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POSITION PAPER

TOPIC:

NEGOTIATION.

Lost art or core competency?



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NEGOTIATION: Lost Art or Core Competency?

*A position paper from NIGP: The Institute for Public Procurement
on the use of negotiation in public procurement.*

INTRODUCTION

To negotiate means “to confer with another so as to arrive at the settlement of some matter.”¹ In procurement, negotiation is indeed about arriving at settlements between buyers and sellers, taking the form of binding contracts. NIGP: The Institute for Public Procurement (NIGP) supports the use of negotiation in public procurement and has reflected that support through many educational courses and presentations covering various aspects of negotiation.

Still, is negotiation a lost art? Or is it a core competency deserving of even greater attention?

POSITION STATEMENT

NIGP stands firmly behind the proposition that, far from becoming a lost art, negotiation continues to be a core competency and a key element in the sourcing process.

Properly employed negotiation techniques contribute to best value solutions while supporting the public’s mandate for a lean, cost conscious government. Competitive negotiations provide greater flexibility than traditional sealed bidding methods, allowing an agency to make an award using other factors in addition to price. Public procurement professionals should understand the value that negotiation brings to the procurement process and the agency, and must know when, and how, to negotiate effectively.

NEGOTIATION IN PUBLIC PROCUREMENT

The use of negotiation is a well-established practice in public procurement at all levels of government. The following descriptions of how negotiation is defined and used across the spectrum of government agencies reflect the grounding principles and intended outcomes that should guide public procurement professional negotiating behavior.

¹ Merriam-Webster Dictionary, 2012.

Federal Government

According to the United States' Federal Acquisition Regulations (FAR), a contract awarded using other than sealed bidding procedures is a negotiated contract. In federal procurements, negotiation may apply to price, schedule, technical requirements, type of contract, or other terms of a proposed contract. Per FAR 15.405(b), "The contracting officer's primary concern is the overall price the Government will actually pay. The contracting officer's objective is to negotiate a contract of a type and with a price providing the contractor the greatest incentive for efficient and economical performance." This implies the contractor is entitled to a fair and reasonable price. After all, it is in the best interest of the government to negotiate contracts that contribute to the contractor's survival and thereby support the long-term success of government contracting. The term typically applied to this relationship is *win-win* negotiation.

Roger Fisher and William Ury, authors of the seminal text on negotiation, *Getting to Yes*, assert that, "you look for mutual gains whenever possible, and that where your interests conflict, you should insist that the result be based on some fair standards independent of the will of either side."² As stated in NIGP's text, *Developing and Managing Requests for Proposals in the Public Sector*, "Win/win is the goal of a principled negotiation, whereby the interests of both parties are satisfied."³

The internet may increase the visibility of pricing in the marketplace, and public procurement professionals can use this information to help build their bargaining position. But a good contract consists of more than simply a good price.

State and Local Government

State and local governments authorize public bodies to award contracts using competitive negotiation in lieu of the more traditional competitive sealed bidding process. Competitive negotiation is more flexible than sealed bidding, allowing an agency to make an award based on factors other than or in addition to price.

In Virginia, for example, competitive negotiation is an authorized method of procurement for both professional and other than professional services.⁴ When procuring professional services in Virginia, a "public body shall engage in individual discussions with two or more offerors deemed fully qualified, responsible and suitable on the basis of initial responses and with emphasis on professional competence, to provide the required services. Repetitive informal interviews shall be permissible. The offerors shall be encouraged to elaborate on their qualifications and performance data or staff expertise pertinent to the proposed project, as well as alternative concepts." [I hate to bring this up so late in the game, but this sentence got included after the earlier review rounds were closed. The Virginia approach to competitive negotiations

² Fisher, Roger and Ury, William. *Getting to Yes*. 1991. Penguin Books. p. xviii.

³ Tai, Khi V. (2007). *Developing and Managing Requests for Proposals in the Public Sector*. 2d. National Institute of Governmental Purchasing, p171.

⁴ Code of Virginia. Virginia Public Procurement Act §2.2-4301

does not follow the ABA Model Code. The Code mentions in a footnote that Comp Neg is similar to Competitive Sealed Proposals, but there are differences as well as similarities. The Code promotes Comp Sealed Proposals. Comp Negotiations is a variation from the Code.]

The California Public Contract Code § 6611 grants the Department of General Services (DGS) broad authority to use negotiation to acquire goods, services (not including architectural and engineering related services), information technology, and telecommunications. For new contracts, DGS may engage in negotiations when doing so would enable the State to:

1. Better define its business purpose or need,
2. Identify different types of solutions to meet its business need,
3. Ensure a “best value” or “most cost-effective” solution, or
4. When the State’s business purpose or need is complex and bidder’s cost to respond is high.
5. The terms and conditions and/or scope of work of *existing* contracts may also be negotiated where doing so is “in the best interest of the state.” PCC § 6611(b).⁵

In addition to competitive negotiation being authorized by code in certain states and jurisdictions, public procurement officers may use negotiation as a tool in other aspects of public procurement. Contracts established through a sole source or emergency may also be negotiated agreements.

Procurement professionals must ensure they are familiar with their jurisdiction’s policies and regulations applicable for negotiation. Failure to take advantage of negotiating opportunities may deprive the organization of the most effective “best value” solutions.

BENEFITS

The overall value and benefit of negotiation is as a practice best able to realize a best value solution for a public body. Best value might not be the lowest cost.⁶ For example, the North Carolina General Assembly established best value as “The selection of a contractor based on a determination of which proposal offers the best trade-off between price and performance, where quality is considered an integral performance factor. The award decision is made based on multiple factors . . .”⁷ In Canada, the Treasury Board establishes national procurement policy that is in alignment with national objectives. As such, an annual procurement strategic plan must maximize the potential benefits of government resources taking into account how proposed procurement plans will impact industrial, regional and aboriginal development; grow industrial

⁵ California Public Contract Code §6611(a-b)

⁶ NIGP Public Procurement Dictionary of Terms.

⁷ North Carolina General Assembly. §143-135.9

investment; promoted international competitiveness; and the long-term impact of the proposed strategy beyond the life of the procurement itself.⁸

Negotiations can clarify price, terms and conditions, quality, performance of the contract or any other aspect of the procurement. In addition to best value results, a negotiated approach allows for situations where the “ideal solution” is not clear at the outset of the solicitation process. As such, it facilitates competition and avoids “no bid” and “one bid” outcomes. Through a negotiation process, there may be greater opportunity to anticipate contract management issues and identify solutions that would mitigate the possible future need for contract amendments, additional funding or lengthy delays.⁹ Finally, negotiation provides a format for realizing greater value to the agency through contractor concessions or no-cost extras.

Successful negotiation elevates the role and value of the procurement department in an organization. NIGP posits that the procurement official should be the entity’s lead negotiator and is in the best position to achieve the overall objective of the negotiation. Keeping a record of savings achieved through negotiation is a notable measure of procurement success. It also provides evidence of the role negotiation plays in helping an organization achieve best value solutions while supporting the public mandate for a lean, cost-conscious government.

WIN-WIN NEGOTIATION

Negotiation, like other procurement practices, is a means to an end. When that end is a best value solution, part of the best value equation includes assessing the risk to service continuity over time, the relative burden of contract management and maintaining an appropriate supplier relationship. Consistent with the FAR’s sensitivity toward outcomes that reflect a balance of both agency interests and supplier economic viability, NIGP embraces the win-win approach to negotiating practice.

Win-win negotiating is the idea that maximizing fulfillment of each other’s *interests* gains more for either party than trying to make sure one’s *position* ends up better than the other party’s. It is a purposeful drive to maximize all possible benefits (not just purchase price) as much as the parties can think of. They explore all creative options and alternatives to expand the “available pie”. Only when they can’t think of or agree on any more benefits are they done. This approach is especially important with mission-critical suppliers, or those with whom you will have a long term relationship. Win-win may well take less effort than an adversarial approach, and is recommended for negotiating with all suppliers. The government has achieved a best value

⁸ Treasury Board of Canada Secretariat. Procurement Review Policy. Preface and Appendix A.

⁹ Robert S. Metzger and Lauren B. Kramer, The Importance of Competitive Negotiations to State Information Technology Procurement, *The Procurement Lawyer*, Volume 48, Number 3, Spring 2013.
http://www.rjo.com/PDF/TheProcurementLawyer_Spring2013.pdf

solution and the contractor has earned business with a reasonable profit expectation. When a negotiation ends, contract management usually begins. Positive negotiation results and relationship can set the stage for collaboration with the contractor throughout the duration of the contract.

After all is said and done, the initial negotiation is only as effective as the results produced by the contract. Critical to obtaining a win-win solution in negotiation is effective advance preparation and an agreed commitment to good faith bargaining. “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.”¹⁰

As part of negotiation preparation, contracting officers should know the strengths and weaknesses of both sides, develop the negotiation approach, and develop an overall plan.¹¹ FAR 15.406-1(b) states, “The contracting officer shall establish pre-negotiation objectives before the negotiation of any pricing action. The scope and depth of the analysis supporting the objectives should be directly related to the dollar value, importance, and complexity of the pricing action.”

Good faith bargaining means the parties come to the negotiating table with positive attitudes. To achieve win-win solutions, the parties must exercise sincere efforts to work through issues and solve problems. Some basic win-win negotiation characteristics include: avoiding deception; being persuasive; being respectful and polite; winning agreements instead of arguments; and using common sense.¹²

Aim for your best case objective, but be prepared to compromise within the bounds of your negotiation objectives. If a negotiation becomes stuck on an issue, move to other issues for which you can come to agreement. Be patient and continue to work toward a solution both parties can accept. Use questions to obtain additional facts about the contractor’s position or to identify possible alternatives.¹³ If you make concessions, you should gain something in return. Do not accept an unreasonable offer, especially one that falls short of your established objectives. In situations where an issue cannot be resolved, be prepared to walk away from a negotiation. The pressure of losing a contract may motivate the contractor to compromise or at least return to negotiation. Use the leverage you have as the party making the award determination. Do not be afraid to put pressure on the contractor during negotiation, but continue to strive for a win-win solution. Forcing the contractor to take a losing position may not be in the best long-term interest of the government.

¹⁰ Georgia Tech. The Contracting Education Academy. <http://contractingacademy.gatech.edu/2011/02/con-120-lesson-6-negotiation-rules-bargaining-process/>

¹¹ *Negotiation Techniques*. Defense Acquisition University ACQuipedia. <https://dap.dau.mil/acquipedia/Pages>

¹² *Negotiation Characteristics of Win/Win Outcomes*, Defense Acquisition University ACQuipedia. <https://dap.dau.mil/acquipedia/Pages/ArticleDetails.aspx?aid=59432931-368a-4b28-8e99-ff7e91b9de7e>

¹³ Acquisition Community Connection. *Chapter 7 – Bargaining Tactics*. <https://acc.dau.mil/CommunityBrowser.aspx?id=379622>

As stated by NIGP, “Relationship issues are important to all agreements but are even more important when a jurisdiction enters into a long-term relationship with a potential supplier.”¹⁴ The final agreement must establish an ease of communication and a degree of trust and reliability. This relationship underpins a win-win negotiation; both parties leave the negotiating table feeling positive about the results.

IMPORTANCE OF PROFESSIONAL DEVELOPMENT

Consistent across levels of government is recognition of the benefits that negotiation can bring to a public entity. Inherent to the nature of a negotiating process is *flexibility*; flexibility to refine scope; consider a variety of solutions; balance multiple risk factors; define solution-appropriate terms and conditions; and, ultimately determine the solution that is of best value, a.k.a. “best interest,” to the state.

Flexibility means that there is no one prescription for negotiating success, therefore, the negotiating process cannot be adequately defined through a simple how-to, administrative guide. Rather, part of the burden of being a procurement *professional* is that it requires a mastery of relevant ordinances, an understanding of entity needs and resources, and a sensitivity throughout a negotiation event to issues that may be viewed as an opportunity or threat by either party. Applying judgment that integrates and balances these many factors in the best interest of the entity is one of the key differentiating skills that elevate the value of procurement professionals and the role of procurement beyond an administrative function.

The importance of training and professional development by procurement leaders to gain and strengthen this core competency to be confident, adept negotiators in the service of their agencies cannot be over-stated. *Professional judgment* is acquired over time through training and practical experience. Without training, the pathway to professional practice is substantially prolonged – if not closed. And that is to the detriment of the agency.

Successful negotiators are prepared. Procurement professionals should seek out training that will help them develop effective negotiation strategies; know when to conduct face-to-face versus telephone negotiation; develop negotiating positions and fallback contingencies; strengthen persuasion skills; read and respond to the other party’s behavior styles during negotiation; neutralize manipulative tactics by the other party; minimize conflicts and deadlocks; and practice the art of bargaining.

¹⁴ Tai, Khi V. (2007). *Developing and Managing RFP’s in the Public Sector*. 2d. National Institute of Governmental Purchasing, p164.

CONCLUSION

Negotiation is a valuable skill for procurement professionals. Negotiation is a standard method of contracting in federal, state and local government procurement. Although the internet facilitates research and fact finding that supports the formulation of sound negotiating positions, the negotiation process itself is a proven method for arriving at best value sourcing outcomes.

Procurement professionals need to know how to prepare and plan for negotiation in order to achieve win-win solutions. Skilled negotiation can improve outcomes for the government. Improved pricing is just one potential benefit. Negotiation can improve the overall combination of quality, service and other elements required for successfully meeting the organization's requirements.

Effective negotiation is about creating an agreement that benefits both parties. With a win-win solution, both parties can walk away from a negotiation that has achieved their respective objectives. It is not in the government's long-term interest to conduct a negotiation that results in a contractor losing money. Win-win negotiation is the start of a collaborative effort with the contractor to achieve solutions where both sides benefit from the relationship.

NIGP's view of negotiation as a core competency of procurement professionalism demands a commitment to professional development. While some individuals have seemingly innate negotiation abilities, negotiating skills are developed and enhanced through training and practice. Procurement professionals are encouraged to gain the knowledge and capacities necessary to conduct well-planned and effective negotiations. The investment in training and skills development will yield tangible and quantifiable benefits to the governmental body and the citizens it serves.