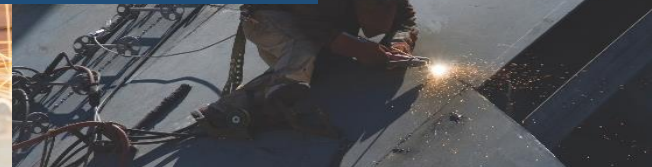




A Procurement Technical  
Assistance Center (PTAC)

# NEGOTIATING STRATEGIES IN FEDERAL CONTRACTING

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# WHAT WE WILL COVER TODAY

- Negotiations – generally
- Pre-Award Negotiations
  - Competitive procurements (Commercial items, Construction design-bid-build, design-build, R&D and other non-commercial items)
  - Sole Source/ non-competitive procurements
- Post –Award Negotiations
  - Requests for Equitable Adjustments
  - Termination Settlements
  - Using Alternate Dispute Resolution for Claims and Disputes
- Key Concepts for Negotiating price

# NEGOTIATION STRATEGIES – GENERALLY

# ESSENTIAL FOR NEGOTIATION

- Good faith – both parties should ..
  - Be honest in their negotiations
  - Have a true desire to reach agreement
  - Strive for an agreement that is fair and reasonable for both sides - important for the agreement to endure
  - Be willing to listen and respond
  - Act professionally

*"Each party should gain from the negotiation."*

*Dale Carnegie*

# ESSENTIAL FOR NEGOTIATION

- Flexibility – Both sides should ...
  - Understand that their maximum positions will likely not prevail
  - Have “Actual Authority” to make concessions during the negotiation
  - Strive to be creative in problem solving and open to alternatives and change

*“We cannot negotiate with people who say what is mine is mine and what’s yours is negotiable”*

John F. Kennedy

# SOME TRAITS OF GOOD NEGOTIATORS

- Integrity
- Capable of making decisions relatively quickly
- Able to think affirmatively- able to look for ways to get things done
- Comfortable questioning and challenging the statements of the opposing side
- A sense of humor –able to lighten the atmosphere when necessary
- Unconcerned with whether the opposing side likes them

# PREPARING FOR NEGOTIATION

- Determine who will be negotiating (individual or team)
- Know the party you are negotiating with (motivations, background, reputation, past agreements)
- Make a list of every single point or issue to be negotiated
  - Categorize the flexibility on each point (“must have”, and “can be conceded”)
  - Look for ways to tie your “must have” points with those that “can be conceded”
  - Set maximums and minimums for individual points or issues
  - Clearly understand your authority to settle each point within the maximums and minimums

# PREPARING FOR NEGOTIATION

- Identify and understand the underlying data, facts, and motivations
- Try to anticipate opposing views and reactions on each point and prepare rebuttal - Play “devil’s advocate”
- Determine your Best Alternative to a Negotiated Agreement (BATNA) and, if possible, your opponent’s BATNA
- Realistically evaluate bargaining position on both individual points and on overall success (BATNAs, time constraints, importance to each Party)
- Determine your overall maximum and minimum positions

# CONDUCTING THE NEGOTIATION - DOs

- Always keep in mind the overall Negotiation Objectives- focus on win/win
- Determine the authority of the opposing party
- Use objective standards whenever possible (industry standards, historical experience, projections based on quantitative analysis)
- Only make concessions on flexible points (“can be conceded” points) if they bring you closer to agreement on your less flexible points (“must haves”)
- Take notes during the negotiation and prepare a memo after the negotiations detailing what transpired

# CONDUCTING THE NEGOTIATION- DON'Ts

- Don't make concessions without getting something in return
- Don't discuss terms of other contracts or agreements
- Don't Bluff – unless you are prepared to have the bluff called
- Don't go into a negotiation meeting unprepared
- Don't treat opposing side as inferior or make things personal- attack the problem not each other

# PRE-AWARD NEGOTIATIONS WITH THE FEDERAL GOVERNMENT

# Pre-Award Negotiation- Government's Goals and Motivations

- The MISSION - Get the user what they need when they need it
- Award within available funding
- Obtain a final proposal that provides the best possible overall value
- Comply with all applicable acquisition laws, rules, and regulations
  - Competition in Contracting Act
  - Federal Acquisition Regulations
  - Avoid successful protest
- Ensure the price is Fair and Reasonable price- Government wants contractor to make a reasonable profit

# NEGOTIATED ACQUISITIONS IN THE FEDERAL GOVERNMENT

- FAR part 15 states that it prescribes policies and procedures governing competitive and noncompetitive “negotiated acquisitions.”
- A contract awarded using other than sealed bidding procedures is a “negotiated contract”
  - Requests for Proposals
  - Requests for Quotations

Our focus : FAR part 15 -negotiated acquisitions

# CONTRACTING BY NEGOTIATION – DISCUSSIONS

- Discussions are mutual exchanges of information between the government and an offeror taken with the intent of giving the offeror an opportunity to revise its proposal
- Objective of discussions -maximize the Government's ability to obtain the best value (FAR 15.306(d)(2))
- In an RFP, "clarifications" (FAR 15.306(a) and 52.212-1(g)) are different than "discussions"

# CONTRACTING BY NEGOTIATION- DISCUSSIONS

- Negotiations will occur ONLY if discussions are held
- If the solicitation states the government intends to “award without discussions” assume that negotiations will not occur
- If discussions are held with one offeror, meaningful discussions must be held with all offerors in the competitive range.

# DISCUSSIONS

If Discussions are held in a RFP...

- Government must communicate all identified significant weaknesses and deficiencies in the proposal.
- Government may ask for a price breakdown –
  - to ensure every requirement is included or because they think the price is low – price realism
  - to negotiate lower their pricing because they think price is high – price reasonableness

# DISCUSSIONS

The negotiations might feel limited!

- Government determines the scope and extent of the discussions. Discussions must be
  - Meaningful - the contracting officer must identify deficiencies and significant weaknesses and adverse past performance
  - Equitable and not misleading
- Government might only conduct discussions in writing– with no oral communication whatsoever.
- Government cannot disclose information or pricing from another proposal

# 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” FAR 15.306(d)

The Government decides the extent of bargaining, if any, that will occur

# COMPETITIVE COMMERCIAL ITEMS AND DESIGN-BID-BUILD CONSTRUCTION

Generally- Bargaining is not extensive or common in these procurements

The federal government may dictate:

- The Contract type – usually FFP, or FFP with EPA
- The Period of Performance
- The minimum performance requirements

# COMPETITIVE COMMERCIAL ITEMS AND DESIGN-BID-BUILD CONSTRUCTION

The federal government may dictate:

- Materials and supplies to be used or delivered
- Delivery and completion dates and requirements
- Minimum qualifications for key personnel
- Method of pricing
- Frequency of payment
- Wages and benefits paid to employees

# COMPETITIVE COMMERCIAL ITEMS AND DESIGN-BID-BUILD CONSTRUCTION

- All offerors are usually required to propose on the same detailed requirement - Government compares “apples to apples”
- Commercial Item contracts generally include terms, conditions and requirements that are consistent with customary commercial practice
- Construction contracts have detailed design specifications

# COMPETITIVE DESIGN/BUILD, R&D, AND OTHER NON-COMMERCIAL PROCUREMENTS

- Generally less likely that award will be made on initial proposals - discussions are more likely
- Solicitation might not dictate every specific detail- gov't might be compare "fruit to fruit" rather than "apples to apples"
- Government might request "other than certified cost or pricing data" to help with negotiations.

# COMPETITIVE DESIGN/BUILD, R&D, AND OTHER NON-COMMERCIAL PROCUREMENTS

- Solicitation may ask offeror to propose solutions which might later be subject to negotiations and bargaining
- Gov't may seek ideas and expertise from offerors
  - BE CAREFUL. If ideas require relaxation of strict minimums, solicitation amendment may be necessary in order for government to accept the idea.
  - Read solicitation carefully to determine what, is and is not, flexible. Get clarification on this before proposal due date.

# COMPETITIVE DESIGN/BUILD, R&D, AND OTHER NON-COMMERCIAL PROCUREMENTS

- Gov't still might dictate the contract type and method of pricing
  - However - Incentive Contracts, Cost Reimbursement Contracts, or Time and Material Contracts might be used
- Gov't might be more willing to engage in Bargaining

# SOLE SOURCE / NON-COMPETITIVE

- A proposal is sought from only one offeror.
- Decision to sole source must be fully justified under FAR 6.3 ( ex. only one source can meet the requirement, the requirement is urgent and compelling, etc.)
- Government is often more likely to seek and accept ideas and expertise from the offeror
- Government is often more willing to engage in Bargaining

# SOLE SOURCE / NON-COMPETITIVE

- Offerors often may have more leverage or bargaining power ( the government may not have a good BATNA)
- Gov't may request pre-negotiation fact finding – sharing and analyzing cost and pricing and related assumptions before negotiations begin
- Government may even require certified cost or pricing data (over \$750,000) or data other than certified cost or pricing data.

# POST AWARD NEGOTIATIONS

# POST AWARD NEGOTIATIONS– GOVERNMENT’S GOALS AND MOTIVATIONS

- Get the user exactly what they need when they need it
- Do the right thing and be fair
- Obtain Fair and Reasonable pricing on changes
  - They take their fiscal duties very seriously
  - Stay within appropriated funding limits
- Be able to sufficiently document the need for change and any associated price adjustment
  - There is significant oversight and audits on contract administration files

# NEGOTIATING - REQUESTS FOR EQUITABLE ADJUSTMENTS (REAs)

REA – a Request for Equitable Adjustment seeks additional money or additional time based upon specific clauses in a contract.

Examples of such clauses include:

- Changes Clause
- Suspension of Work Clause / Stop Work Clause
- Differing Site Condition Clause

# NEGOTIATING - REQUESTS FOR EQUITABLE ADJUSTMENTS (REAs)

You should be prepared to discuss and present information on both entitlement, and quantum

- **Entitlement** - Does the request have merit? Is the Contractor entitled to any additional time or any additional money under the contract clauses?
- **Quantum** – how much additional time or additional money is the contractor entitled to receive?

# NEGOTIATING - REQUESTS FOR EQUITABLE ADJUSTMENTS (REAs)

## Entitlement -

- Under the Changes Clause – whether the Government expressly or constructively changed the contract, whether the contractor complied with any notice requirements, whether the change increased the cost or time of performance.
- Under the Suspension of Work/ Stop Work clauses– whether the government stopped, delayed or otherwise interfered with work performance or efficiency
- Under Differing Site Condition Clause - whether actual and unknown physical conditions differed materially from the conditions indicated in the contract or from conditions that would ordinarily be encountered.

TIP – Help the government justify and document!

# NEGOTIATING - REQUESTS FOR EQUITABLE ADJUSTMENTS (REAs)

**Quantum** you may need to negotiate and come to agreement on:

## Additional money –

- The dollar amount incurred (source documents),
- Whether the costs were allocable to the contract,
- Whether the costs were allowable under the contract (FAR 31.205)
- The appropriate credits for original work not performed

## Additional time

- the amount of non-excusable delay, non-compensable excusable delay, and compensable excusable delay ( time impact analysis)

# Convenience Termination Settlement

Be prepared to negotiate on:

- What work was performed and what work was terminated
- The amount already paid for work fully performed and the amount still due for this work-includes profit
- The costs incurred in performance of the terminated work
- Profit on the costs incurred for terminated work- Gov't may not allow this
- Settlement expenses
  - subcontractor and supplier settlements
  - Legal fees, accounting, clerical for settling subcontracts and developing settlement proposal

# NEGOTIATING CLAIMS AND DISPUTES USING ADR

- Government policy is to try and resolve all contractual issues in controversy at the Contracting Officer level. Agencies are required to use ADR to the maximum extent practicable. (FAR 33.204)
- We strongly recommend this be the contractor's policy as well !
  - less expensive
  - less time consuming
  - more flexibility on the resolution (more creative, sensible and efficient)
  - "the devil you know" makes the decision

# NEGOTIATING CLAIMS, DISPUTES USING ADR

Mediation – negotiation with assistance from a third party Neutral. The Neutral is often both an expert in helping people negotiate and a subject matter expert. However, the Neutral has no decision making authority

Mini-trials – parties present the issues, positions and evidence to a Neutral and to Senior Principals– one from each party. The Principals must have “actual authority” to bind their party to a settlement. After the presentations the Neutral and the Principals attempt to reach resolution.

Non-binding Outcome prediction – each party makes presentations on the issues, positions, and evidence to an Arbitrator. The Arbitrator issues a non-binding opinion on the merits. This is used to give parties an idea of how the issue might be decided by a board or court and to help the parties move toward resolution.

# KEY CONCEPTS FOR PRICE NEGOTIATIONS

# NEGOTIATING PRICE – DEFINITIONS

- Cost and Price are not the same
  - Contract Costs– the monetary measures of the capital and labor required to complete a contract. It can include cash expenditures, expense accrual (obligation to pay in future – ex. pensions), and draw down of inventory.
  - Contract Price – the amount that the Government will pay the prime contractor for meeting the contract requirements. It includes the Contract Costs plus any fee or profit applicable to the contract
- Price reasonableness and Price Realism are not the same
  - Price Reasonableness - evaluates whether a price is too high
  - Price Realism – evaluates whether a price is too low, often used to determine if the requirement is understood

# NEGOTIATING PRICE –

- Understand the risks associated with the contract type (FAR Part 16)
  - fixed price
  - cost reimbursement
  - time and materials
- Know when price or cost breakdowns are required and be prepared to provide them
  - Data other than cost or pricing data – when CO believes it is necessary (ex. to determine price reasonableness, cost realism, etc.)
  - Certified cost or pricing data – procurements over \$750,000 unless an exception applies (ex. Commercial items, adequate price competition)

# NEGOTIATING COSTS - COST REIMBURSEMENT

Issues that might be discussed or negotiated:

- Cost reasonableness –the reasonableness of individual cost elements when certified cost or pricing data or other than certified cost or pricing data are required.
- Cost realism –government evaluation of an offeror’s probable cost of accomplishing the solicited work
  - Government may believe the probable cost is different than the offerors proposed cost and may adjust for evaluation purposes (actual costs get paid)
  - Probable cost is what the contract performance should cost assuming reasonable economy and efficiency

# RESOURCES ON NEGOTIATING PRICE AND COST

- FAR 15.4
- Other resources- DOD Contract Pricing Reference Guides  
<https://www.dau.edu/tools/p/cprg>
  - Volume 1 - Price analysis
  - Volume 2 -Quantitative Techniques for Contract Pricing
  - Volume 3 - Cost analysis
  - Volume 4 – Advanced Issues in Contract Pricing
  - Volume 5 - Negotiation Techniques

# RESOURCES

- Acquisition.gov is: <https://www.acquisition.gov/>
- Beta.SAM website - <https://beta.sam.gov>
- Wisconsin Procurement Institute
  - Phone: 414-270-3600
  - [www.wispro.org](http://www.wispro.org)



# QUESTIONS?