Contract Negotiations

This chapter describes the contract negotiations process for professional services. Project Managers play a key role in the negotiations, often serving as lead negotiator or facilitator to technical disciplines.

The Project Manager should be familiar with:

1. ***Consultants' Competitive Negotiation Act (CCNA)***, ***Section 287.055***, Florida Statutes
2. ***Negotiation Handbook Professional Services Contracts***
3. ***Procedure No. 375-030-002***, Acquisition of Professional Services, Section 8, Negotiating Contract Fees
4. ***Professional Services Procurement Manual, 375-030-003,*** Chapter 11, Negotiating Contract Fees
5. ***Procedure No. 375-030-020***, Standard Scope and Staff Hour Estimation Guidelines for Project Development and Environment Studies and Design Services
6. ***Automated Fee Proposal Information***

The selection process discussed in ***PMG 220 – Professional Services Contracts***, results in a shortlist of no fewer than three ranked firms. The Department begins the negotiations process with the top-ranked firm by requesting the consultant to provide an audit package inclusive of an Automated Fee Proposal (AFP). The Department concurrently prepares an independent staff hour estimate.

The consultant firm and the Department will make every effort to negotiate a contract that provides a compensation for the required services that is fair, competitive, and reasonable. If a contract cannot be successfully negotiated, then negotiations shall be formally terminated with that firm. Negotiations then begin with the next most-qualified firm.

The Department cannot re-open negotiations with a firm once negotiations have been terminated. Also, it is inappropriate for the Department to have any discussions with the next most-qualified firm until negotiations are officially terminated with the current firm.

Mutual Gains Negotiations

FDOT conducts negotiations for professional services using the "mutual gains" approach based on the principles of negotiations set forth in the book "***Getting to Yes"*** by Roger Fisher and William Ury. The mutual gains approach 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.

There are five elements to the mutual gains approach to negotiations:

1. **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. 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.

Understand that positions are simply means to an end and that there may be many positions that can satisfy an interest. Evaluate interests to determine if it is essential (key) or just desirable. Once the key interests are known, negotiate hard for them.

2. **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, or 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.

3. **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.

   Other criteria may also be useful, such as a firm's own experience or industry averages.

4. **Alternatives – Protect Interests:** Both the consultant firm and the Department should have a good idea of what its Best Alternative to a Negotiated Agreement (BATNA) is.

   Once a fair, competitive, and reasonable compensation is determined for accomplishing the work (Scope of Services), the BATNA will guide your walk-away position. Neither the consultant firm nor the Department should enter an unfair contact.

   The mutual gains approach to negotiations does not advocate that either party walk away from negotiations. All consequences of not reaching an agreement should be carefully evaluated before exercising this option. There should be no stigma attached if a firm that chooses to exercise its BATNA.

5. **Relationships – Work Together:** Negotiations are only the beginning of an important relationship. Long-term relationships are equally important to consulting firms and to the Department; it is important that negotiations do not damage those relationships.

   It requires professional skill to negotiate hard for your interests while maintaining positive relationships. Success requires open and honest communication, and an understanding of the issues from the perspective of the other side. Being cooperative does not mean giving up your interests or settling for an agreement that is not as good as your BATNA.

   Each side should enter negotiations with the expectation that each party will work with the other to achieve a successful conclusion. Both sides have a right to fulfill their interests. Each side should be honest about what can, or cannot be done, and never sacrifice an important interest for the sake of maintaining a relationship.

Initial Submittal by the Consultant

The top-ranked firm will receive instructions to submit the following:

1. Comments or concerns regarding the scope of services for project specific contracts
2. Staff hour estimate (where appropriate)
3. Automated Fee Proposal and an audit package

FDOT requires Automated Fee Proposals for most consulting contracts. The ***Automated Fee Proposal website*** should be used in the preparation of fee proposals. When negotiations are completed, upload the updated Automated Fee Proposal into the Consultant Invoice Transmittal System to establish the contract file for payment. **Figure 1**, **Initial Submittal by Consultant**, depicts this process.

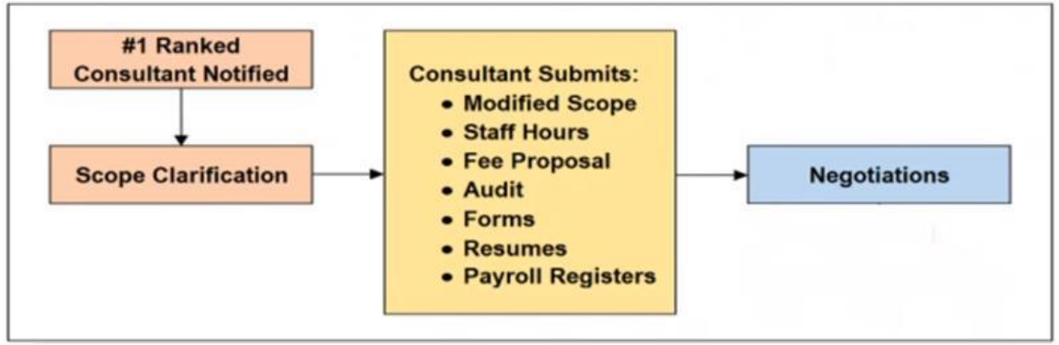
The firm should clearly understand the scope of services before preparing the fee proposal. The firm should submit any proposed changes to the scope of services when submitting the initial package for project specific contracts.

The staff hour estimate should adhere to the ***Staff Hour Estimation Guidelines*** recommendations.

The fee proposal should be accurate, complete, and timely. The fee proposal should also provide clarifications (notes), 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.

Consultant firms should make every effort to classify staff based on the job class typical definitions located in ***Attachment B*** of the ***Negotiations Handbook***; this often results in delayed negotiations when not done properly.

Figure 1 - Initial Submittal by Consultant



The ***CCNA*** requires consultant firms 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. If there are questions, the consultant should address them as instructed in the Request for Fee Proposal in sufficient time to meet the deadline for submission of the package.

Preparations for Negotiations

Both the consultant firm and the Department 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 consultant 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 Procurement staff, and FDOT policies about any issues that may come up during negotiations.

When entering negotiations, it is important to understand what is “on the table.” The project concept, as advertised, must not be altered to the extent that the selection process may be questioned.

Contract elements that are negotiable are described as follows:

- **Scope of Services:** Even though a standard scope of services is used, the provisions of that scope are negotiable on project specific contracts. The consultant firm or the Department may propose an innovative approach that must be understood and accepted by both parties. A field visit with key Department and consultant staff prior to beginning negotiations often proves helpful in reaching a common understanding of project issues and requirements. Substantial or significant scope changes not within the intent of the original agreement may warrant contract re-advertisement or may potentially adversely impact federal funding.
- **Staff Hours:** The FDOT PM is responsible for developing the Department’s independent staff hour estimate for use in evaluating the consultant’s estimate. The Department’s estimate should be prepared in consultation with appropriate support offices (e.g., surveying and mapping, materials, structures, drainage, lighting, signals).

  Comparing staff hour estimates with those of past projects with similar work is a useful practice.

  Subconsultant’s staff hours are negotiated as they are for the prime consultant.
- **Classification of Staff Hours:** Equally important is the distribution of staff hours into the appropriate classifications. It is expected that a significant percentage of total hours negotiated for a specific task will be assigned to the staff classification(s) that will produce the work. Also, more experienced, and knowledgeable staff may warrant higher wages, but increased productivity (fewer hours required to complete the task) should be considered.

  Adding or removing staff members from the nominated team may be considered when distributing hours into the appropriate classifications.

  Salary escalation is not allowed.
- **Cost of Services and Rates:** The ***Negotiation Handbook Professional Services Contracts*** describes the parameters of hourly rates, direct expenses and operating margin. Audited overhead rates are not negotiable, although the consultant may voluntarily elect to use a lower rate as a negotiating point. Operating margin is a negotiated item.

  Rates paid to both the prime consultant, and subconsultants are validated by payroll registers and review of overhead rates. Rate escalation is not allowed.
- **Schedule:** The schedule may have a direct impact on the price of the project. Both the consultant PM and the FDOT PM 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, are Lump sum, Cost reimbursement, Cost per unit of work, and Specific rates of compensation. The ***Negotiation Handbook Professional Services Contracts*****,** and ***PMG 235 – Contract Management***, discuss each of these payment methods.

  The final method of compensation should be agreed to during the negotiations process.

Conducting Negotiations

Once a negotiation strategy has been determined and preparations have been made, the negotiation process itself can begin.

- **Select Negotiators:** The lead negotiators are typically the consultant PM and FDOT PM with both sides assembling a team of support staff, including Procurement. The selected negotiators should participate throughout the process. Negotiators should have the authority from their organization to make decisions. At the start of negotiations, both sides should introduce their Negotiators, and their relative roles made clear to all.

  FDOT negotiators often compartmentalize negotiations, i.e., one group negotiates rates, one staff hours, and so on. Some districts operate in teams and rely heavily on the Procurement staff for information on contractual issues.

  It may be appropriate to bring in specialists at key points in the negotiation process. Good decisions are best made 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:** Begin negotiations with both parties agreeing on how the negotiations are going to be conducted and establishing 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:** Open and honest communication is essential to successful negotiations. Be direct and honest and be willing to share appropriate information and useful data. Exercise active listening to hear and understand the other side's viewpoint.

  Negotiations can be stressful, but emotional reactions can be minimized by always maintaining a professional manner with a positive attitude.

- **Apply a Mutual Gains Approach:** Skilled negotiators understands the value of applying mutual gains approach, and the necessity to be open to reasoned arguments. When both parties negotiate in good faith, the mutual gains approach to negotiations will result in a fair price for both the FDOT and the consultant firm.

- **Document Negotiations:** Many agreements and understandings will be reached during the negotiation process that are important to document. When appropriate, the contract or scope of services should be revised to reflect these agreements. Minor issues discussed that may not warrant revisions in the contract should use the comments column in the standard staff hour estimating forms. Other methods of documenting agreements and understanding include negotiations reports, letters, or memoranda to file.

  The Procurement staff should be consulted for guidance on the appropriate method of documentation. Documentation is very useful when issues arise on a topic that was discussed during negotiations.

For additional information regarding contract negotiations, visit the ***Procurement Office Negotiating Contracts*** webpage.