

Contract Negotiation

2022 Agency Purchasing Conference



When Can the State Negotiate?

- **Expression of Interest** – law requires negotiation of price and scope after highest ranking firm selected.
- **Direct Award** – since there is no competitive bid, and only a posting of the proposed contract for vendor objection, these are completely negotiated agreements
- **Emergency** – Also completely negotiated agreements, but time is not on our side.
- **Change Order/Renewal** – When vendors request contract changes (price increases, substitutions, scope changes), or decline to renew without some change, the State can negotiate.
- **SAYING NO IS PART OF THAT NEGOTIATION.**

Knowledge is Power

- **Know Your Contract – Already Obligated**

- Vendors sometimes refuse to do things they are already contractually obligated to do unless the State gives them something. **This is a hard NO in nearly every case.**
- Ex: Adorama refused to ship part of an awarded order without a price increase on the basis that it made a mistake on its bid.
 - Resolution: Debarment threatened and Adorama complied
- Ex: Trashcan liner vendor refused to perform one month into contract without a price increase.
 - Resolution: Debarment threatened, vendor still refused, Debarment imposed.

Knowledge is Power

- **Know Your Contract – Out of Scope**

- Vendors will offer commodities and services that are different in scope than what was originally contracted for. This is a NO in most cases, but may lead to a new direct award if the applicable requirements are met.
- Ex: Technology vendor wants to sell agency a new module for drug tracking software that agency currently has on contract. The new module tracks meals and dietary requirements.
 - Change Order was denied, but Direct Award justification was provided and a new direct award contract was issued.
- Ex: Agency requested a change order to add an additional building and a new road to a construction project that doubled the original bid cost.
 - Change order was denied and a new solicitation was issued.

Knowledge is Power

- **Know the Market – Comparable Pricing**

- Agencies should investigate what vendor sells to others for, and what competing products are sold for.
- Ex: Providing a vendor with an example of another state or government entity that buys at a cheaper price is a great way to secure a larger discount on a direct award contract.
 - Sources of Pricing Information: Other States, Cooperative Contracts, Prior Bids
- Ex: Showing competitor's lower pricing is a great way to eliminate or greatly reduce a price increase change order request.

Knowledge is Power

- **Know the Market – Comparable Products**

- Agencies should investigate what companies and products compete with the vendor.
- What to Know
 - Who the competitors are
 - Strengths and weaknesses of the competing product
- The threat of switching/rebidding is an effective negotiation tool.

Knowledge is Power

- **Know the Market – General Conditions**

- Agencies should remain abreast of general market conditions.
- Ex: Attempting to obtain N-95 masks in pandemic
- Ex: Vehicle delivery times with microchip shortage
- Ex: Where to find toilet paper?? Anyone??

Knowledge is Power

- **Know the Law – Substantive Issues and T’s and C’s**
 - The State must ensure that the contract requires the vendor to adhere to special legal requirements like HIPAA, licensing laws, etc.
- The State must ensure that the contract excludes illegal clauses like choice of law in another state.
 - W. Va. Code 5A-3-62 helps with this.
 - WV-96 helps with this.

Knowledge is Power

- **Know Your Attorney –**

- Attorneys are trained negotiators and persuaders. Yours may be able to help you secure a more favorable negotiation outcome.

Size Can Help

- You represent the State
 - In most cases this means you represent the larger entity with more resources at your disposal so don't be afraid to use them. (Not always though – Microsoft/Google/Oracle)
- Economies of Scale
 - If your orders can be aggregated, negotiating with higher volume provides leverage for higher quantity discounts.

Timing

- **Ensure sufficient time to rebid, repost, etc.**
 - Consider renewing contracts with enough time to find another vendor if necessary. This eliminates time constraints as a problem in negotiation.
 - Example: Agency requests renewal from vendor six months prior to contract expiration. Vendor responds with a request for a price increase. Agency says no thanks, we will just rebid. Either Vendor concedes to renewal with no increase to keep the contract, or the State rebids. Most of the time, the vendor concedes.
- How is this different if the contract is for nursing services and it expires in 15 days?

Negotiation Strategies: Timing

- **Use Time Constraints to Your Advantage If Possible**
 - Example: Agency is conducting EOI negotiation and federal funds must be spent in short period of time. Agency may attempt to get lower pricing by telling the vendor that time will not allow for protracted negotiation, that agency will pay no more than \$XX, and that agency needs an answer ASAP so that the next bidder can be contacted if the answer is no.

Negotiation Strategies: NO

- Get comfortable saying NO.
- The Purchasing Division has found that simply saying “no” will eliminate many vendor price increase requests.

Negotiation Strategies: Win/Win

- This requires finding a way to give both sides some of what they want.
 - This requires an in-depth understanding of what the other side wants.
- It is not always possible when price is the only item at issue or the request is outside the scope of the original contract.

Negotiation Strategies: Exchange Lesser Issues For Important Issues

- Identify what you can live without and concede those at the appropriate time for things you really want.
- Ex: The State agrees to removal of certain security requirements because there is no protected information involved in exchange for price reductions.

Negotiation Strategies: Extreme then Give

- Starts with an extreme demand/position and then slowly give ground.
- Think good cop/bad cop, but with a single person.
- Example: Vendor terms attempt to eliminate every conceivable liability with a dollar cap of \$0 in its liability limit clause; then negotiates something more reasonable.

Negotiation Strategies: Take It or Leave It

- The State may be required to end negotiations with a take it or leave it ultimatum on issues of legal compliance.
- There really is no alternative in some cases.
- Examples: Contractor licensing; Venue clauses; anything mandated by law.

Negotiation Strategies: Emotional Appeal

- My experience is that this is not very effective.
- Example: If you don't agree to this, there will not be a contract in place, and people will [get sick, go hungry, not get paid, die, etc.]

Negotiation Strategies: No Authority

- Avoids negotiation on certain items
- Sometimes necessary given competing schedules
- Generally only delays the negotiation
- Good Example: Negotiate on most issues, but leave out privacy issues because privacy officer is on vacation.
- For the State: Insist on getting to someone with authority from vendor before discussion of major contract components.

Negotiation Strategies: Good Cop/Bad Cop

- One negotiator goes over the top with issues to make a point. The other negotiator then walks it back to a more reasonable position.
- This has been successfully used to deal with a change order attempting to restructure financing of software. During the negotiation, good cop attempted to find an agreeable solution, but eventually bad cop threatened breach of contract. In this case, the vendor agreed that it could be construed as breach of contract and ended its pursuit of the change order.

Negotiation Strategies: Delay

- Delay tactics are often used to increase pressure one party or the other.
- Ex: Vendor delays committing to a renewal until two weeks before contract expiration. Vendor then demands a price increase. The State is then forced to execute an emergency contract to continue services.
- This can be avoided by timely pursuing contracts and renewals.

**WHAT HAVE
YOU
EXPERIENCED?**



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