

## Negotiation Guideline

### Purpose

This Guideline<sup>1</sup> provides information about the key issues in negotiation in government procurement activities. It also provides practical advice to assist officers perform effectively during negotiations with suppliers. A key aspect of procurement is about forming relationships with suppliers and there is often a need for negotiating the best possible outcomes for the both the public authority and the supplier. Negotiation should relate to the principle of driving value for money.

This Guideline is intended only as a starting point to provide an overview of the main issues that need to be considered in negotiating. It is strongly recommended that officers who are involved in negotiations, particularly for large complex or strategic procurements possess the appropriate skills and experience.

### Negotiation for Government Procurement/Sourcing

#### What is negotiation?

Negotiation is differentiated from 'clarification' which is a normal part of the supplier selection process. Negotiation is a bargaining process between two or more parties, each with its own goals and objectives, seeking to reach a mutually satisfactory agreement on, or settlement of, a matter of common concern. In a procurement context, it is the process of arriving at an agreement on the conditions of contract, through discussions between the public authority and the supplier. Effective negotiation should result in a cost-effective agreement that is fair, durable, meets the legitimate needs of both parties and improves (or at least does not damage) the relationship between parties.

One of the main reasons for entering a negotiation is to achieve better results than would be possible without negotiating. From the public authority's perspective, the primary objective of the negotiation should be to<sup>2</sup>:

- Test the understandings and assumptions that have influenced a supplier or provider in preparing their offer; and
- Achieve the best value for money by working together to refine or enhance the offer – this may or may not include price negotiation.

It is important that when you are negotiating on behalf of a public authority, not to get involved in haggling. For example: "Supplier A said I could buy it for \$100 less than you, can you beat that?" It is unethical to discuss the pricing and other conditions of supplier's goods and services with their competitors.

A Negotiation Plan supports the process of negotiation. In accordance with the

<sup>1</sup> 'Negotiations', State of Queensland (Department of Housing and Public Works) 2018

<sup>2</sup> 'Negotiating with your preferred supplier', New Zealand Ministry of Business, Innovation and Employment

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*Sourcing Policy*, Negotiation Plans are required for all complex and strategic procurements. Formal negotiation plans are optional for routine and transactional procurements.

The Procurement Services SA *Negotiation Plan Template* may be used by public authorities.

### Why Negotiate

The most important reason is that a negotiated agreement normally results in stronger ownership by all the parties than when the arrangements are forced. As a result, a negotiated agreement is more likely to be successful for the duration of the contract term.

Reasons for negotiating in procurement are listed below.

#### *Before a contract is entered into:*

- to clarify issues between the parties
- to resolve conflicts or problems by open discussion
- to develop the relationship and deepen understanding between parties
- to improve on the current offer (e.g. price, quality, performance, conditions, service levels)
- where unusual or complex circumstances exist, and these need to be explored by the parties
- when substantial risks are involved in the procurement and parties look to reduce or transfer the risk exposure
- to explore opportunities for the creation of additional value.

#### *During the operation of a contract:*

- when there are concerns over supplier performance, it is preferable to negotiate and solve the problem rather than litigate
- when variations to the contract are contemplated, it will be necessary to negotiate the terms and conditions for the variation
- when unusual or complex circumstances arise, and these need to be explored by the parties.

### When to negotiate

In a competitive procurement/sourcing process, negotiation with potential suppliers should not take place before the offers have been fully evaluated and, as a result of this evaluation, a preferred supplier (or a short-list of suppliers) has been identified. If only one supplier is preferred, this should not be disclosed to them as this may weaken the negotiation position.

Negotiation should only be undertaken when the expected benefits from the

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negotiation exceed the anticipated costs associated with it.

Typical process stages for negotiation include:

- after selection of a preferred supplier or a short-list of suppliers
- before contract signature by a preferred supplier
- before any contract variation
- whenever any issues arise during the operation of the contract.

During the supplier selection process, it may be necessary to seek clarification of offers before the final selection of the preferred supplier is made. This may be essential to reach an informed decision about which supplier has provided the best offer. Seeking such clarification is perfectly acceptable. However, you should be careful that clarification does not become negotiation (e.g. asking the supplier leading questions).

### What can be negotiated

Price is often considered as a starting point for many procurement negotiations. However, a skilled negotiator also explores the wider opportunities to improve the overall value for money offered to their public authority by negotiating better terms and conditions including such matters as:

- **technical support aspects** - warranties, life-cycle support, maintenance agreements, etc
- **financial aspects** - deposits, payment terms, discounts, payment schedule, cancellation penalties, abatements, etc
- **risk management aspects** - financial guarantees, insurances, warranties, service standards, liquidated damages clauses, etc
- **management information aspects** - access to information, reporting, documentation, attendance at performance/contract management meetings, etc
- **government support aspects** - government provided facilities and information, access to government staff, etc
- **timeframes** - completion dates, delivery dates, milestone achievement, etc.
- **general matters** - including packaging and freight, use of specified personnel, sub-contracting arrangements etc.
- **performance incentives**

### Planning and preparing to negotiate

The negotiation process commences by developing broad negotiation strategies at the acquisition planning stage, which can be further developed once the initial evaluation has concluded.

Time invested in planning and preparation before the negotiation will substantially

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improve the outcomes of any contract negotiation. Failure to plan properly often leads to unclear objectives for the negotiation, the use of inappropriate negotiating styles or tactics and a sense that a better result could have been achieved. Most negotiating teams greatly under-estimate the amount of time needed to adequately prepare for and research the background to a negotiation.

### Understanding the context

Negotiation always takes place within a context. Some of the important issues to consider in understanding the context of a negotiation include:

- the nature of the procurement in terms of its value, complexity and risk profile,
- the nature of the supply market - fully competitive, dominated by a few larger suppliers, unsophisticated suppliers, rural and remote supply issues
- the supplier relationship (one-off or long term)
- previous experience negotiating with the supplier. What is their typical approach to doing business with the government? What is the state of the existing relationship between the parties?
- any particular political or community sensitivities that may arise as a result of this negotiation
- the skills and experience of the public authority's negotiating team
- the public authority's BATNA (best alternative to a negotiated agreement)
- the balance of power in the negotiation.

### Knowing what needs to be achieved

Once the context for the procurement negotiation is understood, standard techniques can be applied to planning the negotiation. Knowing what to achieve in the negotiation is essential and this knowledge is helpful in deciding the most appropriate approach to be used for the negotiation. At a minimum, it is necessary to understand the broad goals or desired outcomes of the procurement. When this strategic direction/goal is clearly understood, it is possible to decide on consistent objectives for the negotiation and to develop a negotiation plan.

This plan should include details of:

- negotiating team composition
- timeframes for the negotiation
- the public authority's priorities and intended outcomes
- what is known and not known about the supplier's objectives and priorities
- the supply variables (e.g. service delivery methods, volumes, reporting, pricing, payment options) and the value and relative importance of each variable
- the key deliverables (performance indicators, milestones, timeframes)
- the proposed terms and conditions of the contract

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- negotiation styles to be adopted
- strategies, tactics (if any) to be applied
- what concessions can and can't be given, and any 'deal breakers'
- any limits on the negotiators' authority
- process requirements etc.

### The negotiating team

For strategic and complex procurements, a team of negotiators may be appropriate. Consideration should be given to the composition (for example, experts in technical and financial areas, end-user). A negotiation lead should be selected, and roles of other members established and clarified. These negotiators should be appropriately trained and skilled and have the required technical skills and ability to commit the public authority to any agreed outcomes. The negotiation team should be identified well in advance to allow for adequate planning and preparation. It is important that negotiating team members understand what they are required to contribute to the negotiation (e.g. technical knowledge, financial expertise, legal support etc.).

### Balance of Power in the Negotiation

Three crucial variables determine the balance of power when conducting a negotiation. These are Power, Time and Information.

#### *Power*

It is important to make a realistic assessment of the power relationship in any procurement negotiation. Sometimes the balance of power will sit with the public authority, simply because of the sheer size of government and the large buying power that it represents. Sometimes the balance of power is in the supplier's favour where the public authority is a small customer or a supplier has a monopoly position in the market.

Power relationships between larger public authorities and large corporate suppliers tend to be more equal, whilst the balance of power when public authorities deal with small-to-medium enterprises (SMEs) tends to favour the public authority.

Any market power must not be misused to damage, eliminate or exclude competitors from the market.

Public authorities can strengthen their negotiating power by identifying a number of alternative products/services that could meet their requirements and by having a range of possible suppliers, thus reducing their dependence on sourcing a particular item or service from a particular supplier.

Negotiation teams should never enter a negotiation without knowing the alternatives that are open to them.

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### *Time*

Negotiation is a process, and the starting point of a negotiation is always long before the start of the formal face-to-face negotiating.

In the preparation phase gather as much information as possible both about the public authority's priorities, issues, needs, interests and alternatives and the interests and alternatives of the supplier.

Generally, good outcomes in procurement negotiations cannot be achieved in tight time frames. It is worth investing the time that is necessary to explore issues, identify the needs and interests behind expressed positions and develop creative and innovative solutions of mutual benefit to the negotiation.

Time is a valuable commodity in a procurement negotiation. The public authority can best use available time to improve its negotiating position substantially by gathering useful information which allows the development of alternatives to the solution being proposed by the supplier.

### *Information*

Information is usually easiest to gather during the preparation phase before the formal negotiation begins. The gathering of adequate information during the preparation phase of a negotiation can significantly enhance the likelihood of a mutually satisfactory agreement being reached during the formal phase of the negotiation.

During the formal phase, it can be a common strategy for parties to try to conceal their true interests and priorities. The chance of obtaining accurate information from an experienced negotiator during an adversarial negotiation is quite low.

The more information about the other party's priorities, issues, needs, and interests, as well as any organisational pressures (such as their financial situation, deadlines and costs) that you have access to (i.e. their BATNA), the easier it will be to develop negotiating proposals which address these and the stronger the negotiating position will be.

The following are ways to gather information on potential suppliers:

- their website and publications (annual reports etc)
- media
- Government publications and statistics
- product and consumer reports
- online services and professional bodies
- the supplier themselves
- information received/requested through the market approach process and submission of tender documentation.

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### Best Alternative to a Negotiated Agreement (BATNA)

BATNA stands for the Best Alternative to a Negotiated Agreement and this concept was developed by the Harvard Negotiating Project. Having a well-developed and attractive BATNA is a source of great power in any negotiation. The BATNA can be identified in any negotiation situation by asking the question:

*‘What will we do if this negotiation is unsuccessful?’*

Exploration of alternatives that might exist outside the current negotiation can tip the balance of power in a negotiation. However, attractive alternatives may not always be immediately obvious. Sometimes it will take time to identify what these alternatives are and more time again to make them attractive to the public authority. This is time well invested as having a strong alternative improves the ability to negotiate a good outcome in negotiations.

The stronger your BATNA, the greater the range of alternative courses of action. The stronger your BATNA, the greater the ability to walk away from an unsatisfactory negotiation. A risk to be aware of in a negotiation is being too committed to reaching agreement without sufficient consideration of one’s BATNA. If you are unaware of your BATNA, you could be at risk of entering into an agreement that you would be better off without.

Use the supplier’s BATNA to your advantage. Usually the other party will refuse to reach agreement if they believe their BATNA is better than the negotiated terms. You need to convince the other party that their belief is incorrect. A useful approach is to point out factors to the other party which would convince them that they have simply miscalculated the strength or attractiveness of their BATNA or has underestimated the negative consequences of not reaching an agreement with you.

### Negotiating styles

There are predominantly five styles of negotiation. Whatever negotiation strategy is undertaken it should be consistent with the evaluation plan, and ensure fairness, consistency, and impartiality to meet high standards of probity.

The ideal outcome is ‘win-win’, but this is not always achievable. A negotiating style suitable to the needs of the situation should be employed whenever possible. The five styles are outlined in the table below and the outcome advantage is illustrated in the diagram.

Style	Characteristic
<i>Avoiding</i>	<p>Avoidance is where the issues are ignored completely or there is no interest in negotiating trivial issues. Avoidance can be an appropriate style when:</p> <ul style="list-style-type: none"> <li>• The issues are trivial, and more important issues are pressing</li> </ul>

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Style	Characteristic
	<ul style="list-style-type: none"> <li>• There is no chance of getting what you want</li> <li>• There is a need to have time to cool down and regain perspective</li> <li>• You need more time to gather information</li> <li>• You need to delegate to someone else</li> <li>• When the issue is a symptom of another, bigger issue</li> </ul>
<i>Accommodating</i>	<p>Accommodation as a negotiating style is characterised by the desire to please others at the expense of your own interests. This approach is often called 'lose-win negotiation' or 'soft negotiation'. This style is used when:</p> <ul style="list-style-type: none"> <li>• The issues are much more important to the other party and there is an opportunity to build 'credits' for later use on more important issues. (This is the principle of making concessions in negotiation.)</li> <li>• You want to seem reasonable</li> <li>• Continued competition would damage the situation or the relationship and preserving the relationship is especially important</li> <li>• You want to minimise losses by conceding early</li> </ul>
<i>Compromising</i>	<p>Compromise is an approach where the parties meet at midpoint. Both parties achieve a moderate but incomplete satisfaction with their agreement – a type of sub-optimal 'win-win'. It is typified by the 'split the difference' tactic in negotiation. Compromise is an appropriate style when:</p> <ul style="list-style-type: none"> <li>• Issues are not worth the effort to be negotiated in full</li> <li>• A temporary settlement to a complex issue is needed</li> <li>• An expedient solution under time pressure is needed</li> <li>• You have a weak bargaining position</li> </ul>
<i>Competing</i>	<p>A competitive style is characterised by the desire to win at all costs. It is often described as a 'win-lose' approach. This style is used when you can develop factual and logical explanations for your key positions and:</p> <ul style="list-style-type: none"> <li>• Substantive interests are important, but the relationship less so</li> <li>• A quick decisive action is required</li> <li>• Other options are not possible</li> </ul>
<i>Collaboration</i>	<p>Collaboration is characterised by a desire to satisfy all interests in a 'win-win' solution. Collaboration style is utilised when you can identify what you want to gain in return for trade you're willing to make and:</p> <ul style="list-style-type: none"> <li>• Finding a long lasting or creative solution is required</li> <li>• Both sets of interests are too important to be compromised</li> <li>• Reaching a consensus is required</li> <li>• Developing and maintaining a relationship with the supplier is important</li> </ul>

## Negotiation Preparation Checklist

The checklist below should be adapted by public authorities to be fit-for-purpose



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thorough preparation and planning process for negotiation.

- Form and prepare the negotiation team (if appropriate), well briefed, specified roles, confident and informed on the issues, rehearsed
- Think about your public authority's position and underlying interests in the negotiation process
- Seek input and advice from key stakeholders
- Think about the possible positions and underlying interests of the supplier
- Develop some possible outline proposals which consider the needs and interests of both parties to use to start the negotiation
- Develop some desirable targets for the negotiation. These may shift during the negotiation
- Identify your BATNA
- Determine whether there is a deadline on when a decision must be reached
- Consider where the negotiation will be held – office, conference room, your facility, the supplier's premises, or on neutral ground
- Develop a plan for dealing with interruptions
- Set an agenda for the first meeting after consultation with the supplier
- Prepare the meeting space and provide private meeting space for the other party's use.

### Conducting the Negotiation

At the start of the negotiation establish understanding of each party's positions and the interests behind those positions. This stage allows identification of areas where mutually compatible interests exist. Identifying areas of mutual benefit is essential in this stage of negotiation. Areas of potential mutual interest should be explored together, with both parties generating options that might work and putting these on the table for discussion.

Effective communication is very important at this stage, ensuring that good listening skills are put into play to gather as much information as possible as well as reading body language from the other party.

### Making offers

At some point, clarifying interests and developing options for mutual benefit must develop into the making of an offer. Once an issue has been thoroughly explored, be prepared to make an offer.

Suppliers will typically start with the highest defensible offer and procurers should respond with the lowest defensible offer.

Offers should be put clearly and firmly and when deciding what to offer, keep in mind the following points:

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- Your BATNA.
- Know what your other alternatives are (including your BATNA). Develop not only your BATNA, but also your second and third best alternatives. The more options you have, the easier it is to negotiate a good agreement or walk away from a negotiation, knowing that you are not losing anything by doing so.
- Develop an understanding of the other party's BATNA. (You should have developed this information during the planning and preparation phase of your negotiation and if this is not the case, consider pausing the negotiation to undertake this).
- Stick to your pre-agreed and approved negotiation limits. At the resistance point, let the supplier know that they are getting close to your limit and that soon your best option will be to walk away and follow your BATNA.

### Offering Concessions

A concession is a revision of a previous position that has been held and justified. Making concessions can be essential in reaching a negotiated agreement. Consider the following:

**When should the concession be offered?** Encourage the supplier to offer the first concession. Do not offer a concession without specific pressure from the other party.

**How much should be offered?** The concession you make need not match the one offered to you, but it must not be disproportionately small. Value the concession from the other party's point of view. Try to identify items that are low-cost for the government to give but are of real value to the other party.

**What should be offered in return?** Concessions should be traded and should not be made without a return. Do not give concessions lightly.

### Best and Final Offer

A best and final offer (BAFO) is a process that seeks to obtain the best result from shortlisted suppliers in relation to the procurement requirements. The process involves inviting all shortlisted suppliers to submit their final offer, which will not be subject to subsequent negotiations.

### Reaching Closure

A negotiation closes when the parties agree on enough of the terms and details and are ready to formulate the agreement<sup>3</sup>. The public authority will need to identify where the negotiated terms need to be reflected in the contract. If applicable, brief the legal team who are preparing the contract on the importance and impact of each

<sup>3</sup> In a legal sense, a negotiation closes when the parties have reached agreement on all the points under negotiation and have entered into a legally enforceable agreement with each other.

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of the negotiated points. Make sure the wording in the contract reflects what has been agreed to with the supplier.

After the formal negotiating phase has finished and an agreement has been reached it must be implemented and monitored (through contract management phase).

### Breaking Deadlocks

A negotiation cannot be effectively closed whilst the supplier still holds objections to some of the current terms. These objections must be identified, and legitimate objections dealt with. This is easier in a climate of trust where there is willingness to work through the legitimate objections until both parties are satisfied. Failure to address and resolve objections will lead to deadlock, not closure.

A deadlock exists when negotiations reach an impasse and both parties appear to have exhausted all possible concessions.

Deadlocks can be broken in two main ways:

- Changing something – making the situation different; and
- Explaining something – making the situation seem different.

Break-throughs can be encouraged by pursuing some of the following options:

- lead negotiators for both sides meet informally in a neutral environment
- form sub-groups to work through issues from various relevant areas of the negotiation such as technical, financial, etc.
- bring in an outside 'expert' to give a different perspective on the problem
- suggest a recess for both parties to consider more fully the other party's position
- offer a minor (pre-planned) concession as a gesture.

### Record Keeping

It is good practice to keep written records of all negotiation meetings with all shortlisted suppliers. Negotiations can move along at a very fast pace and it is easy to lose track of what concessions were offered by whom and what follow up actions need to be taken.

Documenting each stage of the negotiation process ensures:

- accuracy of details i.e. who, what, why and when
- accuracy of matters discussed, agreed to, or subject to further review
- actions to be taken and by which party
- offers/concessions made/accepted/modified/rejected.

Good record keeping is also an important part of ensuring proper transparency and accountability for the negotiation process. Negotiation records may be needed if the negotiated outcome is subjected to external scrutiny.