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1.1 Describing Negotiations

Negotiation Is Part of Life (FAR 15.402). Negotiation is a part of normal everyday life. In fact, experts on the subject have said that life, itself, is just one continuous negotiation.

Still, many people feel that they are not experienced contract negotiators. Perhaps they do not realize that there are many types of contracts. Not all are complex written agreements. Most contracts are oral agreements which may or may not involve the exchange of monetary consideration.

Without realizing it, you have probably been involved in a variety of contract negotiations every day of your life. In fact, we constantly bargain with other people to fulfill both our monetary and non-monetary needs.

- At work, you are probably involved in continuing negotiations with your superiors, subordinates, and coworkers concerning a variety of personal and professional issues. They may be as minor as deciding who will make the next pot of coffee or as major as the rating on your annual performance evaluation.
- At home, you are probably involved in continuing negotiations with your family over a wide variety of issues. They may be as minor as the time for dinner or as major as where you will live. A child crying for a favorite toy can be a formidable negotiator.
- You have likely been involved in numerous negotiations that will have a long-term affect on the course of your life, including:
    - The terms of your current employment;
    - An automobile purchase contract or lease agreement; or
    - Your home mortgage or apartment rental agreement.

In fact, you must negotiate for most things you want in life. You can only avoid negotiation if you have no desire for anything held or controlled by someone else. Regardless of your profession, skill as a negotiator is essential to your success. In Government contracting, the skill is particularly important because your daily work requires you to obtain supplies and services from responsible sources at fair and reasonable prices.

Description of Negotiation. Negotiation is a process of communication by which two parties, each with its own viewpoint and objectives, attempt to reach a mutually satisfactory result on a matter of common concern.

In negotiation, a mutually satisfactory result is vital, because even though the parties may have opposing interests they also are dependent on each other. Labor and management, for example, need each other to produce products efficiently and effectively. Likewise, buyers and sellers need each other to transact business. Both sides must be willing to live with the result.

Negotiation is not one party dictating or imposing terms on another. When that happens, the outcome will rarely produce mutual satisfaction. The result can only be mutually satisfactory if both differences and common interests are considered.

To obtain agreement, you must generally sacrifice or yield something in order to get something in return. In other words, you must give to get. But as long as the anticipated benefit is greater than your sacrifice, a negotiated agreement is beneficial. The limit on yielding is reached when one party believes that concessions would be more costly than the benefits of agreement.

While negotiation is often a process of mutual sacrifice, it should also be a process of finding ways whereby both parties will have their interests optimized under the circumstances. Negotiations should not just be aimed at how to split the pie. Instead they should be aimed at finding optimal solutions -- ways to make the pie larger for all concerned. For example, both parties benefit when negotiators find that a change in buyer requirements will enable the seller to deliver a higher-quality standard product instead of a specially built product. The seller realizes lower risks or perhaps more profit from the sale

of a standard product. The buyer pays a lower price for a product that meets the buyer's real needs.

Negotiated Contracts vs. Sealed Bidding (FAR 14.101(d), 15.000, and FAR 52.215-1). The Federal Acquisition Regulation (FAR) states that any contract awarded using other than sealed bidding procedures is considered a negotiated contract.

- Procedures for contracting by sealed bidding require the Government to evaluate bids without discussions and award to the responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government considering only price and price related factors. Negotiations are not permitted prior to contract award.
- Procedures for contracting by negotiation permit negotiations prior to contract award. However, a solicitation under procedures for contracting by negotiation may or may not actually require negotiations. For example, the Instructions to Offerors -- Competitive Acquisition:
  - Standard provision states that the "Government intends to evaluate proposals and award without discussions." When that provision is used, actual negotiations are not permitted unless the contracting officer determines in writing that they are necessary.
  - Alternate I, states that the "Government intends to evaluate proposals and award a contract after conducting discussions with offerors whose proposals have been determined to be within the competitive range." Here negotiations are required with any offeror(s) in the competitive range.

In Government contracting: (FAR 15.306(d)). Negotiations are exchanges, in either a competitive or sole source environment, between the Government and offerors, that are undertaken with the intent of allowing the offeror to revise its proposal. These negotiations may include bargaining. Bargaining includes persuasion, alteration of assumptions and positions, give-and-take, and may apply to price, schedule, technical requirements, type of contract, or other terms of a proposed contract. When negotiations are conducted in a competitive acquisition, they take place

after establishment of the competitive range and are called discussions.

The key word in this definition is "bargaining." The Government anticipates that bargaining will occur in competitive as well as noncompetitive negotiations.

Satisfactory Negotiation Results (FAR 15.101, 15.402(a), 43.103(a), and 49.201(a)). What is a satisfactory result in a Government contract negotiation? That depends on whether the negotiation is competitive or noncompetitive and when it takes place in the contracting process.

- Competitive discussions may take place either before contract award or before award of a task/delivery order under an indefinite-delivery indefinite-quantity contract. The discussions with each offeror in the competitive range should be directed to facilitating preparation of a final proposal revision that will provide the best value for the Government, given the award criteria, the offeror's proposal, and existing constraints within the offeror's organization. Then the Government can evaluate the available proposals to determine which proposal offers the overall best value.
- Noncompetitive negotiations can take place either before or after award. In noncompetitive negotiations for:
    - Award of a new contract or a task/delivery order under an existing indefinite-delivery indefinite-quantity contract, the satisfactory result is a contract or order that provides for the purchase of the required supplies or services from a responsible source at a fair and reasonable price.
    - A bilateral contract modification, the satisfactory result is a contract modification that reflects the agreement of the parties about any modification of contract terms, including any necessary equitable adjustment related to the modification.
    - A fixed-price termination for convenience settlement, the satisfactory result is a settlement that fairly compensates the contractor for the work done and the preparations made for the terminated portions of the contract, including a reasonable allowance for profit.

The Other Party in Government Contract Negotiation. In preaward Government contract negotiations, a potential recipient of the Government contract is normally referred to as an "offeror." In post-award situations, the contractor may still be considered an offeror, because the negotiation centers on the offer submitted by the contractor. However, most contracting professionals use the term contractor after contract award. It would be particularly confusing to refer to a firm submitting a contract termination proposal as an offeror.

To avoid confusion, this text will consistently use the term "contractor" in referring to the non-Government party in a Government contract negotiation.

Negotiation Success. A successful negotiation is a product of many factors. Factors that contribute to success in any negotiation always include:

- **The specific circumstances surrounding each negotiation.** This may be viewed as the bargaining leverage available to each party involved. For example, the circumstances often favor the contractor when the Government is bargaining for a high-demand product in short supply. Similarly, the circumstances will generally favor the Government when several firms are vying to provide a product only demanded by the Government.
- **The skill of the negotiators.** Highly skilled negotiators will have a greater probability of negotiation success than negotiators who do not have the requisite skills. Good negotiators can often obtain favorable deals under adverse circumstances. Conversely, negotiators with poor bargaining skills sometimes fail to obtain satisfactory agreements even when the circumstances favor their bargaining position.
- **The motivation and fairness of each party.** The greater the motivation and fairness on each party, the more likely it is that the negotiations will end with a satisfactory agreement.
    - Successful outcomes are more likely when one or both parties are willing to make fair concessions.
    - The likelihood of successful negotiation decreases when either party is poorly motivated or unfair. Achieving negotiation success becomes

particularly difficult when one party is unwilling to compromise or show any flexibility.

Negotiator Abilities. The best negotiators exhibit the ability to:

- **Plan carefully.** Planning begins with requirement development and continues through negotiation. It includes market research, solicitation preparation, and proposal evaluation. You must know the product, the rules of negotiation, and your alternatives.
- **Gain management support.** Management support is vital to your success as a negotiator. If contractor personnel know that management does not support your objectives, the contractor's negotiators may simply tolerate you until they can escalate the negotiation to management.
- **Effectively apply bargaining techniques.** Good negotiators are capable of employing bargaining techniques which facilitate negotiation success.
- **Communicate effectively.** Good negotiators:
  - Sell others on their bargaining position by speaking in an articulate, confident, and businesslike manner.
  - Disagree with others in a cordial and non-argumentative manner.
  - Listen effectively. Many otherwise good negotiators begin to concentrate on their answer almost as soon as the other party begins speaking. As a result, they miss the true meaning of the communication.
- **Tolerate conflict while searching for agreement.** Most contract negotiations involve some conflict. After all, no two people on earth agree on everything all the time. Negotiators who:
  - Can agree to disagree in a polite and respectful manner will be able to search for ways to achieve a mutually satisfactory outcome.
  - Will give anything to avoid conflict are often not able to secure satisfactory results for their side.
  - Who display a tendency for arguing will increase the conflict and make a satisfactory outcome all the more difficult to attain.
- **Project honesty.** Good negotiators are honest and they make others believe that they are honest. Securing trust is vital to securing a mutually satisfactory

outcome. Concessions are difficult to obtain when other do not trust you.

- **Foster team cooperation.** All members of the negotiation team may not agree on every issue. Disagreements must be resolved in a manner that fosters team cooperation and the appearance of team unity during contract negotiations.
- **Apply good business judgment.** Good negotiators are able to evaluate every change in a negotiating position based on its overall effect on attaining a mutually satisfactory result.

1.2 Recognizing Possible Negotiation Outcomes And Styles

Negotiation Outcomes. In general, there are three possible outcomes to every negotiation. These outcomes are known as "win/win," "win/lose," and "lose/lose." Any negotiation can conceivably result in any of these outcomes, but different negotiation styles can make one or the another more likely.

Win/Win Outcomes (FAR 15.101, 15.402(a), 43.103(a), and 49.201(a). A win/win outcome (also known as a both-win outcome) occurs when both sides achieve long-term satisfaction with negotiation results. Negotiations emphasize developing a mutually beneficial agreement. For example, awarding a contract at a fair and reasonable price is in the best interest of both the contractor and the Government.

Commercial businesses are emphasizing win/win negotiations because of the increasing importance of long-term business relationships. Each side has a vested interest in mutual long-term satisfaction. Any short-term advantage achieved by wringing out every last concession is usually not as important a long-lasting business relationship.

There are several important reasons why Government negotiators should also strive for win/win outcomes.

- FAR guidelines emphasize a mutually satisfactory result by using negotiation guidelines such as best value, fair and reasonable price, equitable adjustment, and fair compensation for work performed.

These guidelines emphasize that the Government should not win at the expense (or loss) of the contractor.

- The Government has a vested interest in the long-term contractor success and survival.
  - Well-stocked good-quality suppliers providing goods and services at reasonable prices are essential to Government operations.
  - Contractor success enhances competition by encouraging more firms to do business with the Government, and increased competition reduces contract prices and improves quality.
- Win/win negotiators often achieve better outcomes. A negotiator is less likely to be giving and trusting when the other negotiator displays selfishness and mistrust. The genuine concern demonstrated by win/win negotiators is frequently reciprocated by the other party.
- Win/win negotiations are typically much less confrontational and tend to foster better long-term relationships.
- Win/win negotiations are characterized by much higher levels of trust and cooperation which facilitate the negotiation process.

Win/Lose Outcomes. When a negotiation results in a win/lose outcome, one side is perceived as having done significantly better at the expense of the other. This type of negotiation tends to be highly competitive, with a large degree of mistrust on both sides.

In commercial business, win/lose outcomes often occur when the negotiators do not anticipate additional business beyond the initial transaction. There is no motivation to ensure long-term satisfaction for the other side. Examples of win/lose outcomes abound in everyday life, such as private home and auto sales where the negotiators generally do not anticipate additional negotiations with the other party.

- Both sides often feel that they are the losers in a win/lose negotiation because of the competitiveness and mistrust that characterized the negotiation.
- The losing side might feel good at the conclusion of the win/lose negotiation because of their immediate perception that they obtained the best deal possible under the circumstances.

- In the long run, the losing party often regrets the agreement after discovering that the deal was not a good one after all.
- The losing party becomes even more mistrustful of the other party and reluctant to continue any sort of business relationship.

In a monopsony situation, where the Government is the only buyer, the Government could achieve many short-term wins to the detriment of contractors by dictating contract terms. But win/lose outcomes may have the following negative long-term consequences:

- Suppliers on the losing end of win/lose negotiations may be forced out of business.
- High-quality suppliers may no longer be willing to do business with the Government.
- Contracts with the remaining suppliers may have a greater risk of poor-quality or overpriced deliverables.

Lose/Lose Outcomes. When there is a deadlock, the negotiating outcome is known as a lose/lose outcome. A deadlock occurs when final agreement cannot be obtained. Since both parties had a stake in a successful outcome of the negotiation (or they would not have been negotiating in the first place), both sides lose when negotiations stalemate and deadlock occurs.

The contractor side may lose more than just the profit projected for the lost Government contract.

- Any contribution income (i.e., the difference between revenue and variable cost) that could have been used to help absorb contractor fixed costs may be lost. As a result, all fixed costs must be absorbed by the other business of the firm. The resulting cost increases for those items may reduce company profits and may even contribute to overall company losses.
- The direct labor associated with the proposed contract may no longer be needed by the contractor. As a result, the contractor may be forced to lay off employees. A lay-off may affect labor management relations. It may also increase direct labor costs for other contracts, because lay-offs typically affect lower-paid employees first.

When a deadlock occurs, the Government side also suffers a considerable loss because the desired supply or service often cannot be procured in a timely manner. This is particularly true when the Government is negotiating with a single firm under an exception to full and open competition. When deadlock occurs with a sole source contractor, the unique product or service cannot be obtained.

FAR 15.405(d). Sometimes, avoiding a deadlock is very difficult when the other party is unfair or uncompromising. The Government must decide on the better alternative: deadlocking or being on the losing end of a win/lose outcome. Considerable effort should be made to avoid a deadlock because the Government side will suffer a loss whenever one occurs.

If the contractor insists on an unreasonable price or demands an unreasonable profit/fee, **take all authorized actions to resolve the deadlock**. Determine the feasibility of developing an alternative source. Consider other available alternatives (e.g., delaying the contract, revising requirements, or Government performance). If the contracting officer cannot resolve the deadlock, the contract action must be referred to higher-level management. Management involvement assures a unified Government approach to resolving or accepting the deadlock.

Win/Win Negotiation Style. The win/win negotiation style is to negotiate based on the merits of the situation to obtain a satisfactory result. Generally, you will find that win/win negotiators:

- **Attack the problem not each other.** The differences between the two sides are a mutual problem. In a win/win negotiation, discussions center on identifying and resolving these differences, not attacking the messenger. Negative personal comments can add nothing to attaining a mutually satisfactory result. Ideally, negotiators should think of themselves as working side-by-side to resolve differences in a cordial and businesslike manner.
- **Focus on long-term satisfaction and common interests.** Many negotiators become so involved with their objectives in a particular negotiation that they lose sight of the bottom line -- long-term satisfaction. Winning a particular point in a negotiation may mean

losing a chance to achieve a mutually satisfactory result.

- **Consider available alternatives.** Your solution may not be the only right solution to a particular point in the negotiation. The same may be true of the contractor's position. Attempt to identify other solutions for consideration. The final solution may not be any better than the original solution offered by one side or the other. However, it is perceived as better, because it was reached through mutual cooperation.
- **Base results on objective standards whenever possible.** Negotiators are more likely to be satisfied with a particular result, when it is based on an objective standard. Do not refuse to compromise simply because "that's the auditor's recommendation." What was the standard used by the auditor in developing that recommendation? There may be many standards to consider including:
  - Historical experience;
  - Industry practice; or
  - Projections developed using quantitative analysis.
- **Focus on positive tactics to resolve differences.** Do not rely on deceptive behavior or bargaining ploys. Tricking another negotiator may win an apparently favorable result, but the results during contract performance or in the next negotiation may be devastating.
- **Emphasize the importance of a win/win result.** Remain positive during and after the negotiation. Never gloat about winning the negotiation, even as a joke.
  - The perception of the result by each side determines whether an outcome is win/win or win/lose. In other words, the same contractual result could be viewed as being either win/win or win/lose depending on the eyes of the beholder. For example, a $700,000 contract price could be considered a win/win or win/lose outcome depending on how the contractor views that price.
  - The negotiator's behavior during and after negotiation is often the primary influence on the other side's perception.
  - Regardless of the negotiation result, the contractor is more likely to perceive a win/win outcome when the Government negotiator exhibits win/win behavior.

    - The contractor is more likely to perceive a win/lose result when the Government side appears to have a win/lose attitude.
    - You should exhibit a win/win attitude before, during, and after negotiation.

Win/Lose Negotiation Style. The win/lose negotiation style is to negotiate based on power and using that power to force one negotiator's will on the other. That power could be real or only perceived by the other negotiator. Generally, win/lose negotiators tend to:

- **Use deceptive negotiation tactics to increase or emphasize their relative power in the negotiation.** These deceptive tactics may work, but once identified by another negotiator, their use can actually jeopardize the possibility of a mutually satisfactory result. Several of the more commonly used tactics will be described later in this text.
- **Focus on negotiating positions rather than long-term satisfaction.** Focusing on the legitimacy of a single position (rather than the reasons for differences between positions) emphasizes disagreement rather than agreement.
- **Be argumentative.** Focusing on positions leads to arguments over whose position is better, instead of how to reach agreement.
- **Show reluctance to make any meaningful concessions.** Focusing on positions also makes them unwilling to make meaningful concessions. Any concession might lead to questions about the legitimacy of their position. Such questions may weaken their actual or perceived power in the negotiation.
- **Be highly competitive and mistrustful of other negotiators.** They do not share information unless it is absolutely necessary. Alternatively, they may try to hide relevant information by overloading the other negotiator with irrelevant information.

Spectrum of Negotiation Styles. Negotiation styles are rarely pure win/win or win/lose. Instead, they cover a wide spectrum between the two extremes. You should strive for a pure win/win style, but many negotiators exhibit a combination of win/win and win/lose traits during the course of a negotiation.

For example, mildly deceptive behavior is sometimes exhibited by even the best win/win negotiators. The use of some win/lose traits may even be justified, particularly when dealing with a win/lose negotiator. Similarly, win/lose negotiators often exhibit some win/win traits even though this behavior may only be intermittent or a ploy to deceive the other negotiator.

The figure below depicts the range of negotiation styles with win/win and win/lose at opposite ends of the range. While the spectrum of styles ranges from 100 percent win/win to 100 percent win/lose, the overwhelming majority of negotiators have a style that falls somewhere between the two extremes.

```
                  Win/Win

  100% 90% 80% 70% 60% 50% 40% 30% 20%
                 10% 0%

<---------------------------------------
        ----------------------->

 0% 10% 20% 30% 40% 50% 60% 70% 80% 90%
                  100%

                                  Win/Lose
```

No negotiation style or combination of styles assures a win/win outcome. In fact, following a particular style does not even guarantee that others will perceive that you are following that style. Behavior that is 60 percent win/win and 40 percent win/lose may be perceived as win/lose by the contractor and may even result in deadlock. Likewise, there is always a possibility that a negotiating style that is 30 percent win/win and 70 percent win/lose may be perceived as win/win by the contractor.

While the proportion of win/win behavior needed to produce a win/win outcome varies by negotiation and is never certain, the probability of a win/win outcome typically increases in proportion to the win/win behavior exhibited by the negotiators. Conversely, the probability of either a win/lose or lose/lose outcome increases in

proportion to the win/lose behavior exhibited by the negotiators.

Negotiation Style Comparison. The following table compares win/win and win/lose negotiation styles:

Characteristic	**Win/Win Style**	**Win/Lose Style**
Negotiation Goal	Obtain a result that is satisfactory to both sides, including a fair and reasonable price.	Obtain the best possible deal for your side regardless of consequences to the other side.
Focus	Solve mutual problems.	Defeat the other party.
Environment	Cooperation and trust	Mistrust and gamesmanship
Negotiation Characteristics	• Negotiators attack the problem not each other • Focus on long-term satisfaction • Available alternatives considered • Results based on objective standards • Focus on positive tactics to resolve differences • Emphasis on a win/win result.	• Tactics designed to increase or emphasize relative power. • Focus on negotiating positions rather than long-term satisfaction. • Argumentative • Reluctance to make any meaningful concessions • Highly competitive

1.3 Describing Attitudes That Lead To Successful Negotiations

Overriding Negotiation Themes. Government negotiators should always keep in mind the following basic attitudes when negotiating Government contracts:

- Think win/win;
- Sell your position;
- Win results not arguments;
- Everything is negotiable; and
- Make it happen.

Think Win/Win. A win/win outcome is the paramount objective in a Government contract negotiation. Consequently, you should consciously display a win/win attitude and negotiating style throughout the negotiation process. Use win/win negotiation tactics and avoid tactics that might lead the contractor to perceive that you are using a win/lose style.

Sell Your Position. During negotiations, you are acting as an agent of the Government trying to sell your positions to the contractor's team. Accordingly, you should strive to be persuasive while being respectful and polite. In negotiations as in other forms of sales, it is easier to sell a product when the prospective customer likes and respects you.

Win Results Not Arguments. Trying to win the argument is too often a sign of a win/lose negotiation. When argumentative behavior characterizes negotiations, one or both sides are likely to perceive a win/lose outcome even when the final outcome could otherwise appear balanced and fair. Remember that persuasion is not only a matter of logic and content, but also significantly depends on the manner of presentation.

Everything Is Negotiable. No negotiation position is sacred and off limits if it prevents the more important goal of a mutually satisfactory outcome. Consequently, you must always be prepared and willing to negotiate all issues.

Make It Happen. To achieve long-term satisfaction, you may need to display creativity, initiative, and even courage. Your goal is a mutually satisfactory outcome. Find a way to make it happen.

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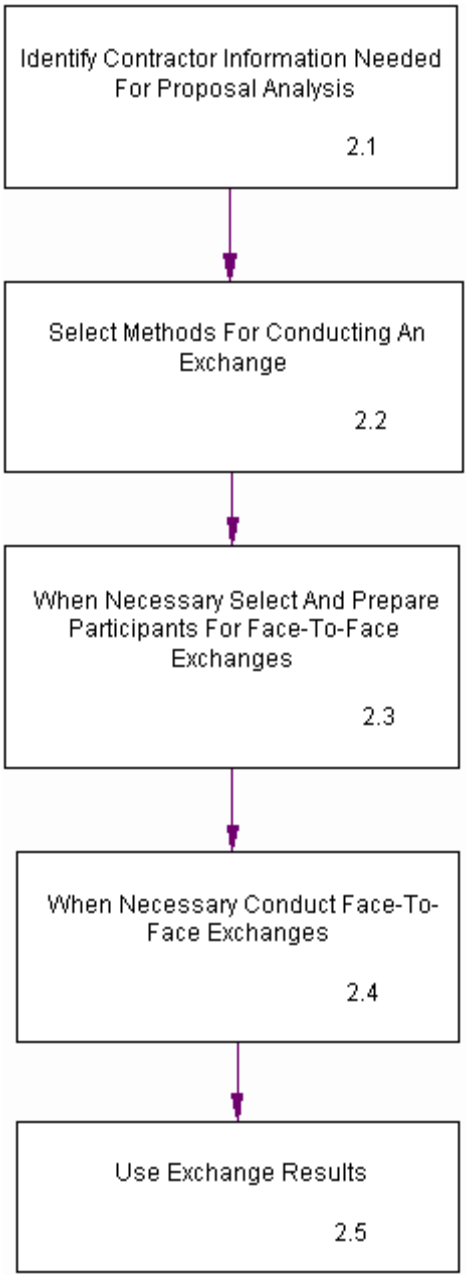
2.0 Chapter Introduction

Procedural Steps. The following flow chart outlines the steps of fact-finding:



2.1 Identifying Contractor Information Needed For Proposal Analysis

Exchanges (FAR 15.306). "Exchange" is a general term used to describe any dialogue between the Government and the contractor after receipt of the proposal(s), including contract negotiations. However, the material in this

chapter is limited to exchanges prior to contract negotiation.

The objective of prenegotiation exchanges is to identify and obtain available contractor information needed to complete proposal analysis. In addition, most types of prenegotiation exchanges provide the contractor with an opportunity to seek clarification of the Government's stated contract requirements.

In competitive negotiations, there may be several different types of exchanges, each with its own unique rules:

- Clarifications with the intent to award without discussions;
- Communications with contractors before establishment of the competitive range; and
- Exchanges after establishment of the competitive range but before negotiations.

In noncompetitive negotiations, exchanges after receipt of proposals and prior to negotiations are normally referred to as fact-finding.

Information Already Available. Before conducting an exchange with the contractor, you should already have:

- The solicitation, unilateral contract modification, or any other document that prompted the contractor's proposal;
- The proposal and all information submitted by the contractor to support the proposal;
- Information from your market research concerning the product, the market, cost or price trends, and any relevant acquisition history;
- Any relevant field pricing or audit analyses;
- In-house technical analyses; and
- Your initial price analysis and, where appropriate, cost analysis.

Clarifications (FAR 15.306(a), 52.212-1(g), and 52.215-1(f)(4))(WECO Cleaning Spec., CGEN B-279305, June 3, 1998).

Clarifications are limited exchanges, between the Government and contractors, that may occur when the Government contemplates a competitive contract award without discussions.

Remember that award may only be made without discussions when the solicitation states that the Government intends to evaluate proposals and make award without discussions. For example, both the standard FAR Instructions to Offerors -- Competitive Acquisition and Instructions to Offerors -- Commercial Items provisions advise prospective offerors that award will be made without discussions.

When you contemplate making a competitive contract award without conducting discussions, you may give one or more contractors the opportunity to clarify certain aspects of proposals that may have an effect on the award decision. For example, a request for clarification might give the contractor an opportunity to:

- Clarify the relevance of a contractor's past performance information;
- Respond to adverse past performance information if the contractor has not previously had an opportunity to respond; or
- Resolve minor or clerical errors, such as:
    - Obvious misplacement of a decimal point in the proposed price;
    - Obviously incorrect prompt payment discount;
    - Obvious reversal of price f.o.b. destination and f.o.b. origin; or
    - Obvious error in designation of the product unit.
- Resolve issues of contractor responsibility or the acceptability of the proposal as submitted.

The key word is limited. The purpose of a clarification is to permit a contractor an opportunity to clarify key points about the proposal as originally submitted. You must not give the contractor an opportunity to revise its proposal.

Communications (FAR 15.306(b)). When negotiations are anticipated, the contracting officer must first establish the competitive range. Communications are exchanges, between the Government and contractors, after receipt of proposals, leading to establishment of the competitive range. Communications are only authorized when the contractor is not clearly in or clearly out of the competitive range. Specifically, communications:

- Must be held with contractors whose past performance information is the determining factor preventing them from being placed within the competitive range. Such

communications must address adverse past performance information to which the contractor has not had a prior opportunity to respond.

- May be held with other contractors whose exclusion from, or inclusion in, the competitive range is uncertain. They may be used to:
  - Enhance Government understanding of the proposal;
  - Allow reasonable interpretation of the proposal; or
  - Facilitate the Government's evaluation process.
- Must not be held with any contractor not in one of the situations described above.

The purpose of communications is to address issues that must be explored to determine whether a proposal should be placed in the competitive range.

- Communications must address any adverse past performance information to which the contractor has not previously had an opportunity to comment.
- Communications may address:
  - Ambiguities in the proposal or other concerns (e.g., perceived deficiencies, weaknesses, errors, omissions, or mistakes); and
  - Information relating to relevant past performance.
- Communications must not permit the contractor to:
  - Cure proposal deficiencies or material omissions;
  - Materially alter the technical or cost elements of the proposal; and/or
  - Otherwise revise the proposal.

Exchanges After Establishment of the Competitive Range But Before Negotiations. Exchanges after establishment of the competitive range but before negotiations should normally not be necessary. Proposals included in the competitive range should be adequate for negotiation. However, there may be situations when you need additional information to prepare reasonable negotiation objectives.

The purpose of such exchanges is to obtain additional information for proposal analysis and to eliminate misunderstandings or erroneous assumptions that could impede objective development. You must not give the contractor an opportunity to revise its proposal.

Fact-Finding (FAR 15.406-1). In a noncompetitive procurement, fact-finding may be necessary when information available is not adequate for proposal evaluation. It will most often be needed when:

- The proposal submitted by the contractor appears to be incomplete, inconsistent, ambiguous, or otherwise questionable; and
- Information available from market analysis and other sources does not provide enough additional information to complete the analysis.

The purpose of fact-finding is to obtain a clear understanding of all the contractor's proposal, Government requirements, and any alternatives proposed by the contractor. Hence, both you and contractor personnel should view fact-finding as an opportunity to exchange information and eliminate misunderstandings or erroneous assumptions that could impede the upcoming negotiation. Typically, fact-finding centers on:

- Analyzing the actual cost of performing similar tasks. This analysis should address such issues as whether:
  - Cost or pricing data or information other than cost or pricing data are accurate, complete, and current;
  - Historical costs are reasonable; or
  - Historical information was properly considered in estimate development.
- Analyzing the assumptions and judgments related to contract cost or performance, such as:
  - The reasonableness of using initial production lot direct labor hours and improvement curve analysis to estimate follow-on contract labor hours;
  - Projected labor-rate increases; or
  - Anticipated design, production, or delivery schedule problems.

Because the procurement is not competitive, there is a special temptation to negotiate during fact-finding. However, it is especially important for both parties to avoid that temptation. Negotiating during fact-finding causes the Government to lose in two ways:

- The negotiations may inadvertently harm the Government position because the issues are negotiated before analysis is completed.
- Once fact-finding turns into negotiation, it becomes less likely that any remaining fact-finding issues will be clarified.

2.2 Selecting Methods For Conducting An Exchange

Methods for Conducting an Exchange. The following table identifies several methods commonly used to conduct exchanges after receipt of proposals but prior to contract negotiation. The table also identifies when each method is commonly used in procurements with prices exceeding the simplified acquisition threshold.

Methods Commonly Used to Conduct Exchanges Prior to Contract Award	
Method of Exchange	**Use in Exchange Situations**
Telephone	• Rarely used for 2-way exchanges in competitive situations. May be used to request a written response to relatively simple questions. • Commonly used in noncompetitive situations when questions are relatively simple. Especially common when the dollar value is relatively low. • Rarely used in noncompetitive situations when questions are relatively complex.

Written	• Commonly used in competitive situations to assure complete documentation of the information requested and received. • Rarely used in noncompetitive situations unless the question is very complex and there is time to wait for a written reply.
Face-to-face -- involving either a single representative from each side or several team members from each side. Teams may include audit and/or technical specialists	• Rarely used for exchanges in competitive situations. • Commonly used in noncompetitive situations when questions are relatively complex and the dollar value justifies the cost involved.

Telephone Exchanges. Telephone exchanges permit personal and timely communications related to less complex issues. When using telephone exchanges, there are several points that you should consider.

- **Identify all questions to be covered before initiating an exchange.** The telephone is a casual medium of exchange that we use everyday. There is a great temptation to pick up the phone whenever we have a question. Before you do, remember that multiple conversations could confuse the contractor about the issues involved.

- **Make a checklist of the points you want to cover.** It is easy to get sidetracked during a telephone conversation. The checklist will help keep you on track.

- **Document all information requested or received.** A good record is vital, but a telephone conversation does not normally provide one.
    - Generally, a written summary is the most practical approach to documenting a telephone conversation.
    - Some contracting officers use audio recordings, but many people resist having a conversation taped. Never tape a conversation unless all parties to the exchange give their permission. Make sure that they give permission and that permission is recorded each time a conversation is taped.
- **Request a written response for complex questions or in situations where the exact wording of the response is important.** For example, the exact wording of any information received from a contractor is particularly important in a competitive situation.

Written Exchanges. Written exchanges are particularly useful in competitive situations where it is important to have complete and accurate documentation of the question asked and the exact response. There are several points that you should consider before initiating a written exchange.

- **Make sure that your written document asks exactly the question you want answered.** The contractor may misinterpret a poorly written question.
- **Make sure that your written exchange meets time constraints.** Traditionally, written exchanges take two weeks or more. With e-mail, fax, and overnight mail, a written exchange can now be almost as fast as a telephone call.

Face-to-Face Exchanges. With complex issues, face-to-face exchanges with the contractor are often desirable. Exchanges at the contractor's place of business may be particularly desirable when issues are complex and the dollar value is large. Quick access to contractor technical information and support can facilitate and expedite the exchange process.

2.3 Selecting And Preparing Participants For Face-To-Face Exchanges

Select Government Team Members. For smaller less complex contract actions, the contracting officer or contract specialist may be the only Government representative participating in face-to-face exchanges. Normally as the value and complexity of the contract action increase, the size of the Government team will also increase.

Select team members based on their expertise in the areas being considered in the exchange. The table below identifies common roles in face-to-face exchanges and potential team members to fill those roles.

Face-To-Face Exchange Team Selection	
Team Role	**Potential Team Member**
Team leader	• Contracting officer • Contract specialist
Technical analyst	• Engineer • Technical specialist • Project or requirements manager • End user • Commodity specialist • Inventory manager • Transportation manager • Property manager • Logistics manager
Pricing analyst	• Auditor • Cost/Price Analyst
Business terms analyst	• Legal Counsel • Administrative Contracting Officer • Administration Specialist

Team Leader Preparation. The team leader is responsible for team preparation as well as team leadership during the

exchange session. Team preparation includes the following responsibilities:

- **Planning for the exchange session.** Several key points must be considered and many require coordination with team members and the contractor:
    - Location of the exchange session (i.e., Government or contractor facility);
    - Timing of the exchange session;
    - The exchange session agenda;
    - Exchange methodology (e.g., group meeting with the contractor, small team interviews, or individual interviews);
    - Exchange logistics (e.g., team member availability, travel funding when applicable, or meeting room arrangements).
- **Assigning roles to team members.**
    - Assign analysis responsibilities based on member qualifications.
    - When appropriate, some team members may be assigned specific responsibility for listening to, documenting, and analyzing contractor responses.
- **Assuring that team members are generally and individually prepared for the exchange session.**
- **Reviewing initial team questions.** This review will assure that the team leader has an opportunity to:
    - Become aware of the projected areas and depth of the exchange.
    - Identify any issues that may cross the boundaries of individual analyses.
    - Identify any inappropriate questions for elimination or rephrasing.
- **Sending initial questions to the contractor.** Sending initial questions to the contractor's designated team leader prior to the exchange session will speed the exchange. Why start the session by asking questions and then waiting an extended period for the contractor's initial response? Sending initial questions before the exchange will permit faster contractor responses and the contractor will also be aware of the areas of greatest Government concern. This awareness will permit better overall contractor preparation for the exchange session.

General Team Preparation. All team members must be familiar with the rules for Government-contractor dialog during the exchange session.

- **Encourage team members to DO the following:**
  - Use questions as a way to begin the exchange.
  - Start with simple questions.
  - Include questions on the rationale for estimated amounts.
  - Break complex issues into simple questions.
  - Continue questioning until each answer is clearly understood.
  - Identify and rank discussion subjects and levels of concern.
  - Be thorough and systematic rather than unstructured.
  - Ask for the person who made the estimate to explain the estimate.
  - Caucus with team members to review answers and, if needed, formulate another round of questions.
  - Assign action items for future exchanges related to unanswered questions.
- **Emphasize that team members MUST NOT DO the following:**
  - Negotiate contract price or requirements.
  - Make Government technical or pricing recommendations.
  - Answer questions that other team members ask the contractor.
  - Allow the contractor to avoid direct answers.
  - Discuss available funding.

Technical Analyst Preparation. Technical analyst preparation includes the following:

- **Analyzing the technical proposal and marking areas of concern.** Government personnel must be able to communicate effectively with contract personnel. By the time that exchanges begin, key contractor personnel will have been working with the proposal for several weeks. Proposal development likely involves systems that have been in place several years. Careful proposal analysis by Government personnel is essential for an effective exchange. Marking the proposal provides a clear reference to guide the exchange.
- **Developing initial questions.** Each Government analyst should develop initial exchange questions during the analysis. Some questions may be answered later in the

analysis, but preparing the questions during analysis will eliminate time wasted reconstructing the question at a later time. More importantly, it will assure that a particular concern is not lost in the rush to complete preparations for the exchange. Questions should deal directly with each issue involved in a non-threatening way, such as:

  - ***How was the estimate developed?***
  - ***What is to be provided by the proposed task listed on (specific) page number?***
  - ***When will proposed effort be finished?***
  - ***Who will accomplish the proposed effort?***
  - ***Why is the level of proposed efforts needed?***
  - ***How does the proposed effort relate to the contract requirements?***

- **Reviewing the initial questions.** After the proposal analysis is completed, the technical analyst should review initial questions to assure that the:
  - Questions do not unwittingly give away potential Government positions or other confidential information.
  - Analyst is completely familiar with the questions so that the analyst can concentrate on listening and verifying answers during the exchange session.
- **Providing initial questions to the team leader.**

Pricing Analyst Preparation. For most contract actions, the contracting officer or the contract specialist is the pricing analyst -- the expert who analyzes material prices, labor rates, and indirect cost rates. The cognizant auditor typically is not a member of the exchange team, but provides advice and assistance.

For larger more complex contract actions, there may be a cost/price analyst assigned. For even larger contract actions, the cognizant auditor may join the team.

Pricing analyst preparation includes the following:

- **Analyzing the proposal and obtaining related information.** In particular, detailed information on rates and factors may not be contained in the proposal under analysis. Instead they may be contained in one or more forward pricing rate proposal(s). The pricing analyst must obtain enough information to analyze the proposed rates and factors used in proposal

preparation. Normally, that requires close liaison with the cognizant auditor and administrative contracting officer (ACO) when one is assigned to the contractor.

- **Developing initial questions.** Questions should be deal directly with each issue involved in a non-threatening way, such as:
  - ***How does the proposed material unit cost compare with recent contractor experience***?
  - ***What steps were used to develop and apply the escalation factor for unit material costs?***
  - ***What points were considered in key make-or-buy decisions?***
  - ***What steps were used to estimate direct labor rates?***
  - ***What steps were used to estimate indirect cost rates?***
- **Reviewing the initial questions.** After the proposal analysis is completed, the pricing analyst should review initial questions to assure that the:
  - Questions do not unwittingly give away potential Government positions or other confidential information.
  - Analyst is completely familiar with the questions so that the analyst can concentrate on listening and verifying answers during the exchange session.
- **Providing all questions to the team leader.**

Business Terms Analyst Preparation. For most contract actions, the contracting officer or the contract specialist is also the business analyst -- the expert responsible for analyzing proposed terms and conditions. In fact, for most contract actions, little analysis is required at this point, because the contractor accepts the Government's terms and conditions as presented in the solicitation or contract modification.

For more complex contract actions, the ACO, contract administration specialists, legal counsel, and others may be involved in analyzing proposed terms and conditions.

Preparation must center on how proposed terms and conditions will affect the contractual relationship.

- **Analyzing the proposal and obtaining related information.** Normally, the analysis will center on the

legality and advisability of the proposed business terms.

- **Developing initial questions.** Normally, questions should be carefully coordinated with all Government activities affected.
- **Providing all questions to the team leader.**

2.4 Conducting Face-To-Face Exchanges

Orientation. The face-to-face exchange session should begin with an orientation. The contents of the orientation will typically depend on numerous factors including: the size of the Government and contractor teams participating in the exchange, the location of the exchange, the procedures for the exchange, and the complexity of the issues involved.

- **Greeting.** Create a cordial atmosphere by exchanging pleasantries and compliments. At the very least, express appreciation to the contractor for participating in the acquisition. If you are the host, welcome the contractor team to your facility. If you are the visitor, thank the contractor for the opportunity to visit the contractor's facility.
- **Introductions.** If all the parties involved do not know each other, participants should be asked to introduce themselves and describe their role in the exchange session. If the group is large, circulate a roster to obtain a permanent record of information such as each attendee's name, job title, business address, and telephone number.
- **Facility Orientation.** If you plan a group meeting in a single conference room, the facility orientation can be limited to information such as security restrictions and the location of facilities such as refreshment areas and rest rooms. If Government team members will separate and meet with different contractor experts in different locations throughout the contractor's facility, an orientation on the entire facility may be appropriate.
- **Agenda Review.** If you plan a group meeting in a single conference room, the agenda will normally be limited to an overview of the topics to be covered and anticipated length of the exchange session. If you expect the session to continue over more than one day, you should review the projected daily schedule.

- **Session Purpose.** Emphasize that the purpose of the session is to obtain information, not negotiate.

Exchange Interviews. The key to the exchange process is the Government exchange interview of contractor personnel. The whole Government team can work together to conduct each interview, subsets of the team can conduct different interviews simultaneously, individual team members can conduct the interviews, or different combinations can be used for different interviews.

Team members conducting an exchange interview must present a professional image, listen carefully, and actively encourage an open exchange.

The basic interview skills include:

- **Questioning.** This is the backbone of the exchange interview. The best questioning style largely depends on the subject matter and the personality of the person being interviewed.
  - Detailed questions on specific issues are normally recommended, because of the limited time available for interviews. This can be used to get to the heart of a specific issue without unnecessary and sometimes confusing discussion.
  - Wide-ranging and non-directed questions can be particularly useful when the Government analyst desires to obtain broad information on contractor processes and systems. In addition, some people resent detailed questioning, because they feel that they being interrogated. As a result, they are prone to be more candid in responding to wide-ranging questions.
- **Probing.** This technique is useful when the interviewee's answers are either vague or qualified. Probing:
  - Typically involves a series of questions concerning the same issue. The initial questions are general. Each successive question is more specific and designed to elicit a more detailed response. The goal is a full and adequate answer.
  - May also involve asking the same question in different ways. When the answer is not satisfactory, you may rephrase it and ask it again. Alternatively, you may allow a period of time to pass before rephrasing and asking it

again. This process continues until the interviewee provides an adequate answer.
    - May lead to interviewee frustration and anger. Do not allow a question to go unanswered. You might ask the question another way to assure clarity and understanding. If the interviewee cannot or will not answer candidly, the team leader may need to elicit contractor management support in obtaining an acceptable answer.
- **Listening.** Listening is as vital to communication as talking. Inadequate communication is too often caused by inadequate listening. Moreover, the art of listening is of special significance during fact-finding because the purpose of the sessions is to absorb answers by listening.
- **Understanding.** Differences in language or interpretation can often lead to misunderstandings and even unintentional disputes. There are several techniques that you might consider using to assure understanding:
    - Share relevant portions of the Government's evaluation of the contractor's proposal with the contractor to demonstrate points that Government evaluators did not understand.
    - Rephrase the interviewee's statement and ask whether your interpretation is correct.
    - Use a form similar to the example on the next page to document understanding.

Exchange Interview

Date: _____

Subject: _____

Government Team Member(s) _____

Contractor Team Member(s) _____

Summary (topics, questions, answers, and exhibits): _____

_____

Documents Reviewed: _____

_____

Action Items: _____

_____

_____ _____

Government Representative Contractor Representative

Government Caucus. As information is gathered, Government team members should caucus periodically to compare notes about the information obtained so far. The caucus may highlight conflicting information provided by the contractor or confirm the viability of supporting information provided by the contractor. Accordingly, a caucus may result in additional questions, confirmation of progress, or the confirmation that Government concerns about the contractor's proposal have been answered.

Conclusion. The face-to-face exchange should continue until both parties agree on the facts or at least one party feels that a break is necessary because the needed facts are not currently available. Neither party's position can be realistic until there is mutual understanding concerning the facts.

Sessions should end with a formal conclusion where the Government team leader:

- Summarizes the important findings during the session.
- Identifies open issues when questions remain.
- Asks the contractor's representative for comment.
- Expresses appreciation to the contractor.
- Schedules another exchange session if necessary.
- Schedules a tentative time for negotiations, if another exchange is not needed.

Document Results. Document exchange results. The documentation should identify the information received and how it was used on the contracting decision process. Usually, the documentation is prepared by the team leader.

However, in large complex negotiations, the team leader may designate another team member as the team recorder.

2.5 Using Exchange Results

Use Depends on Purpose. Your use of exchange results will depend on the reason for the exchange.

Use of Clarification Results (FAR 15.306(a)). The results of a clarification can be considered in the award decision without negotiation. For example, if the contractor demonstrates the relevance of past experience, that experience should be considered in making the contract award decision. Unrelated experience should not be considered.

Use of Communications Results (FAR 15.306(b)). The results of a communication can be considered in establishing the competitive range. For example, if the contractor's response to adverse past performance information does not refute that information, that failure might lower the firm's overall rating enough to exclude the firm from the competitive range.

Use of Other Exchanges Before Competitive Negotiations (FAR 15.306(d)). The results from exchanges that take place after establishment of the competitive range but before contract negotiations, may be used to complete proposal evaluation. Those results should be considered in developing negotiation objectives.

If the exchange reveals serious flaws in the request for proposals, the contracting officer should consider amending the solicitation or canceling the solicitation and resoliciting.

Use of Fact-Finding Results. The results from fact-finding should be used to reevaluate preliminary prenegotiation objectives. Normally, the Government and the contractor positions should be closer together, based on the results of the fact-finding.

During the fact-finding, the Government team should have:

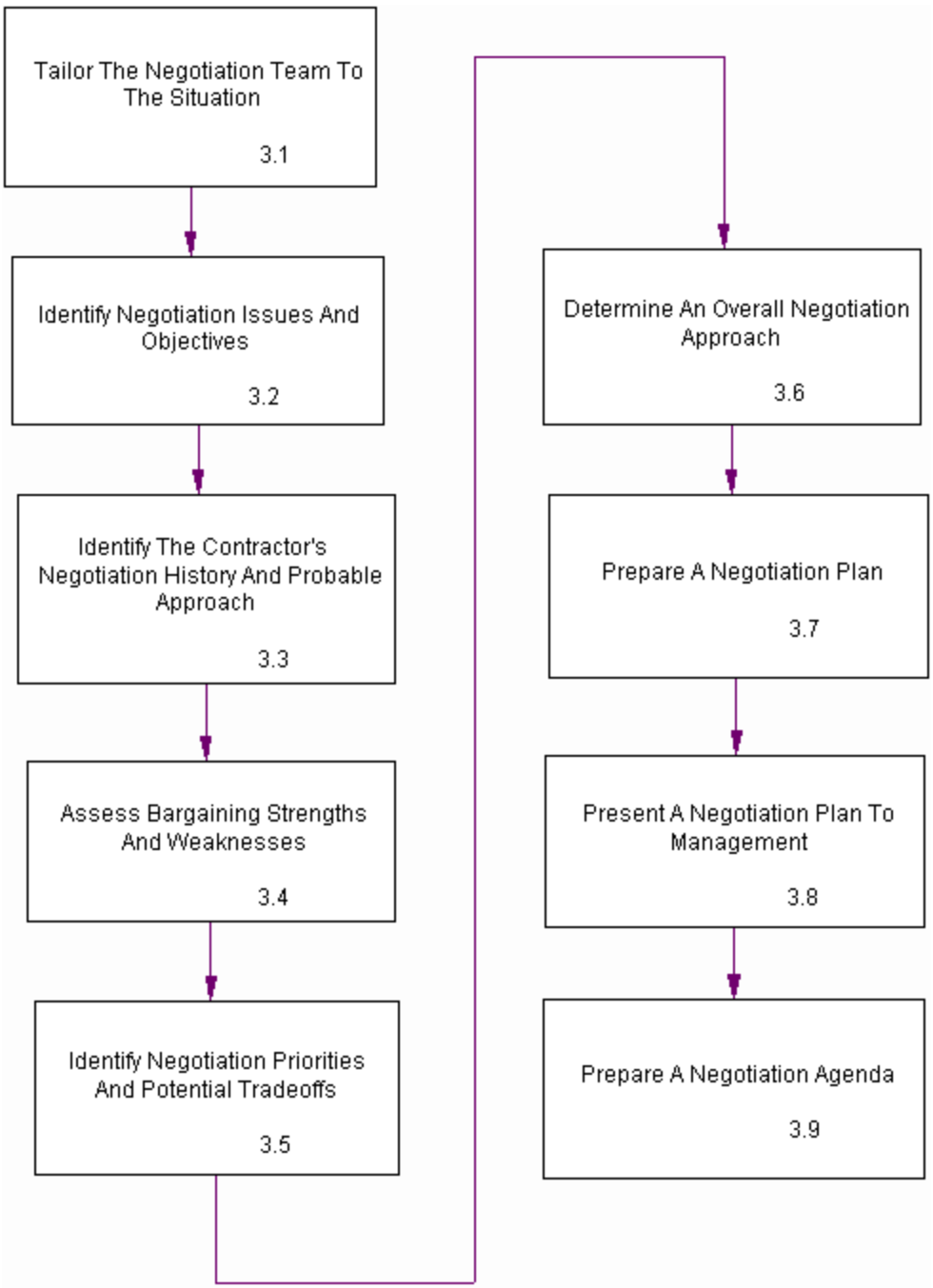
- Obtained a mutual understanding with the contractor on the pertinent facts pertaining to the offer;
- Tested the validity of the issues and positions identified prior to the exchange;
- Verified the facts presented in the proposal;
- Verified or refuted proposal assumptions; and
- Identified the contractor position on key negotiation issues and the relative importance of each position.

Ch 3 - Negotiation Preparation

- 3.0 - Chapter Introduction
- 3.1 - Tailoring The Negotiation Team To The Situation
- 3.2 - Identifying Negotiation Issues And Objectives
- 3.3 - Identifying The Contractor's Probable Approach To Negotiation
- 3.4 - Assessing Bargaining Strengths And Weaknesses
- 3.5 - Identifying Negotiation Priorities And Potential Tradeoffs
- 3.6 - Determining An Overall Negotiation Approach
- 3.7 - Preparing A Negotiation Plan
- 3.8 - Presenting A Negotiation Plan To Management
- 3.9 - Preparing A Negotiation Agenda

3.0 Chapter Introduction

Procedural Steps. The following flow chart outlines the steps in negotiation preparation:



Need for Preparation. Thorough preparation is the most important prerequisite to effective negotiation. Neither experience, bargaining skill, nor persuasion on the part of the negotiator can compensate for the absence of preparation.

- In general, thorough preparation improves the likelihood of a win/win negotiation that will produce a quality contract and set the foundation for timely and effective contract performance.
- Specifically, thorough preparation produces tangible rewards, including:
  - Fewer contract modifications because the technical requirements are well conceived and well defined;
  - Better technical performance because requirements were well defined; and
  - Cost estimates closer to actual contract costs.

Contractor Preparation. Structure is forced upon the contractor by the proposal preparation process. To complete an effective proposal, the contractor must:

- Understand contract requirements before beginning proposal preparation;
- Establish and use an estimating system designed to meet contractor and Government requirements;
- Identify assumptions related to contract performance (e.g., current competition, market alternatives, possible performance problems, and effect of the market on contract costs);
- Evaluate performance alternatives and determine the most effective way to meet contract requirements; and
- Structure a proposal to meet Government technical and pricing requirements.

Government Preparation. To be effective in negotiation, the Government's preparation must mirror the depth and intensity of the contractor's. Thoroughness is important because contractors are typically well prepared. Government representatives must:

- Conduct market research to understand the product, the technical factors affecting contractor performance, and the market factors affecting product price;
- Prepare or review contract documents (e.g., solicitation, contract, or contract modification) considering the current market situation;
- Analyze the contractor's proposal based on the current market situation and specific contract requirements:
- When necessary, use exchanges to clarify information received from the contractor and support further analysis; and

- Develop a negotiation plan based on that analysis.

Available Information. Without adequate information, you can neither prepare for nor conduct effective contract negotiations. As you prepare for contract negotiations, you should already have:

- The solicitation, unilateral contract modification, or any other document that prompted the contractor's proposal;
- The proposal and all information submitted by the contractor to support the proposal;
- Information from your market research concerning the product, the market, and any relevant acquisition history;
- Any relevant field pricing or audit analyses;
- In-house technical analyses;
- Your initial analysis of the proposed price and, where appropriate, of the different cost elements.
- The results of any exchange(s) with the contractor.

3.1 Tailoring The Negotiation Team To The Situation

Potential Team Size. Normally, you should use the smallest team practical to efficiently and effectively formulate and attain the Government negotiation objectives.

For smaller less complex contract actions, the contracting officer or contract specialist may be the only Government representative participating in the negotiation.

As the value and complexity of the contract action increase, you will likely need additional experts. However, a smaller team is normally better unless the additional member(s) can make an effective contribution. As the team size grows:

- Team control during negotiations becomes more difficult;
- Team communications become more complex; and
- The personnel cost associated with the negotiation increases.

Potential Team Members. The table below identifies common roles in negotiations and potential team members to fill

those roles. Note that the roles and potential team members are identical to those identified for face-to-face exchanges. However, you should also note that actual team membership on the two teams may be substantially different.

Negotiation Team Selection	
Team Role	**Potential Team Member**
Team leader	• Contracting officer • Contract specialist
Technical analyst	• Engineer • Technical specialist • Project or requirements manager • End user • Commodity specialist • Inventory manager • Transportation manager • Property manager • Logistics manager
Pricing analyst	• Auditor • Cost/Price Analyst
Business terms analyst	• Legal Counsel • Administrative Contracting Officer • Administration Specialist

Team Leader. In contract negotiations, the ultimate team leader is the contracting officer responsible for the contract action. The contracting officer has ultimate responsibility for the negotiation, because only the contracting officer has the authority to bind the Government to a contract.

The contracting officer may act as the day-to-day team leader or delegate that responsibility to a contract specialist after considering factors such as the:

- Dollar value of the contract action;
- Complexity of the issues involved in the negotiation;
- Contractual and operational importance of the contract action;

- Policy of the contracting activity; and
- Experience of the assigned contract specialist.

Principal Negotiator. The principal negotiator is the person who represents the Government during contract negotiations and does most of the bargaining. The team leader is normally the principal negotiator because the team leader has the broadest perspective of key negotiation issues. However, the team leader may designate others to fill the role of principal negotiator.

- Another individual may be designated as the principal negotiator because of that person's particular expertise in analysis and negotiation. For example, a price analyst may be designated to serve as the principal negotiator when the price analyst is the most informed and capable negotiator. Of course, the team leader is still responsible for the results of the negotiation.
- To take advantage of varying kinds of expertise, different principal negotiators can be used to bargain different issues. For example, an engineer might negotiate technical issues (e.g., labor hours) while a price analyst negotiates indirect cost rates. When using this approach the team leader must be particularly vigilant to assure that the various negotiators share information and work toward the same objectives.

Other Team Members. Individuals should only be selected for team membership when they can add to the efficiency and effectiveness of team efforts to formulate and attain negotiation objectives. In particular, additional team members may be required when their expertise is needed to:

- Support Government efforts to understand the contractor's position; or
- Explain the Government position.

Questions and responses on key issues generally continue throughout the negotiation process. Expert support:

- Is generally only needed until the differences between the Government and contractor positions are clearly defined. After that, expert support may actually be detrimental to the negotiation. The experts on both

sides may be so convinced that their position is correct that they will consciously or unconsciously sabotage any efforts at compromise.
- May be needed throughout the negotiation whenever certain very important and very complex issues are discussed. Mutual understanding on such issues may be critical for successful contract performance.

3.2 Identifying Negotiation Issues And Objectives

Identifying Issues. An issue is any assertion about which the Government and the contractor disagree. In contrast, nonissues are assertions about which both parties agree.

Typically, issues arise when the Government and the contractor make different assertions based on the same or related facts. Differences occur because the two parties have different perspectives and interests in the negotiation.

- A nonissue can become an issue if it is challenged during the course of negotiations.
- An issue can become a nonissue if the assertion is no longer challenged.

Sources of Issues. In contract negotiation, an issue can come from any challenge to an assertion made by the contractor or the Government. Generally, an assertion made in the contractor's proposal is challenged based on:

- The field pricing report;
- The audit report;
- The in-house technical analysis;
- Your cost or price analysis;
- Exchanges with the contractor; or
- Another type of Government analysis.

The issue may also be related to a contractor challenge of Government requirements as stated in the solicitation, contract, or contract modification.0

Issues and Objectives. Issues are the bases for the differences between the Government and contractor negotiation positions. For example, the positions on labor rates might differ because the Government challenges the

contractor's use of a particular labor index to estimate future direct labor rates.

Because issues are the bases for differences between the Government and contractor positions, you must identify the key issues that effect those positions before you develop your prenegotiation objectives. If you do not, there is a good chance that your objective on one issue will not be consistent with your objectives on related issues. For example, if the Government challenges the use of a particular index to forecast direct labor rates, that challenge should effect all similar rates estimated under similar conditions.

Prenegotiation Objectives (FAR 15.101 and 15.402(a)). Your objective in any contract negotiation should be best value for the Government.

- In a competitive negotiation, the objective in negotiating with each contractor should be a final proposal revision that provides the best value based on the contractor's proposal, the solicitation criteria, and the conditions affecting the contractor's operations. The Government can then award a contract to the firm whose proposal provides the overall best value.
- In a noncompetitive negotiation, best value is a contract with a responsible source that:
  - Will satisfy Government requirements in terms of product quality and timely delivery:
  - Has a fair and reasonable price:
  - Fairly apportions risk between the Government and the contractor; and
  - Satisfies Government socioeconomic goals (e.g., small business set-asides).

Technical Objectives. Government technical objectives are based on Government's requirements and its evaluation of the contractor's technical proposal based on those requirements. Technical objectives should center on whether the contractor can effectively and efficiently meet Government requirements. Typically, technical objectives deal with the:

- Acceptability of the contractor's technical proposal. For example, the Government may maintain that a larger motor is required to meet an equipment requirement.

- Performance risk associated with the contractor's technical proposal. For example, the technical proposal may propose to perform the required service with individuals who may not be qualified.
- Technical factors that may unreasonably affect cost -- often referred to as "gold plating." For example, the contractor may be proposing stainless steel nails to build wooden cabinets. Common nails would work just as well at a fraction of the cost.

Cost or Price Objectives. Issues related to technical issues and issues related to rates and factors will eventually effect cost and price objectives, because the "total package" under consideration will in part determine what price is fair and reasonable.

Whether your negotiation involves price analysis supported by cost analysis or price analysis alone, you must establish an overall price objective. Without an overall price objective, negotiations will often flounder and result in settlements that can be neither explained nor defended. Negotiating cost element by cost element can be risky unless you understand the affect of these agreements on overall price.

Objectives such as "the lowest price we can get" or "a price about ten percent lower than the proposed price" do not qualify as acceptable objectives because they are not in the win/win spirit and are too vague. Price objectives should be planned in terms of a definite dollar amount reflecting a reasonable evaluation of contract requirements and the methods proposed by the contractor to meet those requirements.

Objectives May Change During Negotiation. Your prenegotiation objectives represent your best judgment based on the information available prior to negotiations. As more information becomes available, your objectives may change.

When you must obtain management approval of your negotiation objectives, that approval should address the latitude that you will have to adjust your objectives during negotiations. Depending on your contracting activity's policies and the situation, you may have complete latitude or you may be required to obtain a new approval any time your objectives change. A requirement for

a new approval is most likely when a change in your objectives will probably lead to a higher contract price.

3.3 Identifying The Contractor's Probable Approach To Negotiation

Need to Identify the Contractor's Approach. You have identified issues and the objectives that will drive the negotiation. Now you need to learn more about the contractor's objectives and the road map that the contractor's negotiator will likely follow in attaining those objectives.

Information Sources. Information on how the contractor might approach the negotiation can come from a wide variety of sources. Some of the most important include the following:

- The contract proposal and all information submitted with the proposal should clearly explain the contractor's approach to contract performance and contract pricing.
  - A well supported proposal may indicate that the contractor expects to negotiate a contract close to the proposal.
  - Minimal support may indicate that the contractor is not firmly committed to negotiating a contract.
  - Poor support may mean that extensive negotiations will be required to attain a quality contract.
- Previous proposals and contracts for identical or similar products may give you an idea about how flexible the contractor is during negotiations. Many contractors expect to lose a certain percentage of the proposed price during negotiations. To compensate, they may include "padding" in their proposals so that they can negotiate it away and still have an acceptable contract.
- Price negotiation memoranda (PNMs) with the same contractor for similar work should provide detailed information on where the contractor is likely to be flexible in negotiations and where the contractor is likely to be firm.
- Contract administrators, negotiators, and other Government employees who have had previous dealings

with the contractor can provide more personal information on the company's negotiating style and the approach taken by individual negotiators.
- Information from exchange sessions may indicate where the contractor's position is firm and were the contractor may be more flexible.
- Other information from contract files may indicate how proposals compare with contract performance. For example, during negotiation, the contractor may constantly point out the high risk in performing certain contract activities. Then immediately after contract award, the contractor uses a firm fixed-price subcontract to shift that risk to a subcontractor.

Key Questions to Consider. As you collect information on how the contractor might approach the negotiation, ask yourself the following questions:

- ***What objectives and priorities has the contractor probably established for the contract negotiation?***

Identify the contractor's contract objectives and related priorities. Consider stated and readily apparent objectives along with the contractor's unstated needs. While contract price is always important, every negotiation includes non-price objectives.

- ***How will the contractor's general business objectives and priorities affect the negotiation?***

Determine how the proposed contract action will affect the contractor's ability to meet its general business objectives. Most contractors look at a contract as part of the firm's sales mix. Each contract has its own requirements and potential rewards, but is also related to the other business of the firm. Possible objectives might include increasing market share, entry into a new field, improved cash flow, avoiding unnecessary cost risk, or continued Government business.

- ***How will the individual objectives and priorities of the contractor's negotiator affect negotiations?***

Identify factors that may cause the negotiator's objectives and priorities to differ from those of the contractor. For example, a new negotiator may feel a need to prove his/her capabilities by refusing to compromise. A negotiator who

receives an incentive based on the profit/fee rate negotiated, may be willing to concede costs dollars to keep that profit/fee rate high.

- ***What negotiation styles and tactics will the contractor's negotiator likely use?***

Collect information about how the contractor and the projected negotiator have negotiated in the past.

  - Company negotiation strategy and tactics will affect negotiations no matter who represents the firm. For example, some contractor's may have a policy of providing the minimum price-related information possible to the Government. If you need more price-related information to determine price reasonableness, that policy may limit your ability to obtain it.
  - A particular negotiator's style can also be important. For example, if the negotiator is prone to use win/lose tactics, you should consider the use of effective countermeasures to put the negotiation on a win/win path.

- ***What pressures and constraints will affect the contractor's approach to negotiations?***

Learn what pressures and constraints will affect negotiations. For example, some contractor's give negotiators little or no latitude in negotiation. Such restrictions can make it difficult to reach agreement. Early knowledge of this restriction may permit you to use a win/win approach to encourage the contractor to give the negotiator the flexibility needed to reach an agreement.

3.4 Assessing Bargaining Strengths And Weaknesses

Bargaining Power. Bargaining power is relative. It comes in many forms and is never totally one-sided, because both parties have bargaining strengths and weaknesses. Recognizing the relative strengths and weaknesses of the parties involved in any negotiation will help you achieve a win/win result.

- The Government may have bargaining power because it is the only customer for a particular product. However, that power may be offset because the contractor is the only supplier.
- A world-renowned scientist may have bargaining power based on expertise and reputation. However, an experienced technical analyst may be able to offset much of that power.
- Contractors often enjoy bargaining power because the Government lacks knowledge about the existence of potential competitors or substitute products. However, the Government negotiator's knowledge of Government requirements may offset that power.
- An experienced negotiator may have bargaining power because of a reputation gained over the years. However, knowledge of the negotiator's approach to negotiation may offset much of that power.

Bargaining Power and Perception (FAR 31.201-3(a) and 52.243-1). Bargaining power has to be perceived by the other party to have an effect on negotiations. In fact, the power does not have to be real as long it is perceived. For example, many Government negotiators believe that contractors have far superior bargaining power in negotiations to definitize a unilateral contract modification. They point out that the contractor can drag out negotiations while continuing to perform the modified contract and incurring actual costs. However, they do not realize that the Government also has substantial power in that situation. Contracting officers are prohibited from accepting unreasonable actual costs. If an agreement cannot be reached, the contracting officer can make the equitable adjustment by using a unilateral decision. Of course, the contractor can dispute that decision, but it will likely take months or years before the dispute is resolved. Legal fees may be more than the disputed amount. Obviously, a negotiated agreement is in the best interest of both the Government and the contractor.

Sources of Bargaining Power. The following are some of the factors that you should consider as you assess the bargaining strengths and weaknesses of each party involved in a particular negotiation:

- **Competition.** The availability or lack of competition may give one side the upper hand.

    - Sellers enjoy more bargaining power when available sources or alternatives are limited.
    - Buyers enjoy more bargaining power when multiple sources or alternatives are available. Bargaining alternatives exist even during sole source negotiations. The Government may be able to gain bargaining strength by researching the practicality of other alternatives, such as:
    - Performing the required effort in-house;
    - Changing requirements to encourage competition;
    - Developing new source(s) by providing start-up funds to other contractors;
    - Postponing contract award until other sources become available; or
    - Breaking out and separately competing components.
- **Knowledge.** The cliché "Knowledge is power" certainly applies to contract negotiation. The more that you know about the negotiation issues, objectives, priorities, and the parties involved, the greater your bargaining power. Thorough preparation is essential.
- **Time Constraints.** Time constraints affect every negotiation (e.g., time available for negotiations, time available for contract completion, date when work must start, or the expiration of funding). Time constraints become a source of power when the constraint appears to affect one party and not the other. Do not be fooled though. A time constraint that appears to affect only one party may actually affect both. For example, expiring funds place a constraint on the Government. If the contractor has substantial business alternatives, the time constraint on the Government may give bargaining power to the contractor. However, if the contractor needs the contract, the time constraint applies equally to both parties. Relative bargaining power is not affected.
- **Bargaining Skills.** Many contractors have personnel that specialize in contract negotiation. Their bargaining experience and expertise can give them both the perception and the reality of bargaining power. However, applying the concepts presented in this text should improve your bargaining skills and your confidence in your ability to negotiate effectively. Your bargaining power should increase accordingly.
- **Importance of the Contract to Each Party.** As the table below shows, successful negotiations can reward both the organization and the individual. The importance of the Government contract to each side is determined by

how much the rewards benefit the organization and the individual participants.

Organizational Rewards	Individual Rewards
Money/Profit	Increased Self-Worth
Unique Product or Service	Safety
Property	Prestige
Information Rights	Self-Esteem
Privileges	Self-Actualization
Commercial Opportunities	Security
Future Business	Reputation
Product Control	Increased Pay

As with other forms of bargaining power, perception is the key. If a negotiator perceives that a contract is more important to the other party, the negotiator may be less willing to make concessions.

- **Contract Risk.** Every contract involves risks and both the Government and the contractor have an interest in assuring that those risks do not preclude effective and efficient contract performance. However, one negotiator may gain power by taking action to reduce the risk exposure perceived by the other party. That power can be real, even if the negotiator taking the action does not perceive the same level of risk.
    - There are many methods that you should consider for reducing and controlling contract risk. Among the most important are the appropriate use of:
    - Fixed-price or cost-reimbursement contract pricing arrangements;
    - Clear technical requirements;
    - Government furnished property; and

- Other contract terms and conditions.
- While you can reduce or control contract risk you cannot eliminate it completely. Trying to eliminate risk entirely may actually weaken your bargaining power by presenting an image of weakness rather than an image of cooperation.

3.5 Identifying Negotiation Priorities And Potential Tradeoffs

Prioritize Issues. Rank potential negotiation issues in relative order of importance to the Government. After ranking, determine whether each issue is:

- **Nonnegotiable issues or "must points."** These are the issues where you cannot make concessions because of their importance to the Government position.
- **Issues open to concession or "give points."** These are issues that have relatively low importance to the Government but may be valuable to the contractor. As a result, they are projected for probable concession during negotiation. Hopefully concessions on these issues will win concessions from the contractor.
- **Issues to avoid during negotiations or "avoid points."** These are issues that you do not want to discuss during contract negotiations. For example, they may be controversial or weak areas in the Government position.
- **Issues open to bargaining or "bargaining points."** These are issues where the Government may be willing to make meaningful concessions in return for meaningful concessions by the contractor. For example, in a noncompetitive negotiation, price is a bargaining point. The Government and contractor typically reach agreement on a dollar value somewhere between the two opening bargaining positions.

Need for Tradeoff Positions. You should have an objective for each negotiation issue. You should also identify several tradeoff positions that you would consider accepting.

- In a competitive negotiation, you can use these positions to evaluate the contractor's final proposal revision.

- In a noncompetitive negotiation, you can use these positions to develop counteroffers and establish your negotiation limits.

Tradeoff Positions. As you identify tradeoff positions for each issue, there are three questions that you should consider.

- ***What result do you feel is most reasonable based on the available information?***

Use your answer to establish your negotiation objective.

- ***What is the most desirable result that you could reasonably expect to achieve on this issue?***

Use your answer to establish one limit to your range of acceptable tradeoffs.

- ***What is the least desirable result that you would be willing to accept on this issue?***

Use your answer to establish the other limit to your range of acceptable tradeoffs.

Tradeoff Positions On Price. Price is an issue that must considered in every contract negotiation. Many contracting activities consider tradeoff positions on price so important that they require negotiators to obtain management approval of their minimum, objective, and maximum positions on price prior to the start of all major noncompetitive contract negotiations.

- **Objective Position.** This is your best estimate of a fair and reasonable price based on your price/cost analysis. It is the price that you want to negotiate. Other positions should help you reach your objective.
- **Minimum Position.** In a win/win negotiation, your minimum price should be the lowest fair and reasonable price. When used as your first counteroffer, your minimum position should provide room to negotiate. Never offer a price lower than your minimum position, because such an offer would be unreasonable.
    - Establish your minimum position based on a reasonable price for your anticipated best-case scenario of contract performance. That scenario must be based on a reasonable analysis of

available information. It must not be based on an unlikely "pie in the sky" scenario.
    - The use of an arbitrary "nice low figure" as a minimum position is neither appropriate nor defensible. Using an arbitrarily low minimum position is not in the win/win spirit and may even be counterproductive. For example, an indefensible or unreasonable opening position may cause the Government to lose credibility and make attaining a win/win outcome difficult or even impossible.
    - When you use cost analysis, you should establish a minimum position for each major element of contract cost and profit/fee.
- **Maximum Position.** In a win/win negotiation, your maximum price should be equivalent to the highest fair and reasonable price.
    - Establish your maximum position based on a reasonable price for your anticipated worst case scenario of contract performance. That scenario must be based on a reasonable analysis of available information and not an unrealistic scenario.
    - There may be other limits (e.g., the availability of funds or a ceiling price) on the maximum contract price. Such limits provide a defensible maximum position even though the amount is less than the highest price that could be considered fair and reasonable.
    - When you use cost analysis, you should establish a maximum position for each major element of contract cost and profit/fee.

Tradeoff Positions On Other Issues. Price is not the only important issue in contract negotiation. In most contract negotiations, you will also need to develop tradeoff positions for several other key issues, such as:

- Contract type;
- Warranties;
- Delivery schedule; or
- Other business terms and conditions

Base Tradeoff Positions on Clear and Consistent Criteria. A win/win outcome is practically impossible if negotiation positions are not based on clear and consistent criteria. Remember that a win/win outcome is a mutually satisfactory

outcome and a mutually satisfactory outcome is a matter of perception. The best way to maintain the perception of a mutually satisfactory outcome over the long term is to base your positions on clear and consistent criteria.

Without clear and consistent criteria, the negotiation will almost certainly turn into a win/lose or lose/lose situation.

- Negotiators will be encouraged to use win/lose tactics.
- The party that stubbornly refuses to concede anything will usually win. If both parties refuse to move, both sides will lose.
- Even if the outcome is fair and reasonable, one-or-both could eventually feel that they were treated unfairly.

3.6 Determining An Overall Negotiation Approach

Plan the Order for Addressing Issues. Carefully plan the order in which issues will be addressed during negotiations. There is no one right approach.

- One approach is to start with the least important issues and proceed to the more important ones. Concessions on several less important issues may limit or eliminate the need for concessions on a more important issue.
- Another approach is to address issues according to the anticipated ease of reaching agreement. Early agreements hopefully will create an atmosphere of agreement that will continue as you proceed to the harder issues.
- Normally, contract negotiations follow a building-block approach:
    - Basic contract requirements are addressed and resolved before contract price is addressed.
    - Tradeoffs between contract requirements and contract price are addressed after resolution of other technical issues.
    - Contract price is not finally resolved until all other issues are settled, because contract price must consider all the other elements of the contract. The result should be a fair and

reasonable price for each contract item, not an element-by-element agreement on contract costs.

Identify Potential Concessions. Flexibility is vital to win/win negotiations. Negotiators expect to gain something as a result of their negotiation efforts. Refusing to make concessions will frustrate the other negotiator and may lead to a lose/lose situation, no matter how reasonable your position.

A concession may be accepting a different interpretation of existing facts (e.g., accepting that production hours per unit will not be reduced as fast as you estimated in your previous pricing position) or it may be an action to change the facts (e.g., change the contract type). As you consider possible concessions, you should identify:

- Potential concessions that you would be willing to make in response to projected contractor concessions.
- Concessions that you would expect from the contractor in response to your potential concessions.

Plan Bargaining Tactics. Your selection of negotiation tactics should depend on your personality and the results of your research on the tactics that will probably be used by the contractor's negotiator.

- **Avoid the use of win/lose tactics. Government negotiators should always pursue a win/win outcome.**
- Do not try to be someone you are not. A tactic that works well for another negotiator may not work for you. However, that does not mean that you should never try something new.
- The successful application of any negotiation tactic requires a great deal of planning. The negotiator must be prepared to respond in a manner that protects the Government and makes progress toward agreement. This preparation is accomplished by anticipating the probable contractor tactics and developing countermeasures in advance.

3.7 Preparing A Negotiation Plan

Draft a Plan. Draft a negotiation plan. Contents may vary based on agency and contracting activity requirements, but the plan should include information such as the following:

- Background (e.g., contract, contractor, and negotiation situation);
- Major and minor negotiation issues and objectives (both price and non-price);
- Negotiation priorities and positions on key issues (including minimum, objective, and maximum positions on price); and
- Negotiation approach.

Review the Plan. Review the negotiation plan with key negotiation team members.

- Present the plan to the team.
- Encourage input from others on the team to identify weaknesses and alternatives. Normally, you should give special attention to input from those with more experience in negotiations with the same contractor.
- Revise the plan as necessary.
- Define the role each team member will play in putting the plan into action.
- Ensure positions and the overall plan are fair and reasonable.

Team Member Plans. Assure that team members have individual plans designed to support the overall negotiation plan.

- Emphasize:
    - The Government's commitment to a win/win approach to contract negotiation
    - That the Government's principal negotiator's role is the principal speaker and "chairperson" of the Government team. **Other team members must realize that the principal negotiator is the only individual authorized to negotiate with the contractor.**
    - That other team members are at the negotiation to provide support, listen, and evaluate information provided by the contractor. They must not address the contractor's negotiator(s) unless directed by the Government's principal negotiator.
    - That, during negotiation sessions, other team members must not openly disagree with the Government position on any point under

discussion. If they have a concern, they should discretely communicate with the principal negotiator. If necessary, the principal negotiator could call for a caucus to address the concern.

- Assure that each team member understands his/her specific role in the negotiation session.
  - Identify any issue that the team member should be prepared to address during negotiations.
  - Assure that the team member understands the related Government position.
  - Review their anticipated role (e.g., present the Government position, answer contractor questions about that position, or both).
- For all negotiations, warn team members:
  - Not to communicate with contractor personnel outside the negotiation conference on issues related to the negotiation.
  - To safeguard information on the Government position from contractor personnel and other unauthorized persons.
  - About ethical considerations (e.g., no free lunches or favored treatment).
- For competitive negotiations, warn team members not to engage in conduct that:
  - Favors one contractor over another;
  - Reveals a contractor's technical solution, including unique technology, innovative and unique uses of commercial items, or any information that would compromise a contractor's intellectual property to another contractor;
  - Reveals a contractor's price without that contractor's permission;
  - Reveals the names of individuals providing reference information about a contractor's past performance; or
  - Knowingly furnishes source selection information to anyone other than Government personnel who have a need to know.

3.8 Presenting A Negotiation Plan To Management

Need for Management Support. To be successful in a contract negotiation, you must have management support. If management does not support you, other members of the

Government negotiation team and the contractor will soon know. When this happens, team members and the contractor will no longer come to you for guidance and answers. Instead, they will go to management.

You should have continuing communications with management, just as you do with the contractor and members of the negotiation team.

- For contracts that attract a relatively low level of management interest (e.g., small dollar contracts with no major issues), communications will likely center on available funding, workload, and other general management concerns.
- For contracts that attract higher-level management interest, communications should center on the key issues involved. Typically, these communications will involve a briefing on key elements of the negotiation plan, especially the team's negotiation objectives.

Management Briefing. A management briefing gives you an opportunity to obtain policy guidance and management observations on the strengths and weaknesses of the negotiation plan. In fact, multiple briefings may be required to involve different levels of management in the negotiation process.

The prenegotiation briefing can take many forms, including:

- An informal oral presentation;
- A formal oral presentation; or
- A written document (e.g., a prenegotiation or business clearance memorandum).

The actual briefing format will depend on many factors including agency policy, contracting activity policy, and the personalities involved. For example, some managers may feel that they can better evaluate an oral presentation, while others may want the detail that a written business clearance provides.

Management Feedback. Whatever the form of the prenegotiation briefing, there must be provision for management feedback. In particular management should have the opportunity to:

- Approve or reject the negotiation plan.
- Identify any management limits on negotiation flexibility. The negotiation team must know what happens if the team changes its evaluation of one or more key issues during negotiation (e.g., a price higher than the original objective now appears reasonable). The team might be:
    - Empowered to negotiate any position as long as the contracting officer considers the position fair and reasonable;
    - Empowered to negotiate a position within specific limits approved by management; or
    - Limited to the prenegotiation positions specifically approved by management.
- Approve or reject changes to the plan that will permit the team to exceed any previously-established management limit.

3.9 Preparing A Negotiation Agenda

Need for an Agenda. One of the most difficult tasks during a negotiation is to confine the discussion to what is important while avoiding irrelevant subjects. One of the best ways to promote productive and efficient discussion is to establish an agenda for both sides to follow.

Timing. Whenever practical, you should prepare a draft agenda for contractor review prior to the start of contract negotiations. This gives the contractor an overview of what the Government feels is important and provides the contractor an opportunity to recommend changes.

Some negotiators prefer to wait until the start of negotiations to present the agenda. Though often appropriate, this may delay the start of meaningful negotiations while the agenda is being addressed. Negotiations may be further affected if the contractor is not prepared to discuss key issues identified in the agenda.

Prepare Negotiation Agenda. The negotiation agenda should include the following items:

- Topics to be addressed and the order in which they will be considered;

- A general time schedule for the negotiation sessions;
- Location(s) of the negotiation session(s).
- Names and titles of Government and contractor team members. Include office symbols and phone numbers when appropriate.

Ch 4 - Noncompetitive Negotiations

- 4.0 - Introduction
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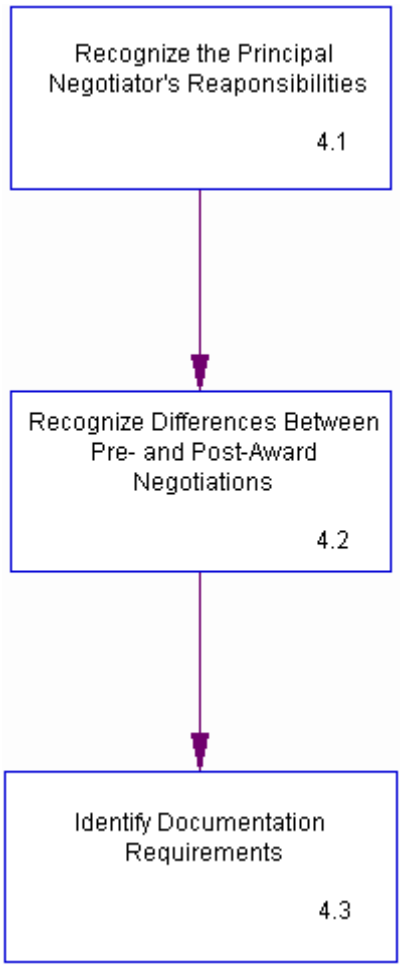
4.0 Chapter Introduction

Noncompetitive Contract Negotiations (FAR 15.306(d)(1)). Noncompetitive contract negotiations are exchanges that take place between the Government and a single contractor. They may take place before or after contract award.

The pattern of negotiations can vary significantly depending on the number, magnitude, and complexity of the issues involved, as well as the personalities of the negotiators. For example,

- The time required to complete negotiations can vary from a few minutes to several months.
- The number of negotiation sessions can vary from one to twenty or more.
- A single negotiator may preside at every negotiation session or different negotiators may take the lead in addressing different issues.

Procedural Steps. The following flowchart outlines the information presented in this chapter:



4.1 Recognizing The Steps Of Negotiation

Principal Negotiator Responsibilities. The principal negotiator must assume Government negotiation team leadership responsibility during the negotiation conference even if the principal negotiator is not the team leader at other times. This includes:

- Actively leading the team throughout the conference;
- Opening the negotiation conference;
- Obtaining any additional facts needed to support continued proposal analysis and negotiation;
- Reviewing facts and identifying negotiation issues;
- Bargaining on the issues;
- Reaching agreements on the issues; and
- Closing the negotiation conference.

Actively Leading the Government Team. The negotiation team must be more than a group of individuals representing the Government. From the beginning of the negotiation conference, the team must function as a single entity. This requires preparation before the negotiation conference and active leadership throughout the conference.

- **Assure That Preparations Are Complete Before Opening the Negotiation Conference.** Before every negotiation session assure that all necessary preparations are complete. In particular, you should assure that the meeting room is properly set up and that team members are available and prepared to perform their assigned roles in implementing the negotiation plan.
- **Assure That Team Support Is Available When Needed.** Normally, the number of Government team members participating in any negotiation session should be as small as practical, but large enough to provide the support required.
    - Consider having the entire team present for the opening of negotiation. This permits everyone to hear the opening comments and participate in the introductions. It also visually demonstrates that the Government position is a team position, not your personal position.
    - For other sessions, you should only include team members whom you expect will actively participate in the session. If you expect to discuss direct material, why have the direct labor expert present? The direct labor expert will likely contribute little to the session, but will be unable to perform other duties while sitting at the negotiation table.
- **Control Team Member Participation.** Exercise the positive control necessary to ensure effective communications while presenting a unified position to the contractor's team.
    - Ask for support when you need it to clarify or emphasize a negotiation position.
    - Interrupt when team members enter into an uncontrolled discussion with the contractor. For example, you might say "I'm going to interrupt you because I think we're getting off the track" or "I'm a little unclear on this point myself, and I'd like to discuss this privately with the team before we continue."

    - Do not permit side conversations between team members and the contractor's team. The noise from side conversations interferes with the negotiation exchange. There is also a good chance that the team member involved could say things that appear to conflict with the Government position.
- **Use Caucuses to Maintain a Unified Government Position.** In negotiations, a caucus is a team meeting to review and, when appropriate, adjust the team position.
    - Use a caucus when you need to:
    - Consult with other team members either in person or by telephone.
    - Restore your control of team participation in the negotiation.
    - Divert the negotiations from sensitive issues or areas of weakness. After the caucus resume negotiations on a different subject.
    - Emphasize to team members that they should request a caucus if you appear to have missed an important point or it appears that you are not taking advantage of a negotiation opening provided by the contractor's team.
    - Hold your caucus in an area away from the contractor's team.
    - For a short caucus (e.g., 30 minutes or less):
        - Move to another room if possible.
        - If another room is not available, consider asking if the contractor's team would allow you to use the negotiation conference room in private for the caucus.
        - If necessary, caucus in the hallway or some other place where you can prevent others from listening.
    - For a longer caucus, suggest that both teams break from negotiations and return at a preset time.
- **Use Breaks to Relieve Tension and Control the Pace of Negotiations.** A break provides both teams time away from the conference table, as well as an opportunity to privately assess new information and reevaluate the team's position.
    - You may call for a break anytime. You might take a:
    - Short break to provide an opportunity to go to the rest room and get some refreshment;

    - Longer break in conjunction with lunch; or
    - A still longer break overnight, over a weekend, or even over several weeks.
    - Consider calling a break when you want to:
    - Provide relief from the stress of the negotiation;
    - Give the contractor's negotiator an opportunity to reevaluate the contractor's position or consider a possible concession;
    - Help restore a cordial and unemotional atmosphere after someone has made a provocative or emotional statement; or
    - Calm down an individual who has become contentious.

Opening the Negotiation Conference. The opening negotiation session is critical, because it sets the stage for the rest of the negotiation conference. It can positively or negatively influence the attitudes that will prevail throughout the conference and significantly affect the probability of a win/win agreement.

- **Greet the Contractor's Team.** Extend a cordial greeting to members of the contractor's negotiation team.
    - Welcome team members as they arrive;
    - Shake hands with all team members if practical;
    - Create a cordial atmosphere by exchanging pleasantries and compliments. At the very least, express appreciation for the contractor's support in the acquisition process.
- **Take Time for Introductions.** Introductions may not be necessary if all the participants know each other. Otherwise, the few minutes required for introductions will pay dividends throughout the negotiation.
    - You may introduce each Government team member yourself or you may have team members introduce themselves. Each introduction should include full name, title or position, and the person's role in the negotiation.
    - Suggest similar contractor team introductions.
    - To help participants remember each others' names, consider providing an attendance roster or nameplates for all team members at the conference table. If the nameplates have been prepositioned on the table, allow time for the contractor's team to rearrange seating in accordance with their seating preference.

- **Help Attendees Feel More at Ease.** Casual conversation often dispels the tension present during every negotiation and helps attendees feel more at ease.
- **Briefly Review Background Information.** Facilitate mutual understanding, by reviewing information related to the contract action under negotiation. In particular, identify any unusual constraints (e.g., imminent expiration of funds) that may affect the negotiation process.
- **Emphasize the Goal of a Win/Win Outcome.** Point out the Government's interest in fairness and a win/win result. Indicate that you assume that the contractor shares that interest.
- **Review the Negotiation Agenda.** Briefly, review the negotiation agenda. When appropriate, provide a written copy for each participant. Then ask for comments from the contractor team. Specifically ask if there are any items that need to be added to the agenda.

Reviewing Facts And Identifying Negotiation Issues. Review contract requirements and the contractor's proposal to assure that you have identified key negotiation issues.

- **Pay Special Attention to Areas Where Issues Are Common.** Ensure that both parties have the same understanding of the:
  - Required contract effort;
  - Contract terms and conditions;
  - Exceptions to Government terms and conditions proposed by the contractor; and
  - Facts, assumptions, and judgments submitted by the contractor as part of its proposal.
- **Summarize the Results of Any Prenegotiation Exchange.** If an exchange preceded the formal negotiation conference, summarize the results of that exchange.
- **Conduct Additional Fact-Finding When Necessary.** Before proceeding with the negotiation conference ensure that both parties feel that the general facts and issues are clear.
  - If the general facts and issues are not clear, conduct additional fact-finding before opening negotiations. Fact-finding should follow the same general guidelines used for conducting prenegotiation exchanges.

    - Fact-finding does not necessarily end once bargaining begins. Additional fact-finding may be necessary whenever additional issues arise.
- **Summarize Areas of Agreement and Issues for Negotiation.** Sometimes an attempt to summarize areas of agreement will identify issues not previously identified. It is better to identify them now rather than after negotiations are complete.

Bargaining on the Issues. Bargaining includes persuasion, alteration of assumptions and positions, as well as give and take on the issues including price, schedule, technical requirements, contract type, or other terms of the proposed contract. In noncompetitive negotiation, bargaining involves offers and counteroffers to define changes in the contractor or Government positions. Bargaining continues until the two parties reach agreement or one party decides that agreement cannot be achieved.

- **Follow Your Negotiation Plan.** Maintain the initiative throughout discussions by following your negotiation plan.
    - Use your agenda to address the issues.
    - Ask questions. Listen and evaluate the answers for responsiveness, truth, and consistency. Listening will minimize the probability of misunderstanding and show that you have a genuine interest in what the contractor's negotiator is saying.
    - Employ appropriate tactics and countermeasures to achieve win/win results.
- **Begin Bargaining With Issues Related to Contract Requirements.** Begin bargaining by seeking agreement on the contract requirements.
    - When addressing contract requirements, always consider potential effects on contract price. Remember that any contract requirement may significantly affect contract cost and price. Do not get boxed into a high price by "gold plating" contract requirements.
    - However, you should consider possible trade-offs between technical requirements and contract price until a final agreement. For example, a lower contract price might be possible if you increase the period of time between contract award and required delivery.

- **Bargain on Price After Agreement on Technical Issues.** Once you have an agreement on contract requirements, you can proceed with bargaining on contract price.
  - Tailor price negotiations to the contract type. When you negotiate a firm fixed-price contract, you can limit your price agreement to total contract price. For other types of contracts, you will need to negotiate more than one contract element to define contract price. For example, when negotiating a fixed-price incentive firm contract, you must agree on target cost, target profit, share-ratio over target, share-ratio under target, and ceiling price.
  - Bargain for a fair and reasonable price. That means you should be willing to negotiate up when the proposed price is unreasonably low or negotiate down when the proposed price is unreasonably high. Remember that your pricing objective should be a price that is:
  - Fair to the buyer;
  - Fair to the seller; and
  - Reasonable considering market conditions, available alternatives, price-related factors, and non-price factors.
  - When bargaining is based on price analysis comparisons:
  - Share information on the bases that you used to develop your estimate of a fair and reasonable price unless the information is confidential or proprietary; and
  - Remember that you need to persuade the contractor's negotiator that your price is more reasonable than the contractor's.
  - When bargaining is based on cost analysis:
  - Begin by examining the contractor's work design and its affect on key elements of cost and profit/fee.
  - Typically, you should address contract costs in the following order:
    - Direct costs (e.g., materials, labor, and other) of performing the work;
    - Indirect costs (e.g., such as overhead and general and administrative expense; and
    - Profit or fee.
  - Do not require agreement on every cost element.
  - Consider available bases for price analysis. Do not get lost in contract cost information. Your

goal should always be a price that is fair and reasonable.

Reaching Agreements on the Issues. As you bargain, remember that you need an agreement that considers all the issues, but you do not have to reach agreement on every issue. For example, you do not have to agree on every issue related to contract cost as long as you can agree on a fair and reasonable contract price.

- **Periodically Review Areas of Agreement.** Review areas of agreement before you begin bargaining and periodically throughout negotiations until you have an overall agreement. Periodic reviews tend to reinforce areas of agreement and demonstrate that the areas of agreement are more significant than the areas of disagreement.
- **Sequence the Areas of Disagreement.** There are several different approaches to sequencing bargaining on areas of disagreement. No one approach is necessarily better than another. The issues being negotiated, circumstances surrounding the negotiation, and the negotiating styles of the negotiator determine the method most likely to succeed. Moreover, predictable patterns may not even be desirable when regularly negotiating with the same party. Approaches include:
    - Negotiating the issues of greatest importance first and then addressing the secondary issues.
    - As each issue comes up, try to reach agreement.
    - If agreement cannot be reached, lay the issue aside and move on to the next.
    - Once you begin discussing issues of secondary importance, you can attempt to trade these secondary issues for the more important unresolved issues.
    - Negotiating secondary issues first and then addressing the issues of greatest importance.
    - It is often easier to reach agreement on secondary issues and success creates a climate of mutual cooperation.
    - The climate of mutual cooperation makes it easier to reach agreement on the more important issues.
    - Negotiating the contractor's demands first.
    - By first making concessions on issues important to the contractor, you create a win/win environment and are more likely to receive comparable concessions.

    - This approach carries obvious risks.
        - The contractor may not be motivated by Government concessions. Why concede after your major demands have been addressed?
        - The contractor's expectations may actually increase. When all the contractor's demands are met, more may appear.
    - Negotiate the Government's demands first. This is the opposite of the approach above.
    - By first reaching agreement on issues important to the Government, you put yourself in a better position to make concessions and foster a win/win environment.
    - This approach also carries risks. The most obvious is that the contractor will perceive unreasonable Government demands and refuse to bargain.
- **Use Mutual Problem Solving to Reach Agreements.** Your initial approach to resolving issues should be to:
    - Work with the contractor's negotiator to identify alternatives. Together, you may be able to identify alternatives that are better than any of the original positions. Brainstorming is often useful for this purpose.
    - Consider the acceptability of identified alternatives. Most alternatives will likely be unacceptable to one side or the other. However, there may be several that are acceptable.
    - Select the best alternative. Most often, you will be fortunate to find a single alternative that is acceptable to both parties. However, if there are multiple alternatives, select the one that provides the highest mutual satisfaction. For example, the Government wants the technical data available for competitive follow-on acquisitions while the contractor does not want to give competitors access to proprietary information. The seemingly unresolvable problem can often be worked out by contractual language that protects the rights of both parties.
- **Use Tradeoffs to Reach Agreements.** Some issues involve differences that do not lend themselves to resolution through problem solving. Each party feels that its position is more reasonable based on the available information. When you encounter such issues, consider attempting to reach agreement through tradeoffs.

    - When you make a concession, attempt to obtain a concession of at least equal importance in return. The concession may be on the same issue or a different issue. Remember that a concession that is relatively unimportant to you may be very important to the contractor.
    - Any offer that you make should be supportable and represent a reasonable position. Provide sufficient support to convincingly demonstrate its merits.
    - Be prepared to sometimes make concessions that represent real sacrifices in the interest of a win/win outcome.
- **Keep a Written Record of Offers, Counteroffers, Agreements, and Unresolved Issues.** This list can be helpful in defining current positions on resolved and unresolved issues.
- **Reach Agreement.** Do not prolong discussions any longer than necessary. Instead, seize the moment to finalize a good agreement. If the contractor's negotiator is reluctant:
    - Emphasize the advantages of the proposed agreement;
    - Offer assurances, such as, "This is a good agreement for everyone," or "I am confident that we both have a good deal;" and
    - Focus attention on your intent to finalize an agreement to provide the final push needed for acceptance.

Closing the Negotiation Conference. Close the negotiation conference as soon as possible once an agreement is reached.

- **Review Key Elements of the Agreement.** A review will protect negotiators from finding out later that they actually agreed to different things.
- **Offer a Handshake on the Agreement.** A handshake is a symbolic gesture of mutual agreement.

4.2 Recognizing Differences Between Pre- And Post-Award Negotiations

This section will examine unique points to consider when negotiating post-award contract actions:

- 4.2.1 - Recognizing Special Considerations For Equitable Adjustments
- 4.2.2 - Recognizing Special Considerations For Termination Settlements

Different Post-Award Negotiations. Two types of post-award negotiations will be examined in this section:

- Equitable adjustment under one of several different contract clauses; and
- Settlement under one of the contract termination clauses.

Negotiation Similarities. While this section concentrates on negotiation differences, remember that there are more similarities than differences. Whether you are negotiating before or after contract award, you must:

- Strive for win/win results;
- Conduct exchanges with the contractor prior to contract negotiations when necessary to establish the facts and issues related to the negotiation;
- Prepare effectively for the negotiation including development and, if necessary, approval of a negotiation plan; and
- Use the negotiation plan and your negotiation skills to obtain a mutually satisfactory result.

4.2.1 Recognizing Special Considerations For Equitable Adjustments

Clauses Providing for Equitable Adjustment (FAR 52.236-2, 52.242-14, 52.242-15, 52.242-17, 52.243, 52.245-2, and 52.245-4).

You may need to negotiate an equitable adjustment under one of several different contract clauses that provide for an equitable adjustment in certain situations. These include the:

- Changes clause;
- Government Property clause;
- Suspension of Work clause;
- Government Delay of Work clause;
- Stop-Work Order clause; or

- Differing Site Conditions clause.

Unilateral and Bilateral Modifications (FAR 43.101, 43.103, 52.212-4(c), and 52.243-1).

There are two basic types of contract modifications permitted under the contract Changes clause:

- **Bilateral modifications** are signed by both the contractor and the contracting officer. You can use them to:
  - Define all aspects of the contract modification, including an equitable adjustment, at the time that the modification is made;
  - Incorporate a negotiated equitable adjustment that resulted from a unilateral contract change, or;
  - Definitize a letter contract.
- **Unilateral modifications** are signed only by the contracting officer and do not require contractor consent.
  - Unilateral modifications are not permitted under the standard FAR Contract Terms and Conditions -- Commercial Items clause. However, the clause may be tailored to provide for unilateral contract modification.
  - Unilateral modifications are permitted under the Changes clauses for all noncommercial contracts.
  - You can use a unilateral contract modification to direct the contractor to modify any of the contract elements specified in the relevant contract Changes clause.
  - The contractor is required to continue performance of the contract as changed and can request an equitable adjustment within the period prescribed in the clause.

Preference for Bilateral Modifications (FAR 43.204(b)). When time permits, the contracting officer should generally modify contract requirements using a bilateral contract modification for three reasons:

- Only one contract document is required.
  - If you make a bilateral contract modification, you can use a single document to modify the contract requirements and incorporate any necessary equitable adjustment.

    - If you make a unilateral contract modification, you must use one document to make the contract modification and a second document to incorporate any necessary equitable adjustment.
- The equitable adjustment is established before work begins. When you use a unilateral contract modification, the contractor must continue to perform the modified contract.
    - While continuing to perform, the contractor incurs actual costs related to the change. As a result the contractor's proposal for an equitable adjustment must include a combination of actual and estimated costs. Each day work is completed so actual costs change and the estimated cost for uncompleted work changes. Negotiations are like trying to hit a constantly moving target.
    - Each day of contractor performance reduces the possibility that you can further influence how the contractor will interpret the modified contract requirements.
- Contracting officers must definitize unilateral modifications within the shortest practicable time. Contracting officers commonly perceive this requirement as additional pressure for timely settlement on them but not on the contractor.

Other Reasons for Equitable Adjustments. An equitable adjustment may also be necessary when:

- Either the Government or the contractor fails to meet its contract obligations. (e.g., the Government fails to deliver Government furnished property when and where required); or
- There is a change in the contracting situation (e.g., a differing site condition on a construction contract).

Equitable Adjustment Objective. As the term implies, your objective should be an "equitable" adjustment. FAR does not define the term "equitable." Instead the Government relies on the judgment of the contracting officer and precedents established by the Courts and Boards of Contract Appeals. In general, an equitable adjustment is one that is **fair** to all concerned. Many define it as leaving the contracting parties in a position no better or worse than before the action or inaction that necessitated the adjustment.

Equitable Adjustment Elements. An equitable price adjustment should consider changes in contract price and other terms affected (e.g., schedule).

- Price changes should consider the reasonable cost of completing the contract before the act that necessitated the adjustment and the reasonable cost of performing the contract after it.
- Contract terms (e.g., schedule) should consider the effect of the act on contract performance. For example, production must stop because parts that meet new requirements will not be available at any price for six months, but parts that met the original requirements were in stock.
- Elements of the adjustment can be traded off. For example, when contract requirements increase, the contractor might request a higher price to make the change and meet the required delivery schedule. However, the contractor might accept a lower price increase if you extend the delivery schedule.

Special Problems in Equitable Adjustment Negotiation. An equitable adjustment negotiation often presents special negotiation problems. The biggest problems are usually related to adjusting contract price. As stated above, the objective is a fair adjustment that leaves the contracting parties in a position no better or worse than before the action or inaction that necessitated the adjustment.

The preferred method of pricing the adjustment is by negotiating the difference between the reasonable cost of performing the contract before the action or inaction that necessitated the adjustment and the reasonable cost after. Depending on the type of equitable adjustment profit may or may not also be adjusted.

The main problem is deciding what costs are reasonable:

- The same rules on cost allowability that apply to new contract negotiations also apply to equitable adjustments. Unfortunately, many contractors not familiar with cost negotiations often do not understand that they cannot recoup such unallowable costs as interest expense.
- You may have to rely on the opinions of experts concerning actual costs incurred by the contractor.

This is particularly likely when the contractor does not have an adequate cost accounting system.
- You may have to rely on the opinions of experts concerning work actually completed. This is particularly likely when the contractor does not have a well documented system for managing contract performance. This is a special problem if the contractor overestimates the work completed to support an unreasonably low estimate of the cost of work deleted and not performed.
- Most contractors are very reluctant to accept estimates showing that the costs for work deleted would have been more than estimated at the time of contract award. Some look at equitable adjustments as an opportunity to recoup losses associated with unrealistically low cost estimates at the time of contract award.

Contractor Advantages in Equitable Adjustment Negotiation. An equitable adjustment negotiation may provide the contractor with negotiation advantages not present before contract award.

- Negotiations are noncompetitive. Pricing alternatives on the original contract may have been limited by competition.
- Contracting officers have time limits to complete definitization of unilateral contract modifications. Those limits increase pressure on the contracting officer to complete negotiations. However, they do not directly increase pressure on the contractor.
- While performing under a unilateral modification, the contractor is incurring actual costs. The fact that the costs have already been incurred provides strong support for the position that the costs are reasonable.

Government Advantages in Equitable Adjustment Negotiation (FAR 31.201-3(a)). An equitable adjustment negotiation may also provide the Government with negotiation advantages that it did not have in the original contract award.

- The contractor performance must continue, so the Government is not faced with a lack of progress in meeting its needs.
- Payment for affected items delivered may be withheld until unit prices have been adjusted as part of the

equitable adjustment, increasing pressure on the contractor to negotiate.
- The contractor is incurring actual costs, but you are precluded from paying any cost that is not reasonable (actual cost or not). Until the adjustment is consummated, the contractor assumes the risk that its actual costs will be accepted as reasonable. As this actual cost increases, so does the pressure to negotiate.
- The clauses that provide for equitable adjustment also provide for a unilateral contracting officer decision if no agreement can be reached. Of course, the contractor can dispute the decision, but the process is expensive and long. Most importantly, there is no guarantee that the dispute will be successful, particularly when the contracting officer's final decision is reasonable.

Win/Win Benefits of Negotiated Adjustments. A negotiated agreement is generally a better deal for both sides because:

- A unilateral contracting officer's decision may give the impression of being win/lose no matter how reasonable it is.
- Disputes are long and expensive for both parties involved.
  - If the Government wins, the contracting officer's decision may still appear one-sided to the contractor.
  - If the contractor wins, it appears that the Government adopted a win/lose position and lost.

4.2.2 Recognizing Special Considerations For Termination Settlements

Contract Terminations (FAR 49.101). There are two general types of contract terminations.

- **Termination for Convenience.** The contract termination for convenience clause gives the Government the right to terminate the contract when it is in the Government's best interest to do so. Specific provisions for settlement will depend on the

commercial or noncommercial nature of the product and the contract type.

- **Termination for Default or Cause.** The contract termination for default clause or termination for cause clause gives the Government the right to terminate the contract when the contractor fails to meet its obligations under the contract. Specific Government rights depend on the commercial or noncommercial nature of the product and the contract type.

Termination Settlement Negotiation (FAR 52.212-4, 52.249-1, 52.249-2, 52.249-6, and 52.249-8).

Noncommercial fixed-price termination for convenience settlements typically require more and more complex negotiations than any other type of termination settlement.

- Commercial contract termination for convenience settlements center on determining the percentage of contract work performed prior to the notice of termination and reasonableness of charges related to the termination. The termination settlement is calculated by multiplying the contract price by the percentage of work performed and adding the reasonable charges related to the termination.
- Cost-reimbursement contract terminations for convenience require little negotiation because the contractor is entitled to receive all allowable costs and any related fee.
- Settlements for terminations for default or cause normally require little negotiation because the general requirements for settlement are described in the clause. In fact, most negotiations related to terminations for default or cause involve contractor efforts to convince the Government that there are factors that justify converting the termination for default or cause into a termination for convenience.

Noncommercial Fixed-Price Termination for Convenience Settlement Objective (FAR 49.201(a) and 49.201(b)).

For a noncommercial fixed-price contract termination for convenience, your objective should be a settlement that compensates the contractor **fairly** for the work done and the preparations made for the terminated portions of the contract including a reasonable allowance for profit.

- Fair compensation is a matter of judgment and cannot be measured exactly.
- Various methods may be equally appropriate for arriving at fair compensation.
- The use of business judgment, as distinguished from strict adherence to accounting principles, is the heart of settlement.
- The parties may agree upon a total amount to be paid to the contractor without agreeing on or segregating the particular elements of cost or profit comprising that total.

Noncommercial Fixed-Price Termination for Convenience Guides for Settlement (FAR 49.201 and 49.207).

The primary objective is to negotiate a settlement by agreement.

- Cost and accounting information provide guides for negotiating a fair settlement, but they are not a rigid measure.
  - In appropriate cases, costs may be estimated, differences compromised, and doubtful questions settled by agreement.
  - Other types of data, criteria, or standards may furnish equally reliable guides for fair compensation.
- The amount payable under a settlement (not including settlement costs) must not exceed the contract price less payments otherwise made under the contract. From that amount you must deduct any disposal or other credits.

Special Problems in Fixed-Price Terminations for Convenience Settlement Negotiation. A fixed-price contract termination for convenience settlement negotiation may also present special problems.

- The biggest problem is often the atmosphere surrounding the termination process. While the atmosphere surrounding a new contract negotiation is one of hope and a new beginning, the atmosphere surrounding a termination is one of lost opportunities. Many times it is an atmosphere of distrust and resentment. You must not allow this atmosphere to drag you into a win/lose negotiation

- Contractors are required to submit final settlement proposals within one year of the contract termination but the period for submission can be extended by the termination contracting officer. The long period of time between the termination and settlement negotiation can affect the availability of information and your ability to verify the facts surrounding the termination. Work in process inventory, special tooling, special test equipment, or important records may be lost during this extended period of time. Costs incurred after the termination may be mixed with costs incurred before the termination.
- The same rules on cost allowability that apply to new contract negotiations and equitable adjustments also apply to termination settlements. Unfortunately, many contractors not familiar with cost negotiations often do not understand that they cannot recoup unallowable costs.
- You may have to rely on the opinions of experts concerning actual costs incurred by the contractor. This is particularly likely when the contractor does not have an adequate cost accounting system.
- In a partial termination settlement, the contractor may propose increased costs in the continued portion of the contract related to the termination. Never consider these costs as part of the termination settlement. However, you may consider the need for a separate equitable adjustment.

Contractor Advantages in Fixed-Price Termination for Convenience Settlement Negotiation. A fixed-price contract termination for convenience settlement negotiation may provide the contractor with negotiation advantages not present before contract award.

- Negotiations are noncompetitive. Pricing alternatives on the original contract may have been limited by competition.
- When the contractor's accounting system permits cost identification and tracking, actual costs should be available. There should be few cost estimates.

Government Advantages in Fixed-Price Termination for Convenience Settlement Negotiation (FAR 52.249-2(g)).

A fixed-price contract termination for convenience settlement negotiation may also provide the Government with

negotiation advantages that it does not have in the original contract award.

- Normally, the Government will owe the contractor additional funds when the settlement is reached. This should increase the contractor's desire to reach an agreement.
- The fixed-price termination for convenience clause permits the contracting officer to unilaterally settle the termination by paying the amounts determined reasonable. Of course, the contractor can dispute the determination, but the process is expensive and long. Most importantly, there is no guarantee that the dispute will be successful, particularly when the contracting officer's determination is reasonable.

Win/Win Benefits of Negotiated Settlements. A negotiated agreement is generally a better deal for both sides.

- A unilateral contracting officer settlement determination gives the impression of being win/lose no matter how reasonable it is.
- Disputes are long and expensive for both parties involved.
    - If the Government wins, the contracting officer's determination may still appear one-sided to the contractor.
    - If the contractor wins, it appears that the Government adopted a win/lose position and lost.

4.3 Identifying Documentation Requirements

Need for Documentation. Documentation must identify the significant facts and issues that affected the negotiated contract price. As a minimum, it should include:

- The proposal and any related information submitted by the contractor;
- The Price Negotiation Memorandum (PNM);
- Copies or references to the location of any technical or audit analysis reports considered during the negotiation; and
- A record of any request for additional contractor information to support the proposal and the contractor's response.

Price Negotiation Memorandum (FAR 15.406-3). At the close of each negotiation, you must promptly prepare a PNM outlining the principle elements of the contract negotiation and include a copy in the contract file. Formats vary, but the PNM must include the following information:

- Purpose of the negotiation (new contract, final pricing, etc.)
- Description of the acquisition, including appropriate identifying numbers (e.g., RFP number).
- Name, position, and organization of each person representing the contractor and the Government in negotiations.
- The current status of any contractor systems (e.g., purchasing, estimating, accounting, or compensation) to the extent that they affected and were considered in the negotiation.
- If the offeror was not required to submit cost or pricing data to support any price negotiation over the cost or pricing data threshold, the exception used (e.g. acquisition of a commercial item) and the basis for using it.
- If the offeror was required to submit cost or pricing data, the extent to which the contracting officer:
    - Relied on the cost or pricing data submitted and used in negotiating price;
    - Recognized any cost or pricing data submitted as inaccurate, incomplete, or noncurrent:
    - The action taken by the contracting officer as a result of that recognition;
    - The action taken by the contractor as a result of that recognition; and
    - The effect of the defective data on the price negotiated; or
    - Determined that an exception applied after the data were submitted and, therefore, did not consider the submission to be cost or pricing data.
- A summary of the contractor's proposal, any field pricing assistance recommendations, including the reasons for any pertinent variances from them, the Government's negotiation objective, and the negotiated position.
    - When the determination of price reasonableness is based on cost analysis, the summary must address each major cost element.

    - When determination of price reasonableness is based on price analysis, the summary must include the source and type of data used to support the determination.
- The most significant facts or considerations controlling the establishment of the prenegotiation objectives and the negotiated agreement including an explanation of any significant differences between the two positions.
- To the extent such direction has a significant effect on the action, a discussion and quantification of the impact of direction given by Congress, other agencies, and higher-level officials (i.e., officials who would not normally exercise authority during the award and review process for the instant contract action).
- The basis for the profit/fee prenegotiation objective and the profit/fee negotiated.
- Documentation that the negotiated price is fair and reasonable.

PNM Cost Element Summary. When you use cost analysis, your cost element summary should address the offeror's estimating rationale, the Government's objective, and the amount considered negotiated. Commonly, this summary begins with a tabular presentation similar to the following:

Cost Element	Proposed	Objective	Considered Negotiated	Reference
Engineering Direct Labor	$1,000,000	$900,000	$925,000	See Para A
Engineering Overhead	$2,500,000	$2,025,000	$2,127,500	See Para B
Subtotal	$3,500,000	$2,925,000	$3,052,500	
G&A	$350,000	$292,500	$305,250	See Para C
Total Cost	$3,850,000	$3,217,500	$3,357,750	

Using this type of tabular cost element summary, you can identify the areas and degree of differences and provide a general format more detailed analysis.

- In Paragraph A, summarize:
    - The rationale used by the offeror in developing the proposal.

- Any technical or audit recommendations. Focus on any differences between the proposal and the recommendations.
- The reasons for any differences between technical or audit recommendations and the Government objective.
- The reasons for any differences between the Government objective and the amount considered negotiated. (Note: You and the contractor will likely not agree on each element of cost so the amount considered negotiated is your analysis of a the cost used to arrive at a reasonable price.)

- In Paragraphs B and C, address the same subjects covered in Paragraph A with one major addition. Since dollars are calculated using overhead and G&A rates, you need to address whether the dollar differences are the result of differences in the application base, the rates themselves, or both.

PNM Cost Element Summary (cont)	o In the example above, the differences in engineering overhead dollars result from differences in both the base and the rate.	
	Engineering Overhead	**Calculations**
	Proposed	$1,000,000 x 250% = $2,500,000
	Objective	$900,000 x 225% = $2,025,000
	Considered Negotiated	$925,000 x 230% = $2,127,500
	o The differences in G&A expense dollars relate only to differences in the base. The rate is the same for all three positions.	
	G&A Expense	**Calculations**
	Proposed	$3,500,000 x 10% = $350,000
	Objective	$2,925,000 x 10% =

		$292,500
	Considered Negotiated	$3,052,500 x 10% = $305,250
PNM Price Summary	When you use price analysis, your price summary should address each unit price, the Government's objective, and the price negotiated. Commonly, this summary begins with a tabular presentation similar to the following:	

	Item	Proposed	Objective	Negotiated	Reference
	0001	$15,000	$14,000	$14,250	See Para A
	0002	$10,000	$9,750	$9,750	See Para B
	0003	$4,500	$4,400	$4,500	See Para C

- If the same rationale applies to all items, a single explanatory paragraph should be enough.
- If different rationales apply to different items, you may need to provide several explanatory paragraphs.

PNM Analysis of Facts or Considerations Affecting Price. As you document the significant facts or considerations affecting the proposal, your objective, and the amount negotiated, consider the effect of the following:

- Items or services being purchased;
- Quantities being purchased;
- Place of contract performance;
- Delivery schedule or period of performance;
- Any difference(s) between the proposed delivery schedule, the objective schedule, and the negotiated schedule;
- Any previous buys of similar products including:
  - When,
  - How many,
  - Schedule/production rate,
  - Contract type, and
  - Unit prices or total prices, including both target and final prices, if applicable;
- Any Government-furnished material that will be provided as a result of the contract; and
- Any unique aspects of the contract action.

PNM Distribution (FAR 15.406-3(b)). Whenever you obtain field pricing assistance to support your negotiation, you must forward a copy of the PNM to the office(s) providing field pricing assistance. When appropriate, you should also forward recommendations on how field pricing assistance can be made more effective.

Technical and Audit Reports. Technical and audit reports provide key insights into the rationale that you used in developing your prenegotiation objectives. Normally, you should include a copy of each relevant report in the contract file. However, if the report is large or only available electronically, it may not be practical to include a copy in the contract file. In such situations, you must at least include information on where the full report can be found.

Record of Any Additional Information. The contract file should also include a record of any request(s) that you submitted to the contractor for additional information along with the contractor's response.

Ch 5 - Nonverbal Communication

- 5.0 - Chapter Introduction
- 5.1 - Recognizing Different Forms Of Nonverbal Communication
- 5.2 - Describing How Body Language Affects Negotiations
- 5.3 - Describing How The Physical Environment Affects Negotiations
- 5.4 - Recognizing How Personal Attributes Affect Negotiations

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5.0 Introduction

Communication Is More Than Verbal. Good negotiators must first be good communicators. Unfortunately, many negotiators think of communication only as oral or written verbal exchanges. But verbal exchanges account for only a fraction of the messages people send and receive. Research has shown that between 70 and 90 percent of the entire communication spectrum is nonverbal. Consequently, you should be aware of the different forms of nonverbal communication that you are likely to encounter during negotiation conferences.

Although we continually send and receive nonverbal messages, most of us are not fully aware of the ways that we communicate nonverbally. Still, if you watch carefully, you will see that most leading professionals (e.g., doctors, lawyers, politicians, corporate chief executive officers, and contract negotiators) are excellent nonverbal communicators. Some people call it charisma. Others call it style. Whatever it is, they have it!

5.1 Recognizing Different Forms Of Nonverbal Communication

Importance of Nonverbal Communication. If you are only aware of` a negotiator's verbal message, you will likely miss the major portion of the overall communication. Being aware of both nonverbal and verbal messages will give you an important edge.

- Skills in interpreting nonverbal communications will help you glean useful information from others involved in the negotiation.
- An awareness of nonverbal communication may also prevent you from harming your own negotiation position by inadvertently sending nonverbal signals that disclose confidential information or weaknesses in your position.

Areas of Nonverbal Communication. Nonverbal communications include all forms of communication that are not part of the language that we speak or write. There are many ways that we reveal ourselves nonverbally This text will concentrate on the three areas of nonverbal communication that will most likely affect contract negotiations:

- Body language (kinesic communication) using facial expressions, body movements, gestures, and posture;
- Physical environment (proxemic communication) using available space, distance from or proximity to other people, and territorial control; and
- Personal attributes such as:
    - Physical appearance (artifactual communication) including all options that communicators use to modify their appearance;
    - Vocal cues (auditory communication); and
    - Touch (tactile communication) particularly the handshake.

Conscious or Subliminal Messages. Nonverbal communications can involve conscious or subliminal messages.

- **Conscious nonverbal communications.**
    - Senders of conscious nonverbal communications are aware that they are sending a message and the general meaning of that message. For example, the individuals extending a hug know that they are embracing someone and that action is normally perceived as indicating affection.
    - Receivers of conscious nonverbal communication are aware that they received the message and the meaning intended by the sender. The receiver of a hug, for example, generally realizes that the message is a sign of friendship.
- **Subliminal nonverbal communications.** Subliminal messages are communicated to the subconscious mind of the receiver. Receivers of subliminal messages are not

consciously aware of the message. However, these messages are important.

- Gut reactions are frequently based upon your subconscious reading of subliminal nonverbal communications.
- Police and military uniforms subliminally communicate the authority of those wearing them.
- Well-dressed executives project success and credibility.
- Poor dress transmits messages of failure and a lack of credibility.
- Although subliminal messages do not create awareness on a conscious level, they still influence the receiver. In fact, subliminal messages are often more powerful than conscious messages. The advertising world is replete with examples of the value of subliminal nonverbal messages.
- Young, beautiful people are often seen in advertisements to communicate the subconscious message that the advertised product is associated with youth and beauty.
- Companies pay large sums of money to have their products appear in movies. While these appearances are not typical product advertisements, the mere association of the product with the movie transmits subliminal messages that will influence viewers.

Voluntary or Involuntary Messages. Conscious and subliminal messages can both be transmitted voluntarily or involuntarily.

- **Involuntary nonverbal communications.** Most nonverbal messages are involuntarily. In fact, many negotiators are not aware that they communicate nonverbally.
  - Body language is one area where the involuntary nature of nonverbal communication is particularly evident. Every day, people unintentionally convey nonverbal signals by their facial expressions, gestures, and body postures. For example, people telling falsehoods often involuntarily send a telltale nonverbal message to listeners by frequently blinking their eyes.
  - Because involuntary nonverbal communications represent unplanned physical responses, this communication form tends to be particularly

revealing and more honest than verbal communication or even conscious nonverbal communication.

- **Voluntary nonverbal communications.** Nonverbal communication can also be controlled by a knowledgeable person.
  - A person who knows that people telling falsehoods often blink their eyes can take special care not to blink when telling a falsehood.
  - A person who knows that a hug indicates friendship can consciously hug his/her worst enemy as trick to put the person off guard or as part of an effort to improve their relationship.

Interpreting Nonverbal Messages. You must interpret nonverbal messages as part of the overall communication system.

- Typically, an individual nonverbal message is difficult to accurately interpret in isolation because most messages have several possible meanings. For example:
  - A yawn might indicate a lack of interest, physical fatigue, or both.
  - Rapid eye blinking might indicate deceit or just poor fitting contact lenses.
- A nonverbal message is easiest to interpret when it is consistent with other communications that you are receiving at the same time. For example, you might be more likely to interpret rapid eye blinking as indicative of dishonesty if the person also avoids eye contact while speaking.
- An inconsistent nonverbal message may be impossible to interpret. However, an apparently negative nonverbal message should raise a red flag indicating that you should look more carefully for related verbal or nonverbal clues. Look for messages that correlate with each other so that you can make a more accurate interpretation.

Cultural Differences. Always consider cultural differences when you send or receive nonverbal messages. A message that has a particular meaning in one society can have a completely different meaning in another society. For example, in the United States we encourage eye contact as an indicator of honesty and interest. People in some other societies believe that they should look down when talking

to another person to indicate deference and respect. For them, direct eye contact might be considered offensive and disrespectful.

5.2 Describing How Body Language Affects Negotiations

Body Language and Attitudes. Body language research has catalogued 135 distinct gestures and expressions of the face, head, and body. Eighty of these expressions were face and head gestures, including nine different ways of smiling.

These gestures and expressions provide insight into the attitude of the originator. Simultaneous physical signals often reinforce each other and reduce the ambiguity surrounding the message. For example, eagerness is often exhibited with the simultaneous physical displays of excessive smiling along with frequent nodding of the head.

Common attitudes communicated nonverbally during negotiations can be grouped into two broad classifications -- positive attitudes and negative attitudes.

Example of Positive and Negative Attitudes.

Which team shows a win/win attitude?

The illustration above depicts the body language demonstrated by two negotiation teams. The nonverbal messages provided by their body postures, facial gestures, and appearance provide substantial information about both teams. Note that the team on the:

- Right transmits nonverbal messages exuding confidence and success.
- Left transmits nonverbal messages that convey negative attitudes and other unflattering characteristics.

Positive Attitudes. Positive attitudes indicated by body language may signal a sincere effort to achieve win/win results. Key indicators of positive attitudes are listed below.

- Speakers indicate respect and honesty by keeping their eyes focused on the eyes of the listener(s).
- Confidence is often exhibited by:
  - Hands in pockets with thumbs out;
  - Hands on lapel of coat;
  - Steepled fingers or hands;
  - Good body posture (e.g., square shoulders and a straight back); or
  - Hands on hips.
- Interest may be exhibited by one or more of the following:
  - Tilted head toward speaker;
  - Sitting on edge of chair;
  - Upper body leaning in sprinter's position; or
  - Eyes focused on speaker.
- Careful evaluation of what is being said is frequently indicated by one or more of the following:
  - Peering out over eyeglasses;
  - Chin cupped between thumb and fingers;
  - Putting hands to bridge of nose; or
  - Stroking chin.
- Eagerness is often demonstrated by:
  - Rubbing hands together;
  - Smiling excessively; or
  - Frequent nodding of the head.

Negative Attitudes. Negative attitudes indicated by body language may signal a deceitful nature or a win/lose

approach to negotiation. Common indicators of negative attitudes are listed below.

- Deception or dishonesty is often demonstrated by:
  - Frequent eye blinking;
  - Hand covering mouth while speaking;
  - Frequent coughing;
  - Looking away while speaking; or
  - Quick sideways glances.
- Defensiveness may be indicated by the following:
  - Arms crossed high on chest;
  - Crossed legs; or
  - Pointing an index finger at another person.
- Insecurity is often exhibited by:
  - Hands completely in pocket;
  - Constant fidgeting;
  - Chewing on a pencil;
  - Frequent coughing;
  - Biting fingernails; or
  - Hand wringing.
- Frustration is frequently shown by:
  - Tightness of a persons jaw;
  - Rubbing back of neck; or
  - Drawing eyebrows together.
- Listener boredom or indifference is generally indicated by:
  - Eyes not focused at speaker or looking elsewhere;
  - Head in hand;
  - Sloppy or informal body posture; or
  - Preoccupation with something else.

Gestures. Be particularly careful when interpreting or using gestures. A gesture that means one thing in one society can mean something completely different in another. There is a good chance that you will encounter differing interpretations whenever you are negotiating with someone from another part of the world. Even if the other party is from the United States, some of these differing interpretations may remain as part of the person's heritage.

- Shaking your head up-and-down means "yes" in the United States and left-to-right means "no." In some parts of the world the meanings are just the opposite.
- The hand signal for O.K. in the United States is an obscene gesture in some societies.

- The thumbs-up gesture is a positive sign in most of the world, but in some cultures it considered a rude gesture.
- The V-shaped hand gesture with the index finger and middle finger may mean victory or peace in the United States, but in some countries it could be interpreted as an obscene gesture.

Body Language Application. In contract negotiation, you can use a knowledge of body language in several ways:

- As you prepare for the negotiation conference, you should briefly review key elements of body language with members of the Government team.
    - Exhibiting positive attitudes will make them more believable as they present support for the Government position.
    - Exhibiting negative attitudes will bring their support into question and may raise questions about the entire Government position.
    - A questioning look by a team member as you make a statement may bring your credibility into question.
    - A lack of interest exhibited by a team member may convince the contractor's negotiator that the issue being addressed is not important to the Government.

- During the negotiation conference, you can use your knowledge of body language in several ways. You can:
    - Gain greater insight into the attitude of the contractor's negotiator.
    - Do not take one element of body language and make grand assumptions. Remember that:
        - Similar types of body language can have substantially different meanings.
        - Body language can be controlled by a knowledgeable negotiator.
    - Look for confirming communications either verbal or nonverbal.
    - Concentrate on using body language that supports your verbal communications (e.g., eye contact will support your truthfulness).
    - Unless you are very good, you will not be able to completely suppress your natural body language.
    - However, unless your natural body language indicates a negative attitude, your use of

positive body language should strongly support your position.
    - Consider body language as you listen to the positions taken by other Government team members.
    - If they appear uncertain, you might interject support.
    - If they appear negative, you might ask for a brief caucus to remind them of the importance of positive body language.

5.3 Describing How The Physical Environment Affects Negotiations

Physical Environment. The physical environment transmits nonverbal messages that can be extremely important to negotiators. Key elements of the environment include:

- The negotiation conference facility;
- Conference table configuration, size, and seating arrangements;
- Physical distance between negotiators;
- Relative elevation of the negotiators; and
- Visual aids.

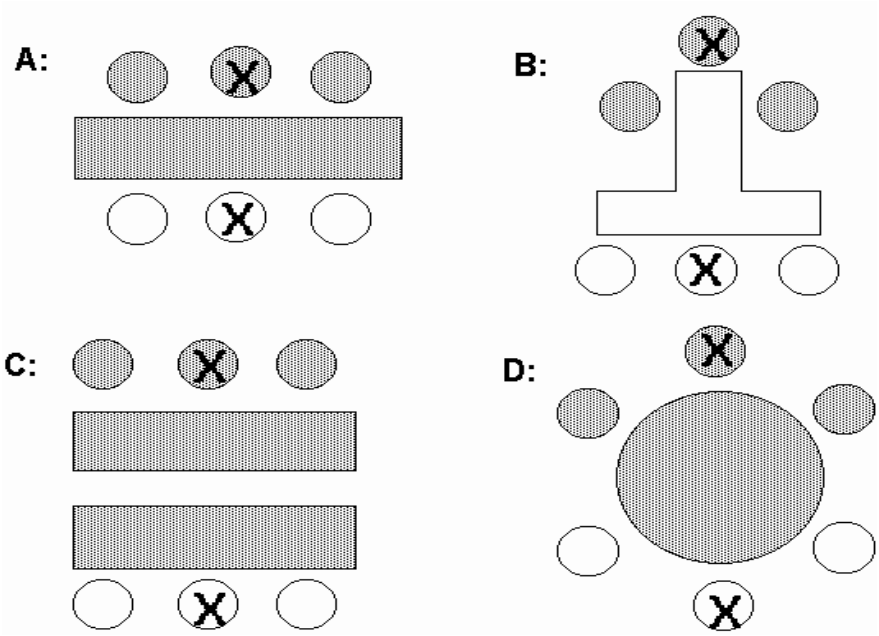
Negotiation Conference Facility. Your negotiation conference facility says volumes about you, your organization, and the importance of the negotiation.

- Messages are sent by the entire facility not just the conference room. A dirty or substandard rest room might actually send a stronger message about your organization than a substandard conference room.
- Negotiators will react to subliminal messages related to the negotiation facility even though they may not realize that the messages exist.
    - Superior negotiation facilities convey positive messages about the host and the importance of the negotiation. These messages may increase the self-assurance of the host and lower the confidence of the guest negotiators.
    - Substandard negotiation facilities convey unflattering nonverbal messages. These unflattering messages may lower the confidence of the host team while increasing the self-assurance of the guest negotiators.

- Negotiators' reactions may be affected by plush carpet or expensive furniture but they are affected more by physical comfort.
    - An older or less attractive Government facility may provide positive results as long as it offers sufficient comfort for everyone involved. That includes:
    - Adequate furnishings, lighting, and space for everyone involved; and
    - A comfortable room temperature.
    - Physical discomfort will likely negatively affect the attitudes of people already under pressure. It may particularly affect the attitude of the guest team, if they perceive the discomfort as a win/lose tactic by the host.

Negotiation Table Configuration. Although there is no standard table configuration for every negotiation conference, the table arrangement transmits important conscious and subliminal messages. Those messages are so important that the negotiations to end the Vietnam War were delayed for almost a year while the parties involved negotiated the shape of the negotiation table.

- The best table arrangement for any negotiation depends on the situation. However, win/win negotiation attitudes can be promoted with table configurations that convey trust. In contrast, win/lose attitudes are created by table settings that communicate disparity or mistrust between the two parties.
- Each negotiation table configuration below conveys a different message.



- Arrangement A is a typical configuration for contract negotiations. The two parties sit together to indicate and foster unity. Each team is on a different side of the table and the teams are facing each other so each team member can clearly hear what anyone on the other team has to say.
- Arrangement B may tend to give one party an advantage over the other because the arrangement suggests only one important person, the person at the end of the vertical extension.
- Arrangement C shows a need for space between the two parities. That space could mean more formality or less trust.
- Arrangement D may be the most conducive to win/win negotiations because the round shape is usually associated with equality.

Negotiation Table Size. The conference table(s) should be large enough to comfortably seat participants from both teams with adequate space for their work papers, reference material, and briefcases. Depending upon the complexity of and probable length of the negotiation, more chairs may be needed if specialists or observers are added to the group. However, any additional furniture should be positioned so as not to interfere with the action at the negotiation table.

Principal Negotiator's Position at the Negotiation Table. The physical position of the principal negotiator is generally at the center of the negotiation team. The ideal place for the principal negotiator in each arrangement shown above is the middle seat flanked by team members.

- The central position conveys a message of authority and sends an image of a unified negotiation team. For example, the President of the United States always sits at the center of the conference table during Cabinet meetings.
- Besides sending a negative nonverbal message, positioning the principal negotiator somewhere other than at the center of the team also has other consequences. In particular, an end position will likely make it more difficult for some team members to whisper advice, give cues, or pass notes to the principal negotiator.

Physical Distance Between Negotiators. People in different cultures require different amounts of physical distance for communication. Too little or too much space between people can have a negative effect. In the United States, most people:

- Reserve the space closer than 1.5 feet for intimate communication. A negotiator may be annoyed and nervous if you attempt to conduct any significant communication from any distance closer than 1.5 feet.
- Allow a distance of 1.5 to 4.0 feet for close interpersonal contact. A negotiator will likely become increasingly annoyed and nervous as you move closer.
- Allow a distance of 4.0 to 12.0 feet for most business transactions or consultations. Note that four feet is about the distance across the typical conference table.
- Communicate only briefly or formally at a distance beyond 12.0 feet.

Relative Elevation of the Negotiators. The phrase "I look up to ..." indicates respect. You need to be aware that this phrase is more than just a cliché.

In fact, most people in the United States are conditioned early in life to defer to people on a higher physical level and that training continues throughout their lives. Teachers stand while students sit. Judges preside

from raised platforms. Political leaders address supporters from raised stages.

Some negotiators attempt to take advantage of this conditioning by raising themselves above the other negotiator. Some make key points while standing or walking around as the other negotiator sits. Others have gone so far as to raise the chairs for their team to a level higher than those for the other team.

Do not allow another negotiator to intimidate you by physically talking down to you. If necessary, stand yourself or ask the other negotiator to sit down.

Visual Aids. Assure that adequate visual aids are available to support both negotiating teams. Marker boards and chalkboards are practically a standard requirement. Visual aids may also include overhead projectors or videocassette recorders with televisions.

Marker boards and chalkboards are excellent for summarizing the negotiation agenda, issues, and agreements. However, you need to remember that the person who is writing on the board has the power of the marker. By controlling what is written, that person can modify the agenda, define key issues, or draft agreements. That power can substantially affect negotiation progress and results.

5.4 Recognizing How Personal Attributes Affect Negotiations

Personal Physical Appearance. You need be aware of the effect that your physical appearance may have on nonverbal communication. Awareness may permit you to build on your natural advantages. However, awareness of any natural disadvantage may be even more important.

Research has found that:

- Physical attractiveness affects the way you perceive yourself and the way other perceive you. Attractive people:
    - Are better liked, get better jobs, and have more self-esteem and social power than unattractive people.

    - Receive preferential treatment in the initiation and development of interpersonal relationships.
- Height affects perceptions:
    - Taller men and women are normally perceived as more dominant than shorter men and women.
    - Tall females are perceived as even more dominant and smarter when they are with short males.
- Body type affects perceptions
    - Athletic looking people are normally perceived as more assertive and self-reliant than people with other body types.
    - Heavier less athletic looking people are normally perceived as more lazy, sympathetic, and dependent than people with other body types.
    - Skinny fragile looking people are normally perceived as more suspicious, nervous, and pessimistic than people with other body types.

Personal Dress. The importance of how we dress is highlighted by the cliché, "Dress for success." Clothing has been found to affect perceptions of credibility, likability, attractiveness, and dominance, but researchers agree that clothing has the most potent affect on credibility.

Unfortunately, many otherwise good negotiators ignore the importance of personal dress during negotiations, and that ignorance negatively affects their ability to attain mutually satisfactory negotiation results.

- Make sure that your clothing is appropriate for the negotiation situation.
    - Normally, you should dress for negotiations as you would for a promotion or job interview. This type of dress emphasizes your credibility and professionalism.
    - Casual days are growing in popularity. On such days, more casual dress may be appropriate. If you adopt more casual dress, always:
    - Advise the contractor of your intent to adopt a more casual atmosphere.
    - Remember that more casual dress will reduce the nonverbal emphasis on your credibility and professionalism.
    - Clothing such as jeans is never appropriate unless you are negotiating on a construction site or similar area.

- If you wear a uniform, wear it properly.
    - In general, people in uniform are perceived to have more power than the same people out of uniform.
    - Failing to wear a uniform properly may be perceived as showing disrespect for yourself, your organization, and the other negotiator.

General Personal Grooming. General grooming, especially poor grooming, can have a profound affect on how you are perceived by others. Do not allow poor personal grooming (e.g., uncombed hair or an unshaven look) to detract from your appearance and communicate unfavorable nonverbal messages about you or your negotiation position. Remember, that if you look good, you will generally:

- Feel better;
- Perform better; and
- Be perceived better by others.

Vocal Cues. The nonverbal messages communicated by the sound of the human voice, can provide valuable information during negotiations. There are eight attributes of speech that provide especially important vocal cues that you should consider during negotiation:

- **Loudness.** Without enough loudness you cannot be heard. However shouting or a harsh sounding voice may be perceived as disruptive or insulting. Many times, lowering your voice almost to a whisper will help you make a point better than shouting.
- **Pitch.** Most factual communication includes moderate changes in the pitch of your voice. A monotone involves little or no change and may be perceived as indicating apathy or boredom. A high pitched voice may be perceived as indicating excitement. A low pitched voice may be perceived as indicating anger.
- **Rate.** A slow rate of speech may frustrate the listener. An increasing rate may be perceived as the result of increasing intensity. A fast rate may be perceived as an indicator of nervousness and it may also be difficult to understand.
- **Quality.** This is the characteristic that permits you to differentiate one voice from another.
- **Regularity.** The regular or rhythmic voice pattern will normally make you sound more confident or authoritative. Irregular speech might be perceived as

more thoughtful or uncertain depending on your words and other nonverbal messages.

- **Articulation.** Speaking each word clearly makes you easier to understand.
- **Pronunciation.** To be understood, you must also use the correct sounds and emphasis in pronouncing each word. Mispronouncing a word might be perceived as indicator of ignorance or incompetence.
- **Silence.** The absence of sound can also send a strong message. Silence gives you an opportunity to listen. You can obtain useful information from the contractor's team by listening to what they say and how they say it.

Handshake Cues. Most negotiations begin and end with a handshake and every time the physical clasping of hands provides subliminal nonverbal message(s) to the parties involved. These messages can have a significant effect on their perceptions or each other.

- Use your initial handshake to convey a positive first impression.
  - Signal positive attributes through your grip.
  - A firm handshake or executive grip conveys positive attributes (e.g., power, confidence, and sincerity).
  - A loose handshake may send unflattering messages (e.g., weakness and insecurity). Some people even feel insulted when someone uses a loose grip or just grasps their fingertips.
  - A vice-like grip rarely sends a positive message. It may be perceived as an attempt at intimidation. It may cause real pain. Either way, it is not conducive to initiating a win-win negotiation.
  - Support your grip with other consistent nonverbal messages.
  - Smile and look the other person straight in the eye to signal honesty and friendliness.
  - Slight up and down movement emphasizes the strength of the relationship. However, you should never forcefully shake the other person's hand up and down like an old water pump. That is normally considered excessive. It can also be painful.
- Use a handshake after agreement to symbolically seal the agreement and set the stage for a positive continuing relationship.

- Consider emphasizing the warmth and importance of your continued relationship by:
- Briefly prolonging the handshake;
- Grasping the person's hand between both your hands; or
- Grasping the forearm, elbow, or even the upper arm of the other party as you shake hands.
- Use a smile and positive words to dispel any tensions that may have built up during negotiations.
- Failing to offer a handshake could seriously damage any hope for positive continuing relationship.

Handshake Differences. Be careful as you interpret handshake cues. As with other nonverbal messages, you should consider the possible effect of cultural differences.

- In some Middle Eastern and Asian cultures, a gentle grip is preferred over the executive grip.
- In some Asian cultures, direct eye contact during the handshake is discouraged.
- In Islamic cultures, men never offer to shake hands with women. Touching between unrelated men and women is forbidden.
- In the United States, some women extend their hand with the palm down preferring to only grasp fingers rather than use the executive grip. However, most business women prefer the executive grip when shaking hands with men or women, and many are offended when someone only grasps their fingers.

Ch 6 - Bargaining Techniques

- 6.1 - Rule 1: Be Prepared
- 6.2 - Rule 2: Aim High
- 6.3 - Rule 3: Give Yourself Room To Compromise
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Ten Rules for Bargaining Success. You do not have to use a particular negotiation style to become a successful negotiator, but your chances of success will improve when you adopt 10 basic bargaining rules followed by win/win negotiators. These rules constitute the most important guidelines on what to do and what not to do in order to attain mutually satisfactory results in Government contract negotiations.

6.1 Rule 1: Be Prepared

Importance of Preparation. Successful negotiators are generally the best prepared negotiators. No amount of negotiator experience, skill, or persuasive ability can fully compensate for the absence of preparation. Moreover, none of the other bargaining rules can be entirely effective without preparation.

Adequate preparation by the Government negotiator is essential. When contractors are better prepared than Government negotiators, they have an important bargaining advantage. Although members of the contractor's team may not spend any more time on this contract than the Government, the cumulative preparation time they have spent selling the same product over and over again may give them an edge over individual buyers. Moreover, contractors usually know more about their relatively unique product or service because it is the reason they are in business and, after all, they produce it and may have even invented it.

Negotiator's Perception. Several surveys have shown that many Government contract negotiators do not understand the importance of negotiation preparation. They rate it far down on a list of factors that affect negotiation success. Why would that be true when all the experts say that preparation is essential for negotiation success?

- Perhaps the negotiators surveyed are not aware of the amount of preparation that is really necessary before the negotiation begins. In fact, everything you do from conducting market research to conducting exchanges with the contractor is preparation. It all affects the probability that you will be able to attain a successful outcome in contract negotiation.
- Perhaps they are aware of the importance of preparation, but they do not feel that they have time to prepare well for each negotiation. It could be that they do not have time because they do not prepare well. Poor preparation leads to poor contracts that require constant clarification, modification, and of course more negotiation.

Preparation Dividends. Adequate preparation for most negotiations includes a careful study of the strengths and weaknesses of both positions along with a study of the needs of the other party and the ways to satisfy those needs. Successful negotiators realize that a relatively small amount of preparation in these areas is well worth the effort. In fact, no other aspect of negotiation continually pays better returns than preparing for the upcoming bargaining session. Conversely, poor preparation adversely affects your chances of success. side way out of proportion to the time saved. Since there is just no substitute for good preparation, you should never negotiate an issue unless you are adequately prepared.

6.2 Rule 2: Aim High

Importance of Aiming High. The slogan "aim high" has a great deal of relevance for successful negotiators because the expectation level of negotiators is closely related to the outcome of the negotiations. Expectations are the gauges by which people measure their performance. Generally, the higher your expectations, the better you will ultimately perform. The reason for this relationship

is that expectations influence your behavior and that behavior influences the outcome of the bargaining session.

Power of Positive Thinking. The strong correlation between expectations and performance should come as no surprise because it affects many facets of our lives. Norman Vincent Peale focused on the importance of a good attitude in his book, *The Power of Positive Thinking*. In other words, you have a better chance at success if you think you will do well. Conversely, if you think that you will not succeed you will generally do poorly. This theme is constantly demonstrated in everyday life. For example, sports coaches motivate team performance by emphasizing that the team can win if it plays up to its potential. What would happen if instead the coach said, "They are bigger and stronger than you are, so just go out there and try not to get hurt?"

Laboratory and Classroom Experience. Laboratory and classroom experience confirms that, under identical circumstances, sellers who expected to receive more for their product (high seller expectation level) generally received a higher price than sellers with lower aspirations. Similarly, buyers who expected to pay a lower price (high buyer expectation level) tended to pay less than their counterparts who faced identical pressures but had lower expectation levels.

Pressures and Limitations Affect Expectations. Negotiators, like people in general, are naturally more aware of the pressures and limitations affecting them than they are of the pressures and limitations affecting other negotiators. As a result, buyers are often willing to pay more than necessary, while sellers are often willing to accept less than necessary.

The private sale of an automobile provides a good example of this phenomenon.

- Private party sellers frequently sell their cars for less money than what the vehicles are actually worth because the sellers are **more aware** of their own personal pressures and problems related to the sale. These sellers have no knowledge of the pressures facing the nameless strangers who respond to their newspaper ads.
- Similarly, car buyers are often acutely aware of the personal pressures associated with their car purchase

(e.g., their urgent need for transportation) and know little or nothing of the pressures facing the seller.

- The party that best understands these pressures will normally have more success in the negotiation process. This ignorance of the pressure facing the other party explains why the expectation levels of otherwise good negotiators are frequently not as high as they should be.

Make Positive Assumptions. The key to establishing high expectations is developing positive assumptions about your bargaining position. Positive assumptions lead to high expectations while negative assumptions lead to low expectations.

The $18,000 blue book value of an automobile is a good illustration of this phenomena.

- Many sellers will assume that $18,000 is the most they could get for the car.
- Sellers with positive assumptions will assume that the blue book price represents an average price which means some cars sold for more than $18,000 and some for less. They expect to be among the sellers to sell at higher than average price. Making this favorable assumption will normally increase their success in negotiations.

Always Aim for a Win/Win Outcome. In Government contract negotiations, high expectations should be more than just obtaining contracts at good prices. You should "aim high" by striving for win/win outcomes with high expectations on both price and on non-price (e.g., contract requirements) issues.

Aiming high must not conflict with a win/win approach to negotiation. High expectations include good quality, timely delivery, and a mutually beneficial long term relationship. Moreover, there is typically a range of prices that you could consider fair and reasonable. Having the expectation of negotiating a contract price below your minimum estimate of a reasonable price is not a win/win approach. Aiming to negotiate a price that is not fair and reasonable will likely result in a win/lose or lose/lose outcome.

6.3 Rule 3: Give Yourself Room To Compromise

Importance of Giving Yourself Room to CompromiseI. Compromise is essential to successfully conducting most negotiations. Even the most skilled bargainers must make concessions in order to obtain successful outcomes. Yet, many negotiators are unable to make material sacrifices because their opening position is too close to their expectation level. Consequently, their inability to compromise often leads to feelings of frustration by both parties which can preclude a mutually satisfactory agreement. You can easily adhere to this rule by establishing an opening position that allows you to compromise and still reach your objective.

When negotiating contract price, Government negotiators should normally present an initial position below what they feel the ultimate price will be in order to be in the position to make concessions before agreeing on the final price. In contrast, contractors should normally ask for more than what they expect so that the other party will be satisfied with a compromise that is still within the Government's range of acceptable outcomes.

Compromise Takes Planning. Whenever you review the proposal and related Government analyses there is a temptation to only develop one position, the Government objective. In developing that objective, you typically consider many compromises from positions taken by one or more Government analysts.

If you only present the Government objective to the contractor, the contractor's negotiator will never fully understand the compromises that you have made in arriving at that position. Instead, the contractor's negotiator will think that you are inflexible.

Instead, you need to develop a variety of positions that will permit you to demonstrate a range of apparently fair and reasonable positions. They will also permit you to demonstrate flexibility in making the concessions needed to reach a mutually satisfactory result.

Examples of Compromise Expectation. In some cultures the price of everything is negotiable even the price of food or the price of a taxi ride. In the United States, we assume that the prices of these basic items are fixed, but expect

the prices of larger items (e.g., an automobile or home) to be negotiable. We normally expect sellers to start high and negotiate down and buyers to start low and negotiate up.

When compromise is expected, you may be penalized for having an opening position too close to your objective. For example, you may have a difficult time negotiating a $170,000 sale price for your home when your initial asking price is $170,000. The reason for this difficulty is straightforward. Americans are culturally conditioned to expect the actual sale price for homes to be less than the asking price.

Automobile dealers have long followed this rule by using sticker prices that are higher than the prices they expect to receive for their cars. This practice makes it easier for the salesperson to negotiate a good price for the dealership. But just as important, buying the car at a discount instills satisfaction in the buyer, who feels that a good deal was obtained because the agreed-upon price is below the sticker price.

Penalty for Not Giving Yourself Room to Compromise. Some negotiators feel that the best way to obtain a quick settlement is to make a first counteroffer at or very close to their objective. Then they do not make any further concessions.

Actually the effect of such positions may be to extend negotiations and even result in a lose/lose situation. Why?

The contractor's negotiator expects compromise during negotiations. The Government's favorable offer raises the negotiator's expectations. The negotiator may be able to settle immediately based on the Government's offer, but negotiations continue because a better deal for the contractor now appears likely. When the Government fails to offer further compromise, the negotiator's expectations are lowered. As a result, the negotiator often becomes frustrated and even angry. Negotiations may actually last longer and end with little satisfaction on either side from any result obtained.

Caution. Never establish an unreasonable position just to give yourself room to compromise. Such positions are normally counterproductive because they often cause the

contractor's negotiator to view you as a win/lose negotiator.

Guard against this predicament by supporting your opening position with a valid rationale based on available facts and reasonable judgments. In Government contracting, your opening position should be your minimum position in the range of fair and reasonable prices.

6.4 Rule 4: Put Pressure On The Contractor

Importance of Putting Pressure on the Contractor. Because of the pressure inherent in every negotiation, success in negotiation stems in large part from the ability of a negotiator to increase pressure the other negotiator while at the same time limiting the pressure on themselves. You can often accomplish this by following some simple procedures which will reduce your stress while increasing the pressure on the other negotiator.

Consider Pressures Facing the Other Party. Bargainers are naturally more aware of their own limitations and less aware of the pressure on others. Fortunately there are several ways you can alleviate this weakness.

- Believe that there are unknown pressures facing the other negotiator. Just believing will alleviate some of the pressure on your position.
- Attempt to identify specific pressure elements as part of your preparation for negotiation.
- Listen and watch during negotiation to identify cues on the pressures affecting the contractor's negotiator.

Consider Competitive Alternatives. In non-competitive negotiations, just the hint of potential competition might pressure the prospective contractor into being more conciliatory and innovative in meeting the Government needs. For example, you can put a great deal of pressure on the prospective contractor by referring to potential alternatives, such as:

- Canceling and resoliciting;
- Changing in product requirements to encourage competition;

- Changing terms and conditions to encourage competition;
- Investing in new source development; or
- Performing the contract requirement with in-house Government resources.

Resist Artificial Pressures. Do not let artificial pressures, such as the perceived stature or the impressive credentials of the contractor's negotiator, increase the negotiating pressure on you.

- Nicely furnished offices in prestigious locations along with great sounding job titles should be of no help at negotiations unless you allow yourself to be influenced by these fake pressures. For example, the fact that the contractor's negotiator is a company vice-president should not be any more stressful than if you were negotiating with any other salesman. In some company's every salesman is a vice-president, because the perceived stature of this job title often gives them leverage over insecure buyers.
- Do not allow certifications adorning walls or listed on business cards intimidate you into thinking that owning the credentials makes the negotiator an expert on the issues under negotiation.

6.5 Rule 5: Do Not Volunteer Weaknesses

Importance of Not Volunteering Weaknesses. Never volunteer information that would weaken your negotiating position or enhance the bargaining position of the contractor. Although this rule is only common sense, it is often overlooked because most people are candid and forthright by nature.

Be Honest But Be Careful. Honesty and ethical behavior are always paramount in any Government negotiating session. However, you do not have to be dishonest to avoid volunteering weaknesses. There are many ways to respond to questions without telling falsehoods or volunteering information detrimental to your bargaining position.

You can normally adhere to this rule by carefully wording statements or by avoiding a direct response to a direct question. For example, when selling a car the owner is commonly asked, "Why are you selling your car?", the

seller could volunteer a weakness by saying, "My car is a gas guzzler." Alternatively, a seller not wanting to disclose the poor gas mileage could avoid revealing the weakness and still be honest by saying "I want to get another car" or "I just want to drive something different" or "I just want to sell my car."

Penalty for Needlessly Disclosing Weaknesses. Examples abound of negotiations where Government personnel needlessly disclosed weaknesses and that disclosure resulted in higher contract prices.

- Without being asked, an Air Force engineer admitted during negotiations that the contractor's proposal of $3.5 million was overly generous because the commanding general wanted the contract and $10 million in funding was available for the work. As a result of this admission, the contracting officer believed the negotiated contract price was thousands of dollars more than necessary.
- A Navy negotiator inadvertently divulged information on the extreme importance of completing a construction contract on time. Because of this admission, the contractor's negotiator correctly concluded that the Government had a short deadline and would not have enough time to solicit other offers from competitive firms. This knowledge significantly weakened the Government bargaining position, resulting in a higher than anticipated contract price.
- An attempt by a contractor's negotiator to invoke pity on his firm by disclosing that the firm was behind on payments to subcontractors backfired when the Government negotiator unfairly took advantage of this weakness. Unfortunately, in response to this disclosure of weakness, the "win/lose" Government negotiator was able to negotiate unreasonably low contractor overhead rates.

6.6 Rule 6: Use Concessions Wisely

Importance of Using Concessions Wisely. Because compromise is a vital part of contract negotiations, most successful negotiators are masters of when and how to make concessions. The concessions that you make, when you make

them, and how you make them will all have a significant affect on the outcome of the negotiation.

Concession Amount. Do not appear overly generous or rush to make concessions. Concede slowly and in small amounts. Concessions too large or given too quickly may:

- Unnecessarily raise the expectations of the other negotiator. Instead of bringing the parties closer together, the increased expectations of the other negotiator may result in the two negotiators actually being farther apart.
- Give the other negotiator the impression that the concessions were not that important to you or that you are overly anxious for a settlement. Several small concessions will more clearly demonstrate fairness and reasonableness than one or two large concessions.
- Leave little room for further maneuvering.
- Be more than necessary to achieve a mutually satisfactory result.

Something in Return. Link your concessions with the spirit of compromise.

- Whenever practical, indicate your appreciation for previous concessions and emphasize the need for additional concessions.
- Never make a concession without getting, or at least asking for, a concession in return. For example, end concession statements by saying "provided that" to insure your sacrifice is linked to a concession by the contractor. Linking concessions may:
    - Make your concessions appear more valuable. Negotiators, like most people, generally put a higher value on something that requires a sacrifice on their part.
    - Force contractor concessions that otherwise would not have been made.

Equal-Concession Trap. Negotiators often demand equal concessions, particularly when negotiating contract price. For example, "We are lowering our price by $100,000 and we hope that you can at least match that concession."

There are two major problems with demands for equal concessions.

- Equal concessions are only equal if you are equally far from your objective. The contractor may be $300,000 above your objective and you only $150,000 below it. If you both concede $100,000, you would be left with little room to compromise.
- This demand is a form of bargaining on positions. Once you get away from the issues, it may be impossible to return. Win/lose bargaining may be your only alternative.

Splitting-the-Difference Trap. Splitting the difference is a form of the equal-concession trap. It is most often offered in price negotiations and it often sounds reasonable. However, there is no guarantee that the resulting price will be fair and reasonable. For example, if the contractor's position is unreasonably high and you are close to your objective, splitting the difference will likely result in a price that is not fair and reasonable.

Repetitive splitting the difference over relatively small amounts should be avoided. This technique often portrays the user in a win/lose vein as someone more concerned about small amounts than a win/win outcome.

If a contractor's offer to split the difference will not enable you to meet your objective, accept the offer as a new contractor position and continue negotiations from there. Remember that when the contractor's negotiator offered to split the difference, that negotiator, in reality, adopted a new negotiation position. If you refuse to split, the negotiator making the offer normally cannot easily retreat from it.

6.7 Rule 7: Say It Right

Importance of Saying It Right. The time-worn axiom, "It's not what you say but how you say it," aptly applies to the way successful negotiators communicate with other negotiators. The importance of good interpersonal relationships cannot be overemphasized. The reason for this is simple. You are trying to negotiate a mutually satisfactory result. **Even the most generous offer may be rejected when the contractor feels slighted or offended.**

Key Points to Saying It Right. There are several points that you should consider in your efforts to say it right.

- **Sell Yourself and Your Ideas.**
  - Show the politeness and cordiality that you would expect from a persuasive salesperson.
  - Think before you speak and try to anticipate possible negative reactions.
- **Never Use Provocative Terms.** For example, use "resolute" instead of "stubborn" or "incorrect" rather than "stupid."
- **Be Polite and Show Respect.**
  - Always address the contractor negotiators in a polite and respectful manner. It is particularly important to state disagreements in a tactful and businesslike manner instead of responding in a way that may appear as a personal attack. For example, a response to an unacceptable offer might be "We appreciate your efforts to resolve this issue, but we still have a long way to go," instead of a personal remark such as "That offer is an insult to my intelligence."
  - Using discourteous or disrespectful language only upsets the other negotiator and makes it that much harder to obtain a mutually satisfactory result.
- **Negotiate from Strength.** Use your strong points - be confident.
- **Be Personable, But Businesslike.** Learn names and use them. Do not use a person's first name or nickname if you feel that the person might be offended.
- **Keep It Simple.** Negotiators generally will be less willing to agree when they do not understand.
- **Never Personalize Differences.** For example, never disagree using personal pronouns. Refer to the "XYZ Corporation position" instead of "your position."
- **Emphasize the Need for Cooperation**. Both parties need to work together to resolve issues. For example, "We must work together to ...."
- **Speak in a Voice That Projects Strength and Confidence.**
  - Be careful not to sound insincere, tentative, or overly eager for a settlement.
  - Do not chance slighting the other negotiator by saying things in a condescending or angry tone of voice.

- **Be Cautious About Expressing Unrelated Opinions.** For example, you might make a seemingly inoffensive statement such as, "The Cubs sure whipped the Reds yesterday." This remark could have a negative effect if the other negotiator is a Reds fan or just doesn't like the Cubs or baseball.
- **Never Make Negative Personal Comments.** Be especially careful not to make negative comments about anyone involved in the negotiation process.
  - Negative comments about personnel on the contractor team will likely anger team members.
  - Negative comments about personnel on your team will make you seem petty and highlight discord within the team.
- **Be Calm And Don't Lose Your Temper.** Remain calm even when others make comments that provoke you. Continue to be polite even when the other side is rude or provocative.

Penalty for Not Saying It Right. Not saying it right can do irrevocable harm to the negotiation process. Making a true but unfavorable remark about another negotiator might set an adversarial tone for the entire negotiation. The offended negotiator might resist every offer, not because of the fairness or logic involved but because of the hurt feelings caused by the remark.

6.8 Rule 8: Satisfy Non-Price Issues

Importance of Satisfying Non-Price Issues. Most negotiations will not end in agreement unless both the price and non-price issues are satisfied. Yet, many negotiators enter negotiations with an awareness only of price issues facing each side and fail to identify important non-price needs of the contractor. In contrast, successful Government negotiators are able to identify the non-price needs of the other party and develop ways to satisfy those needs.

Never narrow down the objective of negotiations to just price issues. Look for non-price needs and the corresponding ways of satisfying the other party. Non-price needs are often difficult to identify because these issues are not specified by the other party. For example, the negotiation to buy a family-owned company includes more

than just bargaining the sales price of the business. Other important non-price issues of the seller should also be addressed, such as the desire to protect the jobs of longtime employees or the retention of the family name on the business.

Identifying Non-Price Issues. Common non-price issues that you must consider include:

- Technical requirements;
- Data requirements;
- Contract start;
- Contract type;
- Contract financing;
- Delivery;
- Options; and
- Government furnished property.

6.9 Rule 9: Use The Power Of Patience

Importance of Using the Power of Patience. The power of patience seems obvious. However, practicing patience is often harder than it sounds because of the pressure inherent in every contract negotiation. The quicker the negotiations conclude, the sooner contract performance begins and this natural pressure is relieved.

Nonetheless, you can use patience to:

- Increase the stress on the contractor's negotiator.
- Display resolve or firmness in your position by demonstrating to the other side that you are not overly anxious for a settlement.
- Dissipate the emotional feelings that surround certain issues by showing a willingness to proceed through negotiations or, when necessary, slow them.

Quite often the extra negotiating time taken by patient negotiators translates into thousands and even millions of dollars in additional concessions. In one case, the Government negotiated a $40 million reduction on a $500 million contract by waiting for 2 days - instead of agreeing on price on the day requested by the Government program office.

Cultural Barriers. American negotiators are generally more impatient than negotiators from other societies. Patience is even sometimes seen as an undesirable quality by the American culture. In contrast, societies known to value patience as a virtue (e.g., the Japanese and Russians) produce negotiators whose patience enhances their bargaining skill. In fact, the Japanese believe that only a fool would quickly conclude a deal. Most successful negotiators would agree with that assessment.

Penalty for Not Using the Power of Patience. Research has shown that the best deal for both sides takes time. Under a controlled environment where both sets of negotiators had access to the same facts, the quickest negotiation sessions generally tended to have unbalanced or win/lose outcomes in favor of either the buyer or the seller. In contrast, the results of longer negotiation sessions based on the same information tended to be more even. These results demonstrated that achieving balanced outcomes takes longer because both sides need time to explain their positions and develop ways to achieve a mutually satisfactory result.

6.10 Rule 10: Be Willing To Walk Away From Or Back To Negotiations

Importance of Being Able to Walk Away from or Back to Negotiations. Deadlock cannot always be avoided and, in fact, is sometimes necessary when dealing with unfair or unreasonable parties. Even the best negotiators sometimes fail to come to mutual agreement and experience this lose/lose outcome. However, good negotiators are neither afraid to walk away from bad deals nor too proud to return to the negotiation table once they realize a better deal cannot be obtained.

Resolve to Walk Away. You should have the resolve to walk away from what a reasonable person would consider to be a bad deal. Emotions or time constraints should not prevent objective thinking or acting in the best interests of the Government. However, the Government team should objectively decide if a stalemate is in the best interests of the Government. For urgently needed items, it may be better for the Government to be on the losing end of a win/lose agreement instead of the losing end of a lose/lose outcome resulting from a deadlock. Nevertheless, the willingness to

deliberately deadlock when a fair deal cannot be obtained is extremely important because this attitude gives you the resolve to credibly apply other bargaining techniques.

Resolve to Come Back. You should also have the resolve to come back to the negotiation table after a deadlock. If you learn that a better deal cannot be obtained in a timely fashion elsewhere, do not let pride get in the way of renewing negotiations. Although it is usually better to let the other party make the first move after deadlock, you cannot be sure that will ultimately happen. But even when you make the first move, the other party will often welcome it because of the severe pressure on both parties caused by the deadlock.

Deadlocks are frequently caused by personality conflicts between the principal negotiators who let egos get in the way of a win/win agreement. Professionalism and a win/win attitude help prevent stalemates caused by personality clashes, but it is sometimes necessary to change principal negotiators in order to get the negotiations back on track.

Walkout Risk. A walkout or even the threat of a walkout may be used to your advantage during the conduct of the negotiation, but not without some risk. The risk is that it may be very difficult to get the negotiation started again and back on track. If your walkout or threat to walkout leads to a concession, it is a successful technique. If the walkout fails, however and your position is weakened because an extreme technique did not work, reconciliation will be difficult . Whenever a negotiation conference has reached a point where you think you should terminate discussion and walk out, consider the impact your walkout will have. When you believe the other side will perceive the walkout as a clear indication they should be more flexible, then the walkout may be appropriate. When the walkout would be perceived as a win/lose ploy, then do not walk out unless you have first tried everything else.

Stay Professional. When you believe that a contractor is about to walk out:

- **Attempt to Forestall the Contractor's Action.** You might suggest a break (e.g., hours, days, or even weeks) to give both parties time to think things over and review their positions.

- **Remain Professional.** Use words such as, "We sorry that you have chosen to end negotiations. If you change your mind, we are certainly willing to continue bargaining on the issues." An angry or frustrated reaction will likely not cause the contractor to reconsider. However, a professional reaction may prevent the impasse make it easier to restart negotiations at a later time.

Considering Your BATNA (FAR 15.404-2(d)). When a walkout appears eminent, you should always consider your best alternative to negotiated agreement (BATNA). Work with management to evaluate your current position and your alternatives. This evaluation should consider questions such as the following.

- ***Is the current Government position reasonable based on the available information?***

Unless there is a truly urgent requirement, such as a contingency operation, you must be willing to back away from unreasonable agreements. If the Government position is reasonable, you need to consider the remaining questions.

- ***What is your BATNA?***

If you believe that your position is reasonable and the contractor's position is unreasonable, you must ask the question "What happens if we cannot reach a mutually satisfactory result with the contractor?" Consider the effect on both current and future requirements. Sometimes an unreasonable negotiation result may be better than the available alternatives.

- ***What is the contractor's BATNA?***

Consider how badly the contractor needs the contract. It may be attractive for a number of reasons (e.g., employment of contractor resources, overhead allocation, or technology advances). It could be that the contractor has no equally attractive business opportunities.

- ***How can you make the Government position stronger vs. the contractor's position?***

You can make the Government's position relatively stronger by strengthening the Government's position or weakening the

contractor's position. One of the most effective ways of weakening the contractor's position is to introduce competition.

Return from a Walkout. Never walkout unless other alternatives appear more attractive. However, you must remain open to returning to the negotiation table if things change, particularly if the contractor becomes more reasonable. Knowledge of the relative strength of your negotiation position will define your power throughout the remainder of the negotiations.

Ch 7 - Bargaining Tactics

- 7.1 - Using Win/Win Tactics
- 7.2 - Identifying Win/Lose Tactics And Appropriate Countermeasures

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Endless Array of Tactics. There is an almost endless array of negotiation tactics. Many are designed to foster win/win results, but others are orientated toward win/lose approaches to negotiation. Most have several variations and can be used in conjunction with other tactics depending on the unique circumstances surrounding the negotiation.

7.1 Using Win/Win Tactics

Tactics for Win/Win Results. The tactics outlined in this section are generally used to facilitate win/win results. Accordingly, countermeasures are generally not necessary. However, even win/win tactics can be abused and used as negotiating ploys by win/lose negotiators. Countermeasures to win/lose use are identified for each tactic throughout this section. For most tactics, there are more countermeasures than those described in this section.

Forbearance. Forbearance is the act of refraining or abstaining from action. In negotiation forbearance allows both parties to agree to disagree and move on to the next issue without making a commitment one way or another.

- **Win/Win Use.** When you and the contractor's negotiator disagree on an issue, you can use forbearance to prevent the negotiation from bogging down on that issue. Instead, you can search for issues where you can agree. Delaying action affords you both more time to view the unresolved issue in a different light.
- **Win/Lose Use.** Forbearance can be used by win/lose negotiators to stall agreement on any issue and place increasing pressure on the other party to make concessions.
- **Countermeasure To Win/Lose Use.** Offer to trade concessions on areas of disagreement. You make a concession on one issue in return for a contractor concession of equal importance.

Questioning. Questioning involves the use of questions to probe the position of the other party.

- **Win/Win Use.** You can ask questions for many useful win/win purposes, including:
  - Obtaining additional facts or specific information on the other party's position.
  - Seeking a specific response, such as "What is the best you can do?"
  - Identifying an alternative by using a question that begins with "Have you considered .?"
  - Breaking impasses using questions such as, "Why.?" or "Suppose.?"
  - Assisting the other party in reaching agreement with questions such as, "When can you start work?" Such questions can often precipitate a settlement.
- **Win/Lose Use.** A win/lose negotiator might question you in an attempt to gain information on the limits of your negotiation position. For example, a negotiator might ask "How much money is available for this contract?" If you answer honestly, the negotiator can adopt that figure as the contractor's negotiation objective for the remainder of the negotiation.
- **Countermeasure To Win/Lose Use.** If you suspect questioning is being used to obtain win/lose results, counter by either:
  - Not answering the question;
  - Rephrasing the question into a question that you can answer without harming your negotiation position;
  - Responding with another question; or
  - Just listening.

Trial Balloon. A trial balloon is a tentative plan offered to test the reaction of a particular audience. You can offer a trial balloon by presenting the contractor's negotiator with an offer prefaced with the words "what if .." Without committing yourself, you can politely bring up solutions for discussion and give the contractor's negotiator the right to accept, reject, or offer an alternative without making a firm commitment. For example, you might say, "How would your company feel about this alternative?"

- **Win/Win Use.** Using this tactic allows you to suggest win/win solutions. It can be particularly useful if

you phrase the trial balloon in a way that encourages the contractor's negotiator to offer alternative solutions.

- **Win/Lose Use.** A win/lose negotiator might use a trial balloon as a trap. For example, the negotiator might offer a price for settlement. If you accept, the negotiator finds a reason not to accept it. The negotiator gains insight into your objective without giving up anything.
- **Countermeasure To Win/Lose Use.** When in doubt about the acceptability of a trial balloon, take time to formulate your response. Trial balloons often require substantial time to answer and generally cannot be analyzed on the spot. Be particularly careful when accepting the trial balloon that would require you to move to the limit of your negotiating range.

Alternative Positions. By offering two or more alternative positions at the same time, you can indicate that you would be willing to accept more than one way of settling a particular issue or group of issues. It is different than the trial balloon, because you are making a commitment to accept any option that the contractor's negotiator selects.

- **Win/Win Use.** You offer alternatives acceptable to the Government. The contractor's negotiator has the opportunity to select the option or alternative course of action most favorable to the contractor's position. You gain an acceptable resolution, and the cost to the contractor's position is minimized. In addition, the selection process gives the contractor's negotiator a sense of ownership in the solution. That sense of ownership may improve the general negotiation atmosphere and lead to the satisfactory resolution of other issues.
- **Win/Lose Use.** A win/lose negotiator might offer two or more unacceptable solutions to key issues. When you refuse them all, the negotiator could use your refusal to support a charge that you are being unreasonable.
- **Countermeasure To Win/Lose Use.** The pros and cons of each alternative position may not be readily apparent. Spend enough time to thoroughly analyze the merits and drawbacks of every option before making your selection. Never accept an unreasonable solution simply because it is the most attractive one offered. If all alternatives are unacceptable, offer another alternative rather than simply rejecting them.

Acceptance Time. Acceptance time is a definite period of time that one party to a negotiation has to accept an offer by another party. Instead of forcing a quick decision, you can use this tactic to deliberately give the contractor's negotiator more time to grasp your solution or ideas.

- **Win/Win Use.** You can increase acceptance time by making a offer near the end of the day and then suggesting a break in negotiations until the next day. Overnight, the negotiator will have time to think about your offer and maybe discuss it with higher management. Negotiators, like people in general, need time to accept something new or different.
- **Win/Lose Use.** A win/lose negotiator might use acceptance time as a delaying tactic. It could be particularly useful when you are under severe time pressure or the momentum of the negotiation appears to be in your favor.
- **Countermeasure To Win/Lose Use.** Do not take too much time to respond to an offer because the momentum could be lost for quick agreement. Taking too much time could also allow a win/lose negotiator an opportunity to develop further delaying tactics.

Brainstorming. Brainstorming is a technique to develop alternative solutions through an unrestrained exchange of ideas. Negotiators using this tactic think out loud and openly discuss many alternative solutions or ways to resolve issues. No value judgment is placed on any idea during the brainstorming session. Ideas are simply recorded for later evaluation and possible use.

- **Win/Win Use.** When negotiators are sincere and open to new ideas, brainstorming can be a useful tactic to identify a wide variety of alternatives on ways to reach a win/win result. During the brainstorming session and later evaluation of the ideas presented, new insights can also be gained on the hidden pressures and needs that the parties involved bring to the negotiation.
- **Win/Lose Use.** For brainstorming to work, the negotiators must be sincere and open to new ideas. A win/lose negotiator who is not sincere could use a brainstorming session to gain information about alternatives that another negotiator might be willing to accept, while revealing nothing. That insight could

then be used to win/lose negotiator's advantage for the remainder of the negotiation.

- **Countermeasure To Win/Lose Use.** The win/lose counter is to simply say nothing and listen. Either both parties share ideas or neither shares.

Salami. The negotiator using this tactic makes demands one demand at a time rather than requesting everything all at once.

- **Win/Win Use.** Using the salami approach permits you to divide complex issues into more understandable components. You have an opportunity to fully explain and sell each position before moving on to another issue. Clear understanding positions on these components can give you a better understanding of different positions on the overall issue. Its like a complicated mathematics problem. Most people cannot look at the problem and tell you the answer. They must complete all the individual calculations needed to find that answer.
- **Win/Lose Use.** A win/lose negotiator might use this technique to win concessions on a variety of issues, before you realize just how many issues there are. Before you know it, you have negotiated away all your flexibility and you have not even gotten to the tough issues.
- **Countermeasure To Win/Lose Use.** When you suspect the other party is a win/lose negotiator, the best countermeasure is to make the negotiator specify all demands before you make your first concession. Refuse piecemeal results.

Blanketing. Blanketing is the opposite of the salami approach. It is designed to get all the issues on the table at the beginning of the negotiation. Negotiators using the blanketing tactic open the negotiation by outlining all their demands at once.

- **Win/Win Use.** When used by win/win negotiators, this is tactic puts all of the issues on the table, so that everyone understands the magnitude of the negotiation task. Otherwise, substantial time may be wasted on trivial issues while key issues are left to be squeezed in at the end.
- **Win/Lose Use.** A win/lose negotiator can use this tactic to bury you like a heavy snowfall blankets a

city and with the same effect -- paralysis. The negotiator hopes that you will be overwhelmed with the extent of all the demands and that you will not be able to dig out the key issues until its too late.

- **Countermeasure To Win/Lose Use.** Before making any concessions, prioritize the issues involved to determine what is really essential to the other party and how important each issue is to the Government.

Bracketing. A bracket is a group or class of issues or solutions that are linked together. Negotiators can use this technique to identify issues that are critical to a mutually satisfactory result.

- **Win/Win Use.** You can use bracketing to group major issues in an attempt to reach a mutually satisfactory result on those issues. This tactic can be particularly useful when there are a large number of issues, but only a few are critical. It may be impossible to reach a satisfactory result on every issue in the bracket, but you can reach a result that provides overall satisfaction. Once you reach a satisfactory result on the critical issues, you should be able to resolve the relatively less important issues more quickly.
- **Win/Lose Use.** A win/lose negotiator might attempt to group issues in a way that resolves the issues critical to him/her but leaves your critical issues unresolved. In that situation, you might trade away your flexibility only to find that the really important issues are still unresolved.
- **Countermeasure To Win/Lose Use.** Make sure the brackets include your critical issues. To maintain more flexibility, you might also consider qualified or tentative acceptance of the results. Later if you feel that the results are unfair, you can withdraw your acceptance.

7.2 Identifying Win/Lose Tactics And Appropriate Countermeasures

Tactics for Win/Lose Results. The tactics in this section are generally considered win/lose tactics because they represent negotiation ploys or ways to facilitate negotiation objectives by deceiving the other party.

Because of the inherently dishonest nature of these win/lose tactics, they are not generally not recommended for negotiators seeking win/win results.

Nevertheless, by understanding these tactics, you will be better able to defend against their successful application. Recognition is the universal countermeasure. In addition, the employment of some win/lose tactics by win/win negotiators may sometimes be desirable when facing a win/lose negotiator.

Funny Money. Many issues in Government contract negotiations relate to percentages, factors, or other estimating relationships. Bargaining on these relationships is essential to reaching a mutually satisfactory result. However, these relationships can become funny money if you allow a negotiator to use them to distract you from their effect on the total contract.

- **Use.** A win/lose negotiator might use these relationships to distract your attention from the true effect on cost or price. For example, a negotiator might say "The Government's position on material overhead is 7.0 percent; the corporation's position is 6.0 percent. The corporation's position on manufacturing overhead is 111.0 percent; the Government's position is 110.0 percent. Since the difference is 1.0 percent in both cases, we propose a compromise where we accept your position on material overhead and you accept our position on G&A expense." That sounds like an even swap until you realize that the contract allocation base for material overhead is $75,000 and the base for manufacturing overhead is $800,000. That even swap would cost the Government $7,250.
- **Countermeasure.** Translate all funny money terms to their actual monetary equivalent. For example, when negotiating indirect costs, always consider the effect of rate changes on total cost or price.

Surprise. Negotiators may introduce a behavior, issue, or goal at an unexpected point in the proceedings. The negotiator plans an apparently_spontaneous event (e.g., an emotional outburst) to surprise or shock the other negotiator.

- **Use.** In general, the surprise tactic is used to disrupt negotiations and move you away from your negotiation plan. The win/lose negotiator hopes that you will have an emotional response (e.g., anger, shock, or even fear) to the surprise. The further hope is that emotion will adversely affect your negotiation efforts. Anger might cause you to lash out and make statements that can later be used to show that you are unreasonable. Shock or fear might cause you to capitulate on a particular issue to avoid further and possibly more intense conflict.
- **Countermeasure.** Knowledge can be the best countermeasure. Some negotiators are known for their use of surprise tactics (e.g. outbursts of anger). A display that might be frightening if you do not expect it. It can be almost entertaining if you do. Surprised or not, do not respond until you are prepared. When necessary, call for a team caucus to make sure that you are responding with reason and not emotion (e.g., anger or frustration).

Undermining. The negotiator using this tactic attempts to put the other party on the defensive using threats, insults, or ultimatums. Although this tactic often backfires because most people resent verbal attacks, it can sometimes be effective when used against an easily intimidated negotiator.

- **Use.** The negotiator using this risky tactic hopes to gain concessions by bullying the other party. Some contractor negotiators have tried to lower the confidence of the Government negotiator by making negative comments about the competence of Government personnel and their frustration with the "red tape" involved in selling to Federal agencies.
- **Countermeasure.** There are several countermeasures to undermining:
    - If the threat is unethical, unlawful, or immoral, state that you intend to report the threat to the proper authorities (e.g., the negotiator's higher-level management).
    - Explain the long-range risks and costs that would result if the contractor party decides to carry out the threat.
    - Play dumb by failing to understand the threat and go on to the next issue.

    - Do not become shaken or emotional when this tactic takes the form of an insult. Insist on respect but continue to be businesslike and polite.

Silence. Silence is the absence of mention. In other words, a negotiator using this tactic does not say anything about a negotiation point. The primary hope is that the issue will not come up. If the issue does come up, the negotiator remains silent or avoids it by talking about something else.

- **Use.** This tactic is generally used when negotiators do not want to disclose weaknesses in their position. For example, a contractor trying to sell parts to the Government might not want to mention the fact that the parts are not covered by any warranty. The tactic is also used when negotiators want to obtain information by letting the other party do the talking. In this case, some negotiators feel obligated to talk and reveal information on their position when the other party is deliberately silent. Sometimes these negotiators will even end up talking themselves into accepting the other party's positions.
- **Countermeasure.** Persistently ask effective questions to uncover information on the avoided topic.

Feinting. Feinting is the use of a pretense or action designed to mislead. In negotiations, this tactic normally involves the use of true but misleading statement or behavior.

- **Use.** Feinting gives the other negotiator a false impression or deceives the negotiator into believing something that is not true. For example, a contractor might feint by telling you that a construction project had already begun when only some minor tree clearing had taken place. In fact, the contractor might be unable to start construction because the necessary earth-moving equipment is still being used on another job.
- **Countermeasure.** Ask probing questions to determine the real situation or bring out the hidden topic. For the example above, the obvious question would be "How much work has been completed?"

Limited Authority. When large organizatio accept a position because related actions have already been completed. For example, the negotiator may present you with a signed subcontract and tell you that the subcontract cost is no longer subject to negotiation because the subcontract price has been set.

- **Countermeasure.** Insist that everything is negotiable. For the example above, point out that even if cost is an actual cost, the burden for proving reasonableness rests with the contractor (FAR 31.201-3).

Bogey. A bogey is standard of performance set up as a mark to be attained. A negotiator using the bogey tactic blames the negotiation position on a standard set by a third party or a situation beyond the negotiator's control (e.g., management policy). Any reason might be used as long as it is beyond the negotiator's control.

- **Use.** Win/lose negotiators using the bogey tactic attempt to convince you that they do not have authority to negotiate the issue because the bogey is beyond their control. They hope that this lack of authority will lower your expectations without you blaming them. Unfortunately, many Government negotiators use this tactic with statements such as "This is the audit-recommended rate, I have to use it."
- **Countermeasure.** Bogey countermeasures include:
  - Question the reasonableness of the bogey and stand firm on your position. In the example above, a contractor might question why you think the audit-recommended rate is fair and reasonable.
  - Offer to negotiate with the person or persons responsible for the bogey.
  - Counter the bogey directly. In the example above, the contractor might state that other negotiators in your office have accepted the proposed rate.

Crunch. The crunch tactic is designed to take another bite at your position no matter how reasonable it is. The user of this tactic is never satisfied and responds in words such as, "You have to do better than that," or "That is not good enough."

- **Use.** Win/lose negotiators using this tactic are attempting to make you doubt the reasonableness of your own position, without offering a specific alternative. The tactic may even make you grateful for a second chance.
- **Countermeasure.** Keep the burden of proof on the contractor by asking the negotiator for specifics. It is not enough to say that your position is not good enough. If you feel that your position is reasonable. Do not move until the contractor offers information that puts that reasonableness in doubt.

Decoy. A decoy is a person or thing that lures you into danger. In negotiations, the danger is an unsatisfactory outcome. The lure is a position or issue that appears important to the negotiator, but in reality is not. The issue or position can be completely fabricated or one whose importance is simply blown way out of proportion.

- **Use.** Negotiators using this tactic intend to trade the decoy for a concession of value. Effectively applied, this tactic enables the user to obtain a valuable concession without giving up anything important in return. For example, the contractor might offer to grudgingly concede on a minor estimating error in return for your concession on a more important issue. The actual error might be real or deliberately placed for you to find.
- **Countermeasure.** Decoy countermeasures include:
  - Conceding the decoy issue and holding out on the important issues.
  - Calling the negotiator's bluff by challenging the validity or importance of the decoy issue.

Legitimacy. Legitimacy is the state or condition of complying with established rules and standards. Negotiators often rely on commonly accepted standards (e.g., past practice, official policy, or written documents) to support a negotiation position.

- **Use.** Win/lose negotiators might use questionable or nonexistent standards to support their negotiation position. For example, the negotiator might say "This is the catalog price." By conveying legitimacy on the price, the negotiator hopes to reduce or eliminate questions. Most people are reluctant to challenge the

status quo or question a position that is supported by an official document.

- **Countermeasure.** Consider generally accepted standards, but do not accept them blindly. Insist that everything is negotiable. For example, the catalog price cited above might be based on sales of 10 or 20 units to retail buyers, when you are negotiating to buy 10,000 units. You should consider the catalog price, but use all available information to negotiate a fair and reasonable contract price.

Ch 8 - Conducting Discussions

- 8.0 - Chapter Introduction
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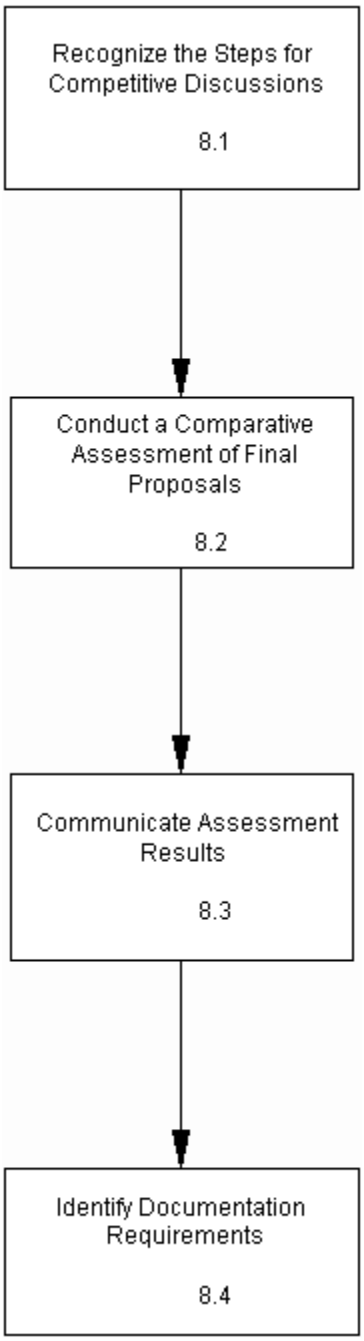
8.0 Introduction

Competitive Discussions (FAR 15.306(d) and 15.307). Competitive discussions are meaningful negotiations conducted as part of a competitive acquisition. The primary objective is to maximize the Government's ability to obtain best value, based on the requirement and the evaluation factors set forth in the solicitation.

- Discussions:
  - Are conducted with each contractor determined to be within the competitive range.
  - With each contractor are tailored to that contractor's proposal.
  - Consider significant weaknesses, deficiencies, and other aspects of each contractor's proposal that could be altered or explained to materially enhance the proposal's potential for contract award.
- At the conclusion of discussions, each contractor still in the competitive range must be given an opportunity to submit a final proposal revision by an established cut-off date.
- The final source selection decision is then based on a comparative proposal assessment against all source selection criteria established in the solicitation.

Discussion Steps. The following flowchart shows the steps in conducting competitive discussions:



8.1 Recognizing The Steps For Competitive Discussions

Principal Negotiator Responsibilities. The principal negotiator must assume leadership responsibility during the discussion conference even if the principal negotiator is not the team leader at other times. This includes:

- Actively leading the team throughout discussions;
- Opening the discussion conference;
- Reviewing facts and identifying discussion issues;
- Bargaining on the issues;
- Obtaining interim proposal revisions if necessary;
- Eliminating contractors from the competitive range when appropriate; and
- Requesting a final proposal revision from each contractor.

Actively Leading the Government Team. Your key leadership responsibilities when leading a competitive discussion team are the same as they would be if you were leading a noncompetitive negotiation team. (See Section 4.1 for more information.)

- Assure that preparations are complete before opening the discussion conference.
- Assure that team support is available when needed.
- Control team member participation.
- Use caucuses to maintain a unified government position.
- Use breaks to relieve tension and control the pace of discussions.

Opening the Discussion Conference. Most points that you need to consider when opening a discussion are the same ones that you should address when opening a noncompetitive negotiation. (See Section 4.1 for more information.)

- Greet the contractor's team.
- Take time for introductions.
- Help attendees feel more at ease.
- Briefly review background information.
- Emphasize the goal of a win/win outcome.
- Review the discussion agenda.

However, you do need to emphasize that competitive discussions are not the same as noncompetitive negotiations. Point out that:

- Discussions will not involve the offers and counteroffers common in most noncompetitive negotiations.
- The contracting officer may:

    - Request or allow a proposal revision during discussions to clarify the contractor's position for further discussion.
    - Refuse to accept a proposal revision when one was not requested.
- The Government will rely on the forces of competition to obtain a win/win result.
    - After discussions, each contractor will be given an opportunity to submit a final proposal revision.
    - The Government will then make contract award to the firm whose proposal offers the best value given the contract requirements and the evaluation criteria for contract award.

Reviewing Facts And Identifying Discussion Issues. Your initial review of the facts in competitive discussions should be similar to your initial review of the facts in noncompetitive negotiations. (See Section 4.1 for more information.)

- Pay special attention to areas where issues are common.
- Summarize the results of any exchange that took place prior to discussions.
- Conduct additional fact-finding when necessary.

Instead of summarizing the areas of agreement and disagreement as you would in a noncompetitive negotiation, you should summarize issues identified for discussion. Generally, the issues will be related to:

- Proposal deficiencies;
- Significant proposal weaknesses; or
- Other proposal aspects that could, in the opinion of the contracting officer, be altered of explained to materially enhance the proposal's potential for contract award.

Bargaining on the Issues (FAR 15.301 and 15.306(d)) (E.L. Hamm & Assoc, Inc., B-250932, Feb. 19, 1993).

Like noncompetitive negotiations, bargaining in competitive discussions includes persuasion, alteration of assumptions and positions. Discussions should address issues related to price, schedule, technical requirements, contract type, or other terms of the proposed contract.

Instead of attempting to reach a final agreement, bargaining in a competitive situation should be directed toward achieving a mutual understanding of the issues that should be addressed in the contractor's final proposal revision (FPR). Any changes in contract requirements will require a solicitation amendment to assure that all contractors are proposing to meet the same contract requirements.

- **Follow Your Discussion Plan.** Maintain the initiative throughout the discussions by following your discussion plan.
  - Use your agenda to address the issues.
  - Ask questions. Listen and evaluate the answers for responsiveness, truth, and consistency.
  - Employ appropriate tactics and countermeasures to achieve win/win results.
- **Explain That Proposal Deficiencies Must Be Corrected.** The term "deficiency" is used to describe a material failure of a proposal to meet a Government requirement or a combination of significant weaknesses in a proposal that increases the risk of unsuccessful contract performance to an unacceptable level.
  - If the proposal contains a deficiency, discussions must lead the contractor to the area of concern so that the contractor will have an opportunity to improve its proposal by correcting the deficiency. For example, if the proposed project manager does not meet minimum contract requirements, point that out to the contractor.
  - Never provide suggestions on how to correct the deficiency.
  - Emphasize that, unless proposal deficiencies are corrected, any proposal evaluation must consider the unacceptable level of performance risk associated with the deficiencies.

Bargaining on the Issues. (FAR 15.306(e))(Pan Am World Servs, Inc., CGEN B-231840, Nov. 7, 1988 and Son's Quality Food Co., CGEN B-244528.2, Nov. 4, 1991).

- **Explain That Correcting Weaknesses Will Improve the Proposal**. A weakness is a flaw in the proposal that increases the risk of unsuccessful contract performance. A significant weakness is a flaw that appreciably increases the risk of unacceptable contract performance.

    - If the proposal contains a significant weakness, you should advise the contractor and provide information on the general area of the weakness. For example, if proposed personnel appear only minimally qualified in the skills required for contract performance, point that out to the contractor. Do not merely restate the solicitation requirements.
    - You are not required to discuss every aspect of a proposal that receives less than the maximum possible rating. However, you must not conduct prejudicially unequal discussions. For example, you must not discuss every proposal weakness (even the smallest) with one contractor and only significant weaknesses with another.
    - Never provide suggestions on how to correct any weakness.
    - Emphasize that, unless proposal weaknesses are corrected, any proposal evaluation must consider the increased level of performance risk associated with the weaknesses.
- **Identify Other Proposal Aspects for Possible Improvement**
    - Emphasize that award(s) will be made to the firm(s) whose proposal(s) provide(s) the best value to the Government considering the evaluation criteria in the solicitation.
    - Where the solicitation states that evaluation credit will be given for technical solutions exceeding mandatory minimums, you may:
        - Negotiate for increased performance beyond any mandatory minimums; or
        - Suggest that a lower-priced proposal that meets any mandatory minimum requirements would be more competitive than a higher-priced proposal that exceeds those requirements in ways not integral to the design.
    - If your analysis indicates that the proposed cost or price is unreasonably high, advise the contractor and provide the basis for your analysis.
    - If your analysis indicates that the proposed cost is unrealistically low for the work required, advise the contractor and provide the basis for your analysis (Biospherics, Inc., B-278278, Jan.

14, 1998--Text of decision available for viewing in PDF Format).
    - For cost-reimbursement proposals, remind the contractor that the proposed cost may be adjusted for evaluation based on the most probable cost to the Government.
    - For fixed-price proposals, remind the contractor that the unrealistically low price will be considered in appropriate areas of proposal evaluation (e.g., performance risk).
- **Never Engage in Inappropriate Conduct.** Never engage or permit team members to engage in conduct that:
    - Favors one contractor over another;
    - Reveals a contractor's technical solution, including unique technology, innovative and unique uses of commercial items, or any information that would compromise a contractor's intellectual property to another contractor;
    - Reveals a contractor's price without that contractor's permission.
    - Reveals the names of individuals providing reference information about a contractor's past performance; or
    - Knowingly furnishes source selection information in violation of law or regulation.
- **Never Mislead the Contractor.** Never engage in conduct that misleads the contractor into submitting an FPR that fails to address the concerns identified during the initial proposal evaluation. For example, do not press a contractor to review its proposal for additional cost savings when the proposal is already appears unrealistically low. Such discussions could mislead the contractor into submitting an FPR that reduces price without addressing cost realism. That FPR would likely be evaluated as offering less value to the Government than the original proposal.

Obtaining Interim Proposal Revisions (FAR 15.307(b)). Never require contractor's to submit more information than necessary for discussions and proposal evaluation. Normally, that means that discussions will be based on the contractor's initial proposal. However, the contracting officer may request or allow a proposal revision during discussions to clarify the contractor's position for further discussion.

Eliminating Contractors from the Competitive Range (FAR 15.306(d)(4) and 15.307). After discussions begin, the contracting officer may determine that a particular firm is no longer among the most highly rated contractors being considered for contract award and eliminate the firm from the competitive range.

- The contracting officer is not required to discuss all material aspects of the proposal with the contractor or provide the contractor an opportunity to revise its proposal before eliminating the contractor from the competitive range.
- When the contracting officer eliminates a contractor from the competitive range, you must not request or accept any further proposal revisions from the contractor.

Requesting a Final Proposal Revision (FAR 15.307(b)). At the conclusion of discussions, you must give each contractor still in the competitive range an opportunity to submit an FPR. All requests for an FPR must be in writing. The request should be brief, but it must:

- Establish a common cut-off date for receipt of FPRs from all contractors still in the competitive range; and
- Advise each contractor that:
  - Its FPR must be in writing, and
  - The Government intends to make award without obtaining further revisions.

8.2 Conducting A Comparative Assessment Of Final Proposals

Source Selection Plan. The assessment of the final proposal revision (FPR) must be conducted in accordance with the source selection plan established prior to solicitation release. The format of the plan will depend on agency and contracting activity policies. However, it should include or provide for the following:

- Basis for the best value decision;
- Source selection organization;
- Proposal evaluation criteria; and
- Evaluation procedures.

Basis for the Best Value Decision (FAR 15.101-1 and 15.101-2). In a competitive acquisition situation, the proposal evaluation and source selection decision process must be designed to foster an impartial and comprehensive evaluation of contractors' proposals, leading to selection of the proposal(s) that provide the best value to the Government. Depending on the acquisition situation, the best value may result from accepting the lowest-price technically acceptable proposal or from considering tradeoffs between cost/price and non-cost/price factors.

- A lowest-price technically acceptable proposal assessment is appropriate when best value is expected to result from selection of the technically acceptable proposal with the lowest evaluated price.
- A proposal assessment process that considers tradeoffs between cost/price and non-cost/price factors (e.g., technical and past performance evaluations) is appropriate when it may be in the Government's best interest to consider award to other than the lowest-priced contractor or other than the highest technically rated contractor.

Source Selection Organization (FAR 15.303). The source selection organization will vary based on a number of factors including the basis for the source selection decision, agency and contracting activity policies, and the size of the projected contract(s).

- When the lowest-priced technically acceptable proposal assessment is used, the organization is usually informal.
    - The contracting officer is the source selection authority (SSA) responsible for making the source selection decision.
    - Depending on the situation, the contracting officer may or may not require technical or audit support in proposal analysis.
- When a trade-off assessment process is used, the organization is usually more formal.
    - The contracting officer is normally the SSA, but the agency head may appoint another individual as the SSA for an acquisition or group of acquisitions.
    - Support is normally provided by a designated team or teams of experts.

    - The team that actually reviews the contractor's proposals may be known as the "source selection evaluation board (SSEB)," "source evaluation board (SEB)," "source evaluation team (SET)," or another similar name. These experts may be further divided into subteams to evaluate different aspects of each contractor's proposal (e.g., cost/price, technical, and past performance) .
    - The source selection organization structure may also include a second team of senior-level advisors. These advisors may be known as the "source selection advisory council (SSAC)" or by another similar name. Their purpose is to advise the SSA on the conduct of the source selection and assist the SSA in analyzing the source selection evaluation results.

Proposal Evaluation Criteria (FAR 15.101-1 and 15.101-2). Proposal evaluation must only consider the criteria identified in the solicitation.

- When using a lowest-price technically acceptable source selection assessment, the solicitation must specify that award will be made to the firm that offers the lowest evaluated price for a proposal that meets or exceeds the acceptability standards for non-cost/price factors.
- When using an assessment process that considers tradeoffs between cost/price and non-cost/price factors, the solicitation must clearly:
    - Identify all evaluation factors and significant subfactors that will affect the contract award decision;
    - State whether all evaluation factors other than cost/price, when combined, are significantly more important than, approximately equal to, or significantly less important than cost or price; and
    - Indicate the relative importance of non-cost/price factors.
    - If no other information is provided, non-cost/price factors are normally assumed to have been identified in the solicitation in their relative order of importance.
    - Other information may be provided in the solicitation (e.g., a statement that together

Factors 2 and 3 are approximately equal in importance to Factor 1).

Evaluation Procedures. Proposals must be evaluated using procedures defined before the solicitation is released.

- When using a lowest-price technically acceptable source selection assessment, you must only evaluate technical proposals for acceptability. Never attempt to make tradeoffs between cost/price and non-cost/price factors.
- When using an assessment process that considers tradeoffs between cost/price and non-cost/price factors, the proposal evaluation procedures:
  - Must provide for an assessment of the contractor's ability to successfully perform the prospective contract.
  - Use any rating or combination of methods (e.g., color ratings, adjectival ratings, numerical ratings, or ordinal ratings) acceptable to your contracting activity and appropriate for the contracting situation.
  - Rate each proposal considering all non-cost/price factors identified in the solicitation. For each factor, the assigned rating must consider the proposal's merit in comparison with a standard for acceptability established before the solicitation was released.
  - Evaluate the cost/price reasonableness and cost realism of each proposal.
  - Must not compare proposals against each other.

8.3 Communicating Assessment Results

Differences in Communication Requirements (FAR 15.304(c)). The requirement to effectively communicate findings varies based on the proposal assessment process.

- When award will be made to the responsible firm with the low-price technically acceptable proposal, little documentation and communication is required in the proposal assessment process unless the low-priced proposal is considered unacceptable for some reason. Then the contracting officer must clearly document the rationale for rejecting the lowest-priced proposal

(e.g., nonresponsible offeror, unbalanced pricing, or unrealistic pricing).

- When award will be made based on a tradeoff assessment, substantially more documentation is normally required.
    - Each technical proposal must be evaluated and a rating assigned in accordance with the source selection plan. The rationale behind the assigned rating must be clearly documented.
    - Past performance must be evaluated unless the contracting officer documents the reason why past performance is not an appropriate evaluation factor. When past performance is evaluated, the evaluation must follow the source selection plan and the results clearly documented.
    - Each cost/price proposal must be evaluated for price reasonableness. In many cases, the cost/price proposal must also be evaluated for cost realism. The rationale behind any decision related to cost reasonableness or cost realism must be clearly documented.

Technical Evaluations for Tradeoff Assessments (FAR 15.305(a)(3)). In tradeoff assessments, the source selection plan typically requires the person(s) evaluating each contractor's technical proposal to consider factors such as compliance with solicitation requirements, technical excellence, management capability, personnel qualifications, and prior experience. The evaluation of each contractor's proposal must include:

- An overall assessment of the contractor's ability to accomplish the technical requirements of the contract
- A summary, matrix, or quantitative proposal rating using a rating method or combination of methods (e.g., color ratings, adjectival ratings, numerical ratings, or ordinal ratings) acceptable to your contracting activity and appropriate for the contracting situation.
    - Each proposal's merit must be considered for each evaluation factor based on a comparison with a preestablished standard for acceptability.
    - Each proposal rating must be supported by an appropriate narrative analysis. Ratings indicating that the proposal just met the standard for a particular factor, will normally require less documentation than ratings

indicating superior, marginal, or unsatisfactory status.

Past Performance Evaluation for Tradeoff Assessments (FAR 15.305(a)(2)). Past performance information is one indicator of a contractor's ability to perform the contract successfully. The comparative assessment of past performance information:

- Is separate from the contracting officer's determination of contractor responsibility.
- Must consider:
  - The currency and relevance of past performance information;
  - The source of past performance information;
  - The context of the past performance information; and
  - General trends in contractor performance.
- Should consider relevant information related to:
  - Past performance information regarding predecessor companies;
  - Key personnel who have relevant experience; and
  - Subcontractors that will perform major or critical aspects of the requirement
- May not rate a contractor favorably or unfavorably on past performance when:
  - The contractor has no record of relevant past performance; or
  - Information on past performance is not available.

Cost or Price Evaluation for Tradeoff Assessments (FAR 15.305(a)(1)). Cost/price evaluation represents the third element in tradeoff analyses.

- Evaluate price reasonableness. Use price analysis and if necessary cost analysis to determine whether the offered price is fair and reasonable. Documentation should alert the SSA to any price that is not:
  - Fair to the buyer;
  - Fair to the seller; and
  - Reasonable considering market conditions, available alternatives, price-related factors, and non-price factors.
- Evaluate cost realism when appropriate.
  - When the proposed contract is cost-reimbursement, cost realism analysis must be used to evaluate:

    - What the Government should realistically expect to pay for the proposed contract;
    - The contractor's understanding of proposed contract requirements; and
    - The contractor's ability to perform the proposed contract.
    - When the proposed contract is fixed-price, realism analysis may be used to evaluate the:
    - Financial risk associated with contract performance;
    - The contractor's understanding of proposed contract requirements; and
    - The contractor's ability to perform the proposed contract.

Evaluation Summary. The presentation to the SSA should follow agency and contracting activity requirements.

- As a minimum, the presentation should include an evaluation summary that combines the technical, past performance, and cost/price evaluations for each proposal.
- Some contracting activities encourage evaluation teams to assign overall ratings or to rank proposals based on proposal evaluation criteria. These overall ratings or rankings become recommendations to the SSA. Other contracting activities encourage an SSA decision based on the proposal analyses without further interpretation.

8.4 Identifying Documentation Requirements

Need for Documentation. Documentation of competitive discussions must fully present the rationale use in making the contract award decision. It must identify the significant facts and issues that affected the negotiated contract price.

- It should include the same information required to document a noncompetitive negotiation: (See Section 4.3)
    - The proposals and any related information submitted by the contractors;
    - The Price Negotiation Memorandum (PNM);

    - Copies or references to the location of any technical or audit analysis reports considered during the negotiation; and
    - A record of any request for additional contractor information to support the proposal and the contractor's response.
- It should also include:
    - Any documentation related to establishment of the competitive range; and
    - The SSA's source selection decision.

Price Negotiation Memorandum (FAR 15.406-3), The general requirements for a PNM for a competitive discussion are the same as the requirements for a PNM in a noncompetitive negotiation. (See Section 4.3) The major difference is related to the number of contractors involved.

- The following PNM elements describe the acquisition situation and only need to be addressed once:
    - Purpose of the negotiation (new contract, final pricing, etc.).
    - Description of the acquisition, including appropriate identifying numbers (e.g., RFP number).
    - To the extent such direction has a significant effect on the action, a discussion and quantification of the impact of direction given by Congress, other agencies, and higher-level officials (i.e., officials who would not normally exercise authority during the award and review process for the instant contract action).
- Other discussion specifics must be addressed for each contractor. Depending on agency and contracting activity policies and the complexity of the negotiations, these specifics may be addressed in the body of the PNM or by using an attachment for each contractor. The information must include:
    - Name, position, and organization of each person representing the contractor and the Government in negotiations.
    - The current status of any contractor systems (e.g., purchasing, estimating, accounting, or compensation) to the extent that they affected and were considered in the negotiation.
    - If the contractor was not required to submit cost or pricing data to support any price negotiation over the cost or pricing data threshold, the

exception used (e.g. acquisition of a commercial item) and the basis for using it.
- If the contractor was required to submit cost or pricing data, the extent to which the contracting officer:
- Relied on the cost or pricing data submitted and used in negotiating price;
- Recognized any cost or pricing data submitted as inaccurate, incomplete, or noncurrent:
  - The action taken by the contracting officer as a result of that recognition;
  - The action taken by the contractor as a result of that recognition; and
  - The effect of the defective data on the price negotiated; or
- Determined that an exception applied after the data were submitted and, therefore, did not consider the submission to be cost or pricing data.
- A summary of the contractor's proposal, any field pricing assistance recommendations, including the reasons for any pertinent variances from them, the Government's negotiation objective, and the negotiated position.
- When the determination of price reasonableness is based on cost analysis, the summary must address each major cost element.
- When determination of price reasonableness is based on price analysis, the summary must include the source and type of data used to support the determination.
- The most significant facts or considerations controlling the establishment of the prenegotiation objectives and the negotiated agreement including an explanation of any significant differences between the two positions.
- The basis for the profit/fee prenegotiation objective and the profit/fee negotiated.
- Documentation that the negotiated price is fair and reasonable.

PNM Distribution (FAR 15.406-3(b)). Whenever you obtain field pricing assistance to support your negotiation, you must forward a copy of the PNM to the office(s) providing field pricing assistance. When appropriate, you should also

forward recommendations on how field pricing assistance can be made more effective.

Technical and Audit Reports. For competitive discussions, documentation should include the team evaluations of both the initial proposals and final proposal revision.

Establishment of the Competitive Range. Competitive range documentation must clearly outline the rationale used by the contracting officer in establishing a competitive range comprised of all the most highly rated proposals. When appropriate, documentation must also outline the rationale used to further reduce the competitive range for purposes of efficiency.

Source Selection Decision. Documentation of the SSA's source selection decision must clearly outline the rationale that the SSA used in making that decision. Clear documentation is particularly important if the decision does not appear to follow recommendations made to the SSA.