated changes are accurate and stated in the final proposed agreement. Follow the appropriate award procedures based on policies and the type of solicitation.

The procurement/contract file should include a record of the negotiation, including:

- Objective and history of the procurement.
- Names of negotiators.
- Explanation of how the final price was negotiated.
- Discussion of revised contract terms.

The negotiation is not complete until the contract is written and executed.

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