

CHAPTER 13 – CONTRACT NEGOTIATIONS

Contents

Introduction	2
Mutual Gains Negotiations	3
Initial Submittal by the Consultant	6
Preparations for Negotiations	7
Conducting Negotiations	10

Introduction

The discussion in this chapter will center on the contract negotiations process for professional services. However, many of the recommended techniques will apply to contracts negotiated under contractual services procurement as well. The principles of mutual gains can be applied to any negotiations.

The selection process discussed in Part 1, Chapter 12, in this handbook, for professional services results in a shortlist of no fewer than three ranked firms. The first-ranked consultant is requested to provide an automated fee proposal. The Department prepares an independent staff hour estimate. Negotiations are then conducted to establish fair, competitive and reasonable prices for the services to be provided.

Both the Florida Department of Transportation (FDOT) Manager (PM) and the consultant firm PM should always play a prominent role in the negotiations process including that of serving as lead negotiator when appropriate. Both PMs are responsible for the success of the project. That success, in large part, depends on the scope of services and resources available. Both of these are determined in negotiations.

Prior to negotiations both FDOT and consultant PMs should review the primary references governing negotiations for consultant contracts with the FDOT:

- [**Consultants' Competitive Negotiations Act \(CCNA\)**](#), Section 287.005, Florida Statutes
- [**Negotiation Handbook Professional Services Contracts**](#)
- ***Procedure No. 375-030-002, Acquisition of Professional Services***, Section 8, Negotiating Contract Fees
- ***Procedure No. 375-030-020, Standard Scope and Staff Hour Estimation Guidelines for Project Development and Environment Studies and Design Services***
- [**Automated Fee Proposal User's Guide**](#)

The CCNA provides that the Department shall: “...*negotiate a contract with the most qualified firm for services at a compensation that is fair, competitive and reasonable.*” It further provides that if such a contract cannot be negotiated with that firm, then negotiations shall be formally terminated. Negotiation shall then proceed with the next most qualified firm. If the Department is unable to reach agreement with the second-ranked firm, the process is repeated with the third-ranked firm. In summary, the Department must negotiate with firms in order of their rankings, one at a time, and cannot re-open negotiations with a firm once negotiations have been terminated.

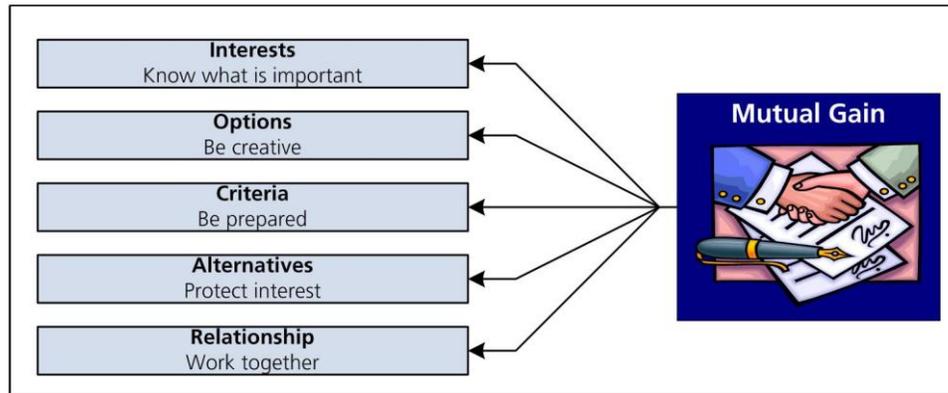
Mutual Gains Negotiations

The FDOT conducts negotiations for professional services using the “mutual gains” approach, as taught by the Program on Negotiations in Cambridge, Massachusetts. The essence of this approach is based on the principles of negotiations originally set forth in the book “**Getting to Yes**” by Roger Fisher and William Ury. The term Mutual Gains Negotiations was carefully selected by the FDOT to reflect the underlying concepts of a negotiating method that increases the chances of arriving at a fair and reasonable price for professional services. It is not a strategy to “win” in negotiations, nor is it a “win-win” approach. The mutual gains approach is designed to take the game-playing out of negotiations. It recognizes that both parties have interests that must be satisfied if there is to be a successful outcome; therefore, both parties should work collectively to realize those interests. However, it also emphasizes negotiating hard for legitimate interests and exercising alternatives when those interests cannot be achieved; thus everyone will not always “win.”

The negotiations process is serious business. On one hand, it determines business success, which affects the livelihood of individuals. On the other hand, public agencies have a legal and moral obligation to safeguard the taxpayers’ hard-earned money. They must ensure that all expenditures result in a reasonable value for the public. Negotiations, therefore, should not be treated as a game where one side wins as much as possible without regard to the interests of the other side.

There are five elements to the mutual gains approach to negotiations: interests, options, criteria, alternatives and relationships. Figure 1, **Mutual Gains**, illustrates the five elements of mutual gain. Each is discussed below and useful procedures for the negotiator are recommended.

Figure 1
Mutual Gains



Interests – Know What Is Important: The first step in the process of mutual gains is to identify your interests and to anticipate the interests of the other side. There is a difference between an “interest” and a “position.” Examples of positions are salary caps or a minimum number of staff hours. An interest is the reason for a position. Interests are not always obvious, so careful analysis is necessary in the pre-negotiation stage. For example, the interests of a consulting firm may be exposure to a new client and maintenance of staff levels as well as profitability. The FDOT’s interests might include: quality of work and schedule as well as budget. Know your interests and negotiate hard for them. Understand that positions are simply means to an end and that there may be many positions that can satisfy an interest.

Options – Be Creative: Once you understand your own interests and have anticipated the other side’s interests, determine where the two sides are likely to agree and where there is likely to be disagreement. Brainstorm options when interests are likely to clash. Many bottom-line dollar issues can be resolved by preparing creative options for issues such as the scope of services, schedule and method of payment. During negotiations, be forthcoming with your interests and try to get the other side to do likewise. Do not get hung up on positions. Seek to understand the interests behind positions and convince the other side that there may be more than one way to satisfy its interests. Try collective brainstorming, with both sides working to satisfy both sets of interests. This process is the essence of mutual gains negotiations.

Criteria – Be Prepared: There is a wealth of legitimate criteria available to help overcome roadblocks in negotiations. The FDOT has extensive data on salary rates, overhead rates, direct expenses and staff hour estimating. It is in the interest of both parties to review the available data carefully and to use it in negotiations as a beginning point for agreement. Remember that other criteria may be useful also such as a firm's own experience or industry averages.

Alternatives – Protect Interests: Each side should have a good idea of what its Best Alternative to a Negotiated Agreement (BATNA) is. A strong BATNA is real power in negotiations. For example, assume you are buying a car. Once you have done thorough research, know the worth of the car you want and have a price from another dealer, you have all the power in negotiations. If you cannot reach a deal, you have a good alternative. Your BATNA will determine your walk-away position. Neither consulting firms nor the FDOT should be forced into poor business deals as a result of negotiations. While the mutual gains approach to negotiations does not advocate that either party walk away from negotiations, that option should be carefully evaluated and exercised when necessary. Otherwise, one party may hold unfair power over the other. Because this element of mutual gains negotiations is available, there must be no stigma attached if a firm chooses to exercise its BATNA.

Relationships – Work Together: Remember that negotiations are only the beginning of an important relationship. Once a deal is struck and a project completed successfully, future projects may result for the consulting firm involved. Long-term relationships are equally important to consulting firms and to the FDOT; it is important that negotiations do not damage those relationships. It requires professional skill to negotiate hard for your interests while maintaining positive relationships. It requires excellent communications and going the extra mile to view the issues from the perspective of the other side. Remember, each side enters negotiations with certain preconceptions about the other side. Some are accurate and some may be inaccurate. Carefully evaluate your own preconceptions, and be willing to alter them if they prove to be false. Understand that the other side has preconceptions about you, and they may or may not be correct.

Many use negotiation techniques that are really nothing but game-playing. Such techniques, in the long run, will damage relationships. Remember, "winning" does not require that the other side "lose." Be open and honest and avoid playing games. The PM must approach negotiations with the attitude that both sides have a right to fulfill their interests. Work as hard to satisfy the other side's interests as you do to satisfy your own.

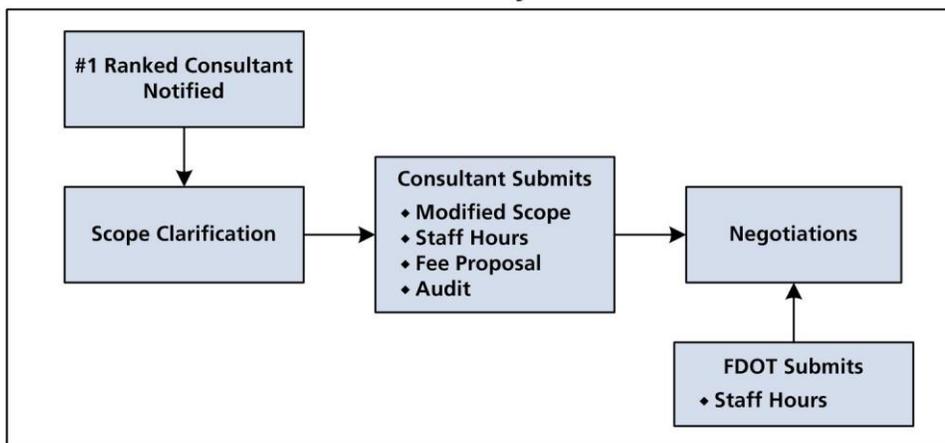
Ultimately a relationship of trust and respect is established by being clear and honest with the other party, not by giving in. Be honest about what you cannot do. You should not sacrifice an important interest for the sake of maintaining a relationship. Being cooperative does not mean giving up your interests or settling for an agreement that is not as good as your BATNA.

Initial Submittal by the Consultant

The top-ranked consultant will receive instructions for the submittal of comments on the scope of services, a detailed staff hour estimate (where appropriate), a fee proposal and an audit package that supports the fee proposal. The FDOT requires automated fee proposals for most consulting contracts. The Automated Fee Proposal User's Guide should be used in the preparation of fee proposals. When negotiations are completed, the updated automated fee proposal will be uploaded into the Consultant Invoice Transmittal System to establish the contract file for payment. Figure 2, **Initial Submittal by Consultant**, depicts this process.

The firm should ensure that the scope of services is clearly understood before

Figure 2
Initial Submittal by Consultant



preparing the fee proposal. The proposal should include proposed changes to the scope, if appropriate. The staff hour estimate should follow the Standard Scope and Staff Hour Estimation Guidelines recommendations whenever possible. But it must be recognized that not all professional services are covered in this document. When the standard estimating forms are used, directions should be followed.

An accurate, complete and timely fee proposal must be prepared. The fee proposal should be clear and contain explanations and sufficient back-up information so that a reviewer can easily determine how the price was developed. Data in this package will be used as the basis for much of the subsequent negotiations. It is, therefore, to the benefit of the consultant to submit a quality package that will make a positive impression on the FDOT negotiations team. Instructions are explicit as to what is required, and they should be followed carefully. The consultant should ensure that everything requested in the instructions is submitted including any required documentation. The CCNA requires consultants to submit a truth-in-negotiations certification stating that all wage rates and other unit costs supporting the fee proposal are accurate, complete and current at the time of contracting. Failure to comply with

this requirement will result in an adjustment of contract fees and may also result in suspension of the consultant’s qualifications. If there are questions, the consultant should address them as instructed in the notification package in sufficient time to meet the deadline for submission of the package.

Preparations for Negotiations

Both sides should prepare properly for negotiations. The more thorough the preparation, the more quickly an agreement can be reached and work can begin. A good rule of thumb is: spend as much time preparing for negotiations as you expect to spend in the negotiations process.

Know What Is Negotiable: The first step in contract preparations is to clearly understand what is “on the table.” Figure 3, **Negotiable Issues**, describes the various contract elements, which are also described below.

Scope of Services: Both parties must agree to the scope. Even though a standard scope of services is used, the provisions of that scope are negotiable. The consultant may have proposed an innovative approach that should be considered, or the FDOT may have some special concerns. Both PMs must understand the scope and be prepared to clarify it as necessary in negotiations. A field visit with key FDOT and consultant staff prior to beginning negotiations will prove helpful in reaching a common understanding of project issues and requirements.

Figure 3
Negotiable Issues



- **Staff Hours:** The FDOT PM should prepare an independent staff hour estimate of the project prior to negotiations for use in evaluating the consultant’s estimate. This estimate should be prepared in consultation with appropriate support offices such as surveying and mapping, materials, or structures. A good check on staff hour estimates is to compare them with those of similar projects taking into account differences in complexity and other factors. The objective of mutual gains negotiations is to avoid game-playing. Deliberately estimating high or low, whether it is the FDOT or the consultant, does not achieve this important goal of the mutual gains theory.
- **Distribution of Staff Hours:** *Not* only are the total staff hours important, so is the distribution of staff hours. For instance, it is necessary to have sufficient hours of key staff in the project, but it is not appropriate to overload the hours with highly paid senior staff.

Another point to remember is that while very experienced staff may receive higher wages, they should be more productive and, consequently, work fewer hours.

- **Staffing:** Addition to or elimination of **selected** staff members from the nominated team is a negotiable issue. However, the nominated team plays a large part in selection. Location of staff may also be an issue and is negotiable.
- **Cost of Services and Rates:** Both PMs **should** review the ***Negotiation Handbook Professional Services Contracts*** and understand the parameters of negotiating salaries, salary escalation, direct expenses and operating margin. Audited overhead rates are not negotiable, although the consultant may opt to use a lower rate as a negotiating point.
- **Subcontract Costs:** Subcontracts **can** be a significant cost factor in a contract. The costs of subconsultant services and associated rates are negotiable for subconsultants as they are for the prime consultant. Subconsultant costs must be carefully prepared and reviewed prior to negotiations.
- **Schedule:** The schedule may have a **direct** impact on the price of the project. Both Project Managers should review the schedule carefully and be prepared to offer refinements, as appropriate.
- **Method of Compensation:** Four **methods** of reimbursement commonly used by the FDOT, listed in the ***Negotiation Handbook Professional Services Contracts***, Section 6, are Lump sum, Cost reimbursement, Cost per unit of work, and Specific rates of compensation.

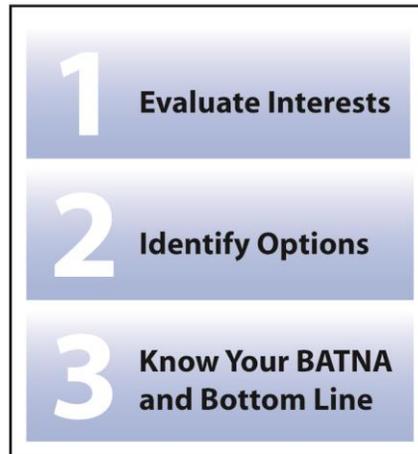
Part I, Chapter 14, of this handbook, discusses each of these payment methods. The Department's preferred method of compensation should be stated in the Request for Proposals. The final method of compensation should be agreed to during the negotiations process.

In evaluating what is negotiable, the project concept, as advertised, cannot be altered. Care should be taken not to alter contract elements to the extent that the selection process may be questioned.

Prepare Using a Mutual Gains Approach: The steps for preparing to engage in mutual gains negotiations are summarized in Figure 4, **Preparing for Mutual Gains Negotiations**.

Evaluate Interests: Each PM should list the key interests for the project. Some must be satisfied to reach an agreement; others may be desirable, but not essential. Be honest with yourself, and make sure only significant interests are listed. Once your interests are identified, place yourself in the position of the other side and list their likely interests using the same process. Then recognize that other parties who may not be directly involved in the negotiations may have legitimate interests in the outcome. These parties should be consulted prior to negotiations to determine their interests.

Figure 4
Preparing for Mutual Gains
Negotiations



- **Identify Options:** This process begins by reviewing your interests and the anticipated interests of the other side. Those interests that are in agreement need not be negotiated since there is agreement. Where there is likely to be disagreement, prepare options to present in the negotiations. Brainstorm options with your team. Be creative; look at all negotiable elements discussed above. For example, if there is likely to be an impasse on staff hours, will changes in the scope or schedule overcome the problem? Have options available before negotiations begin.
- **Know Your BATNA and Bottom Line:** Evaluate all consequences of not reaching an agreement. For the FDOT, it will mean delay because it will be necessary to go through the negotiating process with the second-place firm. Anticipate this alternative by learning about the number-two ranked firm. Audited overhead and expense rates are available for all qualified consultants, and salary rates can be determined from recent FDOT contracts. It is, however, inappropriate to have any discussions with the second-place firm until negotiations are officially terminated with the first-place firm.

For the consultant, the loss of business should be evaluated against the current backlog of work and other potential contracts. Any potential ill will that may be generated with the FDOT should be factored into the consideration.

A thorough analysis of your BATNA allows you to determine your walk-away position. What interests and bottom-line price must be achieved in the negotiations for an agreement? Deliberately formulate an answer to this question before negotiations. Making a walk-away decision in the heat of negotiations is usually a mistake.

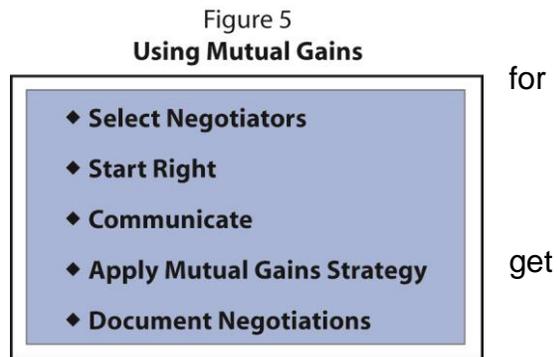
It is not the intent of mutual gains negotiations to encourage terminated negotiations; rather it is to ensure that both parties reach well-thought-out business decisions. While everyone wants negotiations to be successful, there is a point where an agreement cannot be achieved. Know that point before beginning negotiations.

Learn About the Other Side: Both PMs should learn as much as possible about the other side prior to beginning negotiations. The FDOT PM should read submitted material carefully, visit the firm's website, obtain and read its brochures and newsletters, and talk to others in the FDOT who have worked with the firm and its nominated PM. The consultant PM should learn about the district, the office involved and the FDOT PM who will be assigned to the project. The consultant PM should become familiar with the PSU staff and learn the negotiating philosophy of the district he/she will be dealing with. The consultant PM must know the FDOT's policies about any issues likely to come up in negotiations.

Conducting Negotiations

Once a negotiation strategy has been determined and preparations have been made, the negotiation process itself can begin. Figure 5, **Using Mutual Gains**, offers some suggestions for conducting successful negotiations.

Select Negotiators: The negotiators both sides should be introduced and their relative roles made clear to all. Negotiators should have the authority from their organization to make decisions. Going back to the boss to authority for a decision only delays the process, and it may be seen as a delaying tactic. The selected negotiators should participate throughout the process. FDOT negotiators sometimes tend to compartmentalize negotiations; that is, one group negotiates rates, one staff hours, and so on. Some districts operate in teams and rely heavily on the Professional Services Unit (PSU) staff for information on contractual issues. It may be appropriate to bring in specialists at key points in the process. Good decisions are best made, however, when one person leads the entire process and has authority to revisit previously negotiated elements, if necessary, before a final agreement is reached.



Start Right: One of the first steps during actual negotiations is to agree on how the negotiations are going to be conducted and to establish a deadline for an agreement. Take time at the beginning to get to know the individuals on the other side and to establish a degree of familiarity and trust. Work to foster cooperation and rapport. Do not try to use negotiation strategies to give yourself

some sort of psychological advantage. This behavior will be viewed as game-playing and unprofessional. If the other side attempts such tactics, clearly explain that you will not negotiate in such circumstances.

Communicate: Communication is essential to successful negotiations. A key communication skill in negotiating is listening. Earnestly try to understand the other side's viewpoint. Criticizing the other side is a sure way to shut down communications. Do not be secretive during negotiations. Be willing to share appropriate information and useful data. Good communication does not mean agreeing with the other side. Mean what you say, and don't equivocate with bad news. Be direct and honest. Always maintain a professional approach. Negotiations can be stressful, but you should minimize your emotional reactions and be understanding of emotional reactions from others. Stay calm, and separate people issues from substantive issues.

Apply a Mutual Gains Strategy: Become skilled in the use of mutual-gains techniques previously discussed. Throughout the process, both parties should be open to reasoned arguments. A "take it or leave it" position from the outset is not negotiations and may be a violation of CCNA. Both parties should negotiate in good faith. The end result of the mutual gains negotiating technique is to obtain a fair price for both the FDOT and the consultant. Throughout negotiations, therefore, keep in mind that agreement on a bottom line price is the objective, not the mechanics of reaching it.

Document Negotiations: There will be many agreements and understandings reached during the process of negotiations. When appropriate, the contract or scope of services should be revised to reflect these agreements. However, there will also be many minor issues discussed that may not warrant revisions in the contract but are important to document. The comments column in the standard staff hour estimating forms can be used to document understandings reached for levels-of-effort issues. Other understandings can be documented with negotiations reports, letters or memoranda to file. The PSU staff should be consulted if the appropriate method of documentation is not clear.

Regardless of the method used, some sort of documentation is useful. As work on a project proceeds, issues may arise that were discussed during contract negotiations, or work may be added or deleted. Good documentation of the negotiations can avoid confusion during the project. And, when organizations change staff or a new Project Manager takes over before a project is completed, the "gentleman's agreements" reached in contract negotiations may be lost unless they have been properly documented.