

# NEGOTIATION

## About Procurement Negotiation

Negotiation is a discussion aimed at reaching an agreement with a contractor or a prospective contractor regarding terms and conditions of a procurement contract.

In procurement, we negotiate to attain the best value for the State.

Best value may include:

1. Receiving a lower contract price for the required goods or services than we could obtain from the marketplace without negotiation. .

AND/OR

2. Receiving added value in a contract at the original contract price, such as accessories for a commodity or enhanced services at no additional cost to the State.

When an agency requests to negotiate a contract prior to award, it is the buyer's responsibility to facilitate the negotiation to achieve the best value for the taxpayer dollars that are spent.

Prior to executing any type of procurement negotiation, a negotiator for the State is required by law to be trained and certified in negotiation. To be certified, you must successfully complete the online class, 1.7 Negotiation, or other negotiation training provided or approved by OSP.

Entering a negotiation is always at the sole discretion of the State. The State is never obligated to negotiate any terms or pricing of a potential contract, nor to negotiate at all. A prospective contractor may request to negotiate a particular item(s), but if the State so chooses, it may decline the negotiation request. To decline a negotiation request, the buyer may simply email the prospective contractor to advise that the State will not negotiate the requested contract terms.

Procurement law prohibits the State from agreeing to a higher price on a contract than was originally bid by the prospective contractor in their response to a solicitation. For example, if a prospective contractor offers to add additional commodities or services to the contract for an additional cost, the State cannot agree to increasing the cost above the price that was originally bid.

There are 2 general types of negotiation in Arkansas procurement:

1. Basic negotiation for a lower cost.
2. Formal negotiation of contractual terms and/or cost.

## Basic Negotiation

Basic negotiation for a lower cost is a “price only” discussion. This type of negotiation may be utilized for any procurement method.

In this negotiation, the buyer may simply ask the prospective contractor:

- Can you offer the commodity or service at a lower cost?
- Is the quoted price the best and lowest you can offer for the commodity or service?

A buyer may always request a lower cost for any small order purchase or any competitive bid purchase for which low price was determined through online shopping.

Example scenarios of this basic negotiation are:

1. Making a purchase at a retail location for multiple units of a specific item.
  - You might request a discount based on the high-volume purchase.
2. Making a purchase online from a vendor you regularly use.
  - You might email or call the vendor to ask for a lower cost based on your recurrent purchases.

Your receipt serves as documentation of the final, discounted cost.

A buyer may always request a lower cost for responses to any solicited CB or RFP, but Arkansas Procurement Law limits negotiation after an IFB so that it must begin with the lowest bidder and only where the bid price is over the fair market price or is more than the amount that was budgeted for the commodity or service.

A request for a lower cost on an IFB can be handled as a basic negotiation but first requires creating a Negotiation Justification and a Negotiation Plan (more on these documents later) and then simply asking for a lower price.

A simple request for a lower cost on an RFP does not require the Justification or Plan documentation and can be handled the same as a basic negotiation for a competitive bid solicitation.

Some scenarios make negotiation a more significant factor in ensuring you have obtained the best value for the State.

Negotiation becomes a significant factor in achieving best value when:

- The lowest bid is higher than expected based on market research.
- The bids you received are higher than the agency’s budget for the purchase.
- The current market for the commodity or service is very competitive.

It is best practice to email the prospective contractor who submitted the lowest bid to ask if he/she can further lower his/her bid price. Phone calls are also acceptable but require a second step to follow up with an email to obtain written documentation of the lower price.

The following is an example of an email requesting a lower cost:

*Your company is the apparent successful contractor for solicitation [12345] for [commodity/service] with a bid of \$xxx.xx.*

*The State is requesting a lower cost. Can your company provide a lower bid? Please respond to this email with your best and final cost for solicitation [12345].*

Sometimes, the lowest bidder may not be willing or able to provide a lower bid price. The buyer then provides the prospective contractor's response to the end user or agency approver who will decide to either accept the final cost or to not move forward with a contract award.

An email from the prospective contractor providing agreement to a lower cost serves as documentation of your negotiated cost. The confirmation can be provided in the text of the email, or as a signed document attached to the email that the buyer can save electronically and/or print. For more complex pricing (for example, when the price sheet contains multiple lines or tables), it is best practice to ask for a revised price sheet which shows the lowered costs.

The email documentation (and attachment, if applicable) must be filed in the official procurement record. It will supersede the original bid price because the written negotiation agreement will have a more current date than the original bid response.

## **Formal Negotiation: Deciding to Negotiate**

A formal negotiation is a more involved process than simply requesting a lower cost. This is typically used for more complex IFBs or RFPs. With a formal negotiation, you may address cost and/or contractual terms, such as an adjustment in how services will be provided.

### **Choosing to Negotiate an IFB**

The end user(s) or the agency's contract approver(s) determine that formal negotiation is necessary for an IFB when the apparent successful contractor's price is considered too high.

With more complex IFBs, lowering the cost may mean negotiating other items in the solicitation. Negotiating contractual terms on an IFB is acceptable *only* in instances where the negotiation does *not* change the scope of work or the contractual requirements provided in the solicitation. In this instance, the Negotiation Plan should document each contractual term the State is willing to, or intending to, negotiate to ensure a lower cost.

An example of a negotiation point for an IFB might be if the solicitation required that a contractor provide annual training as part of a service, and the State cannot agree to the contractor lowering the cost by eliminating training from the resultant contract.

In this instance, if the prospective contractor can offer a lower cost based on changing the annual training from in-person training to online training, the State can agree to this negotiated term to obtain a lower cost.

It is important to know that procurement law for IFBs allows for negotiation with only one prospective contractor at a time, beginning with the lowest bidder and moving to the next lowest bidder only if negotiation with the lowest bidder fails.

### **Choosing to Negotiate an RFP**

The end user(s) or the agency's contract approver(s) determine that formal negotiation is necessary for an RFP when:

- The apparent successful contractor's proposal is reviewed in evaluation and/or prior to award and is found to contain some contractual provisions which require adjustment to best fit the needs of the State.

AND/OR

- The proposed cost is considered too high.

An example of a negotiation point for an RFP could look similar to the following.

The apparent successful contractor's proposal states:

*The new system roll out will be undertaken in [X] manner and within [X] time frame.*

The State may prefer the roll out to be handled differently and on a different time frame.

In this scenario, the State may choose to negotiate these two items to adjust the way the services are provided.

Procurement law for RFP negotiation allows for the option of:

- Negotiating with the highest-scoring prospective contractor first, then moving the next highest-scoring if negotiation fails with the first. (Similar to IFB negotiations.)

OR

- Concurrent negotiation with all prospective contractors who could reasonably be selected for award.

## HELPFUL HINT

- Procurement law for RFPs also allows for the negotiation option of requesting best and final offers from the prospective contractors.
  - Should a State organization opt for this method of negotiation, see your supervisor or your organization's legal counsel, or contact OSP for direction.
- Even when a solicitation stipulates terms for how negotiation will be carried out, the State is never obligated to negotiate and may simply elect not to do so.

While preparing the RFP, the buyer should:

1. Determine how the State intends to handle negotiations.
2. Include a section in the RFP explaining how the State plans on conducting its negotiations.

## Formal Negotiation: Beginning the Process and the Buyer's Responsibilities

The buyer's first step in the negotiation process is to compile and document the contractual terms that the State wants to negotiate. This could be managed by email, phone call or conference call, or an in-person meeting with the appropriate personnel in the State agency who are requesting the negotiation.

After documenting the negotiation points, the buyer's responsibilities are to:

- Schedule and facilitate internal meetings or discussion.
- Create the Negotiation Plan and other strategy and planning documents.
- Distribute internal documents or information.
- Facilitate the negotiation meetings.
  - Typically, this includes opening the meeting, introducing the negotiation points, and keeping the meeting on topic. The end user or internal experts most often engage in the actual discussion for each negotiation point.
- Ensure that the negotiation process is running smoothly and on schedule.
- Handle the documentation of the negotiation process and its outcome.

## Formal Negotiations: The Negotiation Justification and the Negotiation Plan

Arkansas Procurement Law requires that you create two documents prior to negotiating an IFB.

1. A Negotiation Justification.
2. A Negotiation Plan.

These documents are for *internal use only* and must be not shared publicly prior to the completion of the negotiation.

Neither document is required for RFPs, but it is best practice to create a Negotiation Plan when negotiating contractual terms.

See Arkansas Procurement Law, A.C.A. § 19-11-229 and OSP Rule R15 for details regarding these documents.

The Negotiation Justification documents the reason(s) for entering negotiation. It must include:

1. The bid tab from the solicitation.
2. Certification of budgeted funds by the organization's fiscal officer when all bids received exceed the organization's available funding.
3. Reasons for not issuing a new solicitation, such as time constraints or economic impact.

This justification document must be retained in the official procurement record.

A Negotiation Plan is the formal documentation which lists the contractual terms the State wants to negotiate. Often, these are terms proposed by the apparent successful contractor in their proposal submission. They may also be non-mandatory terms from the IFB or RFP solicitation that the State may be willing to negotiate as a strategy to lower cost.

Per procurement law, the Negotiation Plan must address, at a minimum, the following topics of information:

1. The desired best price and the highest acceptable price.
2. Acceptable adjustments to delivery that may reduce price.
3. Acceptable adjustments in quality that may reduce price.
4. A prioritized list of acceptable adjustments in specifications that may reduce price.
5. A timetable to complete negotiation.

**WARNING**

Negotiation items must not be so extensive that they alter the scope of work of the solicitation.

The Negotiation Plan document is typically created by the buyer as a Word document. It should:

1. Be titled "Negotiation Plan".
2. Identify the solicitation by number and description.
3. Itemize the negotiation points.

### **REMINDER**

Per Arkansas procurement law:

Negotiation Plans shall **not** be revealed to bidder(s) **nor** made available for public review until after the anticipated award is made public in order to avoid revealing information that if disclosed would give advantage to competitors or bidders.

## **Formal Negotiation: Coordinating the Negotiation Team**

Although a buyer will typically handle a basic request for a lower cost, formal negotiation of a complex contract generally includes others in the State agency who are part of the negotiation team.

Upper management in an agency is typically aware that a major purchase is underway, and that it may necessitate negotiation. Often, the buyer and management will have had discussions surrounding a possible negotiation, and its participants, prior to the procurement approaching the negotiation phase.

Although the buyer will often work in conjunction with, or under the guidance of, upper management who will appoint the members of the negotiation team, it is the buyer's responsibility to coordinate and be the point of contact for the team throughout the process.

The State's negotiation team for a complex contract may include, but is not limited to the following participants:

1. The buyer
  - Organizes and facilitates the meetings.
  - Creates any resulting Negotiation Agreement document.
  - Advises on contractual items relative to the procurement.
2. The end user(s)
  - Is typically most familiar with the technicalities of the commodity or service.
  - Often participates in the heart of the discussion with the prospective contractor regarding the negotiation items.
3. The agency's fiscal manager or approver(s)

- Often provides guidance or leads discussion regarding cost or organizational budget.
4. The agency's legal counsel
    - May provide input regarding Arkansas procurement law or law relative to the purchase.
  5. Other representatives from the agency
    - To provide guidance, and/or negotiate specialty areas that the contract may encompass, such as IT, health/medicine, or engineering.

### HELPFUL HINT

Just as every solicitation is different, so is every negotiation. The members of the team will vary depending on the type of purchase and the negotiation topics.

## Formal Negotiation: Preparation

Preparation is critical to a successful negotiation.

A key factor in negotiation preparation is for the team to develop a strategy to attain the State's desired outcome for each negotiation point.

The State's team must know which contractual items the agency *must* have and which they are *willing* to negotiate.

- To ensure each team member agrees with this determination, it is helpful for the buyer to sort or label the contractual items as "must have", "want to have", and "nice to have" for each team member's review and approval.

The State's team must build a strategy for each negotiation item.

The entire team should understand this strategy prior to the negotiation meeting with the prospective contractor.

- Which "nice to have" contractual term(s) would the State be willing give up to ensure the "must have" contractual term(s)?

The State's team must understand what the State wants as well as what the prospective contractor wants.

- Understanding the factors that are most important to the contractor helps the State work toward solutions that will be agreeable to both parties.

The State's team must be aware of what the current market offers for the commodity or service.

- Understanding the competition factors and the current market trends regarding cost helps the State know how much leverage the State may have negotiating certain items.

The State's team must know the goals and limits for the negotiable items.

- Knowing how much the State is willing or able to negotiate on each "want to have" and "nice to have" item will help drive the discussion toward a solution.

The buyer should strongly advise that decision-makers for both the State and the prospective contractor are present for the negotiation discussion.

Attaining instant approval of decisions helps the process move steadily toward conclusion.

Having to repeatedly stop discussions to seek approval can effectively stall a negotiation.

## **Formal Negotiation: The Meeting**

The buyer should:

1. Contact the prospective contractor by email to schedule the meeting and provide a broadly-stated agenda of topics.
  - The agenda *must not* include the details of the State's Negotiation Plan.
  - It is allowable to add topics to the agenda if requested by the prospective contractor and if the topics are acceptable to the State.
2. Ask for the names and titles/roles of each of the prospective contractor's attendees.
3. Advise the prospective contractor that it is critical that the decision-maker(s) for their party attend the negotiation discussion.

When the time and date are confirmed, provide the final, official negotiation high-level agenda to the contractor and each member of the State's team.

The negotiation agenda should include:

- The solicitation number and description.
- The date, time, and place of the meeting, and the duration.
- The high-level list of agenda topics in the order they will be discussed.
- The attendees (and their title) for each party.

A formal negotiation discussion is typically in-person but can be by teleconference or video conference for less complex discussions.

For in-person meetings, the buyer should secure a location where each party can comfortably sit as a team and where discussions can take place in a confidential manner.

It is ideal to have a nearby, secondary room available should the State team or prospective contractor team wish to have a confidential discussion with only their team members.

For the meeting, the buyer should:

1. Ensure that all members of the State team have copies of any necessary documents.
2. Facilitate the meeting in a formal and professional manner.
  - This is not the occasion to engage in extended pleasantries and personally get to know the other party.
3. Open the meeting with introductions of the State team and allow the other party to introduce their team members.
4. Provide an overview of the meeting agenda and announce the first negotiation topic for discussion.
5. Close each discussion topic when appropriate, confirming the agreement for that topic. Then announce the next topic, keeping the discussion on course.
6. Ensure that a State team member is documenting all decisions during the discussion.
7. Close the meeting when appropriate and provide the next steps for both parties.

An example of an acceptable negotiation might be:

- The State agency wants a lower price, and a specification in the solicitation requires the contractor to provide monthly reports by the last business day of the month.
- Instead of manually emailing the reports, the prospective contractor offers to provide an online link whereby the agency can log in anytime to review and export the report data. Using this method will require less labor for the contractor while still providing the required reports for the State.
- Both parties agree that this method of providing the reports will be more efficient, and the contractor can lower its cost because of the decrease in labor requirements.

The negotiation agreement of redefining the method of delivery of the reports to lower the cost is acceptable because *it does not change the requirement of providing a monthly report.*

Because an RFP solicitation typically requires a specific *outcome* or *result* of services provided to the State, prospective contractors' proposed solutions may vastly differ in the way each proposes to meet the required outcome.

It is acceptable for the State to negotiate and agree to the details of the prospective contractor's proposal as long as the provision of the required *outcomes* are still met in the final agreement.

An example of an unacceptable negotiation point might be:

- The solicitation includes a specification that requires the contractor to provide monthly reports by the last business day of the month.
- The contractor offers to lower the price if the agency will change the monthly report requirement to a quarterly report requirement.

The State agency cannot change the frequency of reporting because that would change a specific, required outcome in the solicitation; therefore, it is not acceptable for the State agency to agree to this negotiation item.

A buyer should follow best practices when facilitating a negotiation:

- Control the negotiation discussion.
- Be determined to drive to specifics. Know the details of the issues.
- Be prepared to say no. Let the other party understand that you want to agree *if you can*.
- For sticking points, ask what cost or value is tied to the item. This will open discussion.
- Do not give the prospective contractor a negotiation deadline date.
  - This will cause you to lose leverage.
- Have ownership of all negotiation documents.

Although the goal is to reach a final agreement at the initial negotiation meeting, occasionally, additional meetings are necessary.

For example, one team may need time to research some information or to have an internal discussion regarding a solution proposed during negotiation. Or, perhaps there was a negotiation point for which a solution could not be reached in the time allotted for the discussion, and it must be tabled for further discussion later.

Setting a second negotiation meeting is acceptable, and often required for very complex contracts. The buyer should document the items to be discussed at the second meeting.

He/she should set the meeting and send a new agenda following the same procedure as the initial meeting.

### HELPFUL HINT

*If all members of each team have access to their calendars at the initial meeting, it is often most efficient to set the next meeting date and time prior to adjourning.*

Occasionally, formal negotiation may fail. Either one or both parties may not be able to adjust their position in order to reach an agreement.

In serial negotiations, if negotiation with the lowest responsive and responsible bidder (or highest-ranking prospective contractor for RFPs) fails, the State may negotiate with the next lowest responsive and responsible bidder (or next highest-ranking prospective contractor).

If that negotiation also fails, the State may negotiate with the next in line until an acceptable contract is negotiated or the State determines that negotiations are no longer in the best interest of the State.

Keep in mind that a final price resulting from negotiations shall not be higher than:

1. The bid price originally submitted by the lowest responsive and responsible bidder.
2. A price previously offered in negotiations by a responsive and responsible bidder.

## Formal Negotiation: The Negotiation Agreement

When a negotiation is successful, the buyer must create a Negotiation Agreement document that expressly details all adjustments to the contractual terms and pricing.

The Negotiation Agreement document should contain:

1. The solicitation number and description.
2. The new or adjusted specifications.
  - Written in a contractual manner, the same as specifications are written in the solicitation.
  - Itemized and numbered for easy reference.
3. The new or adjusted pricing.
  - This may be a referenced attachment to the Negotiation Agreement.
4. The order of precedence for the documents governing the contract.

- Order of precedence is not required if using the Standard Commodities or Services Contract document located on the OSP website.

5. Signatures of both parties, with dates.

When the buyer forwards the agreement document to the prospective contractor, he/she should allow time for review. Occasionally, the prospective contractor may have questions or would like to request an edit of the wording in the agreement.

It is not unusual for the document to undergo edits by the parties to ensure that both agree that the document precisely represents the final agreement prior to signatures.

It is best practice to have the contractor sign and date the Negotiation Agreement *prior to* the State signing and dating.

The State signature is:

1. Typically, that of the agency's approving authority for the procurement.
2. The final action that makes the Negotiation Agreement official.

This manual provides instruction on negotiation relative to Arkansas Procurement Law and directives. However, a buyer can improve his/her general negotiation skills by learning from other readily available negotiation materials available online or in print. Buyers are encouraged take advantage of these resources for enhancing their negotiation skills.