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- I. Purpose To provide negotiation guidelines for professional service contracts.
- II. Scope These negotiation guidelines apply to all procurements for professional service contracts
- III. Responsibility
- A. **Introduction**

Florida law requires state agencies and its political subdivisions using certain professional consultants to acquire the services of those consultants by competitive negotiation. The process mandated by statute (287.055, 337.107 and 337.1075, Florida Statutes), County Code of Ordinances, and County purchasing procedures requires a competitive selection of the consultants based on qualifications, followed by a negotiation process to establish a fee for the desired services. The objective of the total consultant acquisition process is the selection of a well qualified firm at a fee which is fair, competitive and reasonable to both the County and the consultant. Negotiations should be conducted in good faith, recognizing that compromise may be required in some cases to achieve an equitable contract. It should be recognized by the County's negotiator that the consultant must make a fair operating margin to remain in business, and it should be recognized by the consultant that it is unfair to the tax-paying public to expect the County to pay more than a competitive fee. A contract that is beneficial to both parties is the desired outcome of a successful negotiation.

The negotiation portion of the consultant acquisition process consists of establishing agreement between the Department and the Consultant on the following major points:

1. Scope of services to be performed
2. Work effort required (both quantity and level of personnel required)
3. Cost of services
 - a. Wage rates (or billing rates for some services)
 - b. Overhead cost
 - c. Direct expenses and subconsultant costs
4. Operating margin
5. Method of compensation

The following information provides general guidelines for the negotiation process. Although the various components are described separately, the negotiation process should be approached from a holistic perspective since scope, work effort and cost are interrelated. It should be recognized that the negotiation of one of these variables may have a significant impact on the other two. Both project management personnel and contractual services personnel should be involved in



negotiating the contract terms for the County. Typically, the project management personnel would assume the lead role in negotiating scope of services, staff hour requirements, and direct expense quantities while contractual services personnel would assume the lead with costs for labor and expenses. However, it is strongly recommended that one person have primary responsibility for the negotiation and participate in all phases of the process.

B. State of Florida Negotiation Guidelines

1. Civil Construction

Engineering Department Road and Drainage Contract Negotiations are heavily driven by F.D.O.T. guidelines published as Negotiation Handbook Professional Services Contracts-Florida Department of Transportation and should be referenced as a guide in process resource ideas and may be found @ <http://www.dot.state.fl.us>.

See form # OF0046 AFlorida Department of Transportation (FDOT) Allowance Caps@ (August 23,1999 FDOT Interdepartmental memo ADepartment Limits on Consultant Overhead, CADD and FCCM Rates@)

2. Conventional Construction

Architectural and Engineering services related to building construction and guided by the Florida Department of General Services, Division of Building Construction and should be referenced as a guide in process resource ideas and may and be found @ http://purchasing.state.oraweb/owa/www_dmsnet.dms_net.hhomepage

See form # OF0045 AFlorida Department of Management Services (DMS)

As with such guidelines they do change by revision. Assure that you are using the latest versions of these guidelines by visiting by using the web sites provided.

C. Conducting Negotiations: The Rules of the Game

The two negotiation teams have opposing financial goals: the contractor wants the highest corporate profit possible from the contract; the local government wants the best available service at the lowest possible cost. Both parties must be satisfied that the final contract contains all the services required at a fair and reasonable price.

In private industry, where negotiation is an art form, a contractor may begin during preparation of the bid response to set the stage for negotiations if the firm is selected as a finalist. For example, it is common practice for a contractor to inflate a price proposal in anticipation of making concessions during negotiations. Another strategy is to include in the proposal conditions or general clauses to be used as throwaways-items that can be traded off in exchange for items that the contractor values more.



The first indication is a sometimes subtle, sometimes obvious, change in the relationship between the contractor and the local government. The amicable ~~We~~ will do whatever you want if we get the award@ relationship established at oral presentations and interviews seldom continues during contract negotiations, when the local government can expect to hear that the simplest requirement is too harsh and unreasonable to comply with.

Anticipate being told that the contractor's low profit margin cannot support the expenses associated with a proposed reporting requirement.

Volumes have been published on conducting negotiations, but none offers a structured game plan for a complete negotiation session. Beginning negotiators should study the literature on negotiation available from the public library and develop technique that best matches their personal style. Whatever the style or technique used, some basic guidelines apply to all negotiations.

Be prepared Know the subject matter. Know the details of the solicitation document and the contractor's proposal and examine other proposals received for the same solicitation. Study the sample contracts obtained from other local governments and any material available about the contract or the contractor. Learn as much about the firm as possible, and try to anticipate probable topics of discussion.

Establish the local government's bargaining position and strategy well before negotiations begin. Decide on the maximum price per contract year that can be paid for the service and the maximum amount for unit prices or hourly rates, and identify any tasks or obligations in the bid document that could be eliminated from the final contract with little or no effect on the service; use these bargaining chips during negotiation to retain other provisions considered more important.

Use one negotiator Several people are generally included on the local government negotiation team, but only the principal negotiator interacts with the contractor's team. The other members are resources called upon as required by the principal negotiator.

Negotiate with those in authority If possible, do not negotiate with anyone who does not have the authority to make a binding decision for the contractor. Items agreed on at the negotiating table should not be subject to rejection by a principal of the contractor. Consider canceling the session if no one on the contractor's team has complete authority to negotiate. Do not rely on titles; many vice-presidents do not have the power to commit their firm to a contract. When in doubt, ask for written evidence of the negotiator's authority to make binding decisions for the contractor.

Negotiate high priorities first Negotiate the critical elements of the contract first, using less important requirements such as reporting, work schedule, liquidated damages, and payment method in bargaining. If negotiations start with the discussion of minor issues



take a firm stand on some of them so that they can be traded later when more critical terms are negotiated. Avoid discussion of major issues without other issues to use in bargaining.

Be patient Time is the local government's worst enemy. Schedule negotiations far enough in advance to allow for their unhurried and orderly progress. Do not rush the negotiation sessions, but make each session productive. Be patient, but do not let proceedings digress from the specific topic of discussion.

Use the competition The contractor knows that the local government places a high priority on cost, and the contractor usually expects to be required to lower cost to obtain the contract. The contractor is also aware that the next-ranked firm is waiting in the wings if negotiations are terminated. Use the contractor's understanding of the local government's position to the best advantage. If a stalemate develops, remind the contractor of the competition.

Consider unacceptable proposals If the contractor proposes an unacceptable term, condition, or price, do not dismiss it outright; instead, present an alternative or modification. Although there are times to take a hardline, repeatedly rejecting proposed terms without discussing alternative approaches can antagonize the contractor's team.

Avoid open conflict Negotiation is a potentially volatile exchange that can unexpectedly escalate into confrontation. Remember that after negotiations are concluded, both sides must work together for the life of the contract. Avoid open conflict with the contractor's team, and always work toward an outcome based on respect for the other's position.

If a contractor's question or proposal requires research or consultation with other team members, call a caucus and interrupt negotiations. Do this only if absolutely necessary.

Use the power of silence Agree, disagree, rebut- but know when to keep quiet. If the local government negotiator remains silent rather than challenge an important issue in the early stages of negotiation, the contractor's team may assume that the issue is relatively unimportant. The local government negotiator can bring up the issue again when a more favorable opportunity arises.

Don't be intimidated Do not be intimidated by the presence of powerful executives on the contractor's team—they may have been included for the sole purpose of impressing, awing, or intimidating concurrence after the local government team. Remember that intimidation works only if the other team lets itself be intimidated.

Put it in writing To avoid renegotiating settled issues later, prepare memoranda of negotiations which lists all the issues resolved at the conclusion of each session and



assure concurrence from both principal negotiators. When negotiations are complete, the documented memoranda of negotiations results become the basis for the final contract.

Strive for a win/win solution Neither party leaves negotiations with everything hoped for at the outset. Be prepared to yield on minor points to protect more important requirements. Never try to win it all; instead resolve differences through acceptable compromise so that both parties are satisfied with the results.

D. Negotiation Procedures

1. Fee Proposals

At the completion of final selection, the number one ranked firm should be requested to provide comments on the scope of services, as well as a detailed staff hour estimate where appropriate, a fee proposal in standard format, and support for all costs contained in the fee proposal.

The supporting information must be adequate to determine a factual basis for all costs contained in the Consultant's fee proposal. Florida Statutes specifically require that a cost analysis be performed for contracts acquired under the Consultants Competitive Negotiation Act, and the fee proposal must provide sufficient information to allow this.

The mathematical accuracy of the fee proposal should be reviewed as well as the supporting information to determine if it adequately provides the basis for the costs contained in the Consultant's fee proposal. Any errors, deficiencies, omissions, etc., noted during the review of the fee proposal and audit package should be immediately brought to the attention of the selected Consultant, and corrective data requested.

2. Negotiation of Scope of Services:

The final negotiated scope of services should be tailored to insure a mutual understanding of the project. During this negotiation process each task and sub-task should be discussed to determine how it is to be accomplished, the nature of the deliverable, and its format. If the consultant's understanding is not in accord with that of the County, discussion should be conducted to arrive at a mutual understanding of the services to be accomplished, the method by which it will be accomplished, and the nature of the final product. Either party to the negotiations should feel free to request written confirmation in the form of modification of the scope to reflect agreed-to terms.

The scope of services is one of the major factors affecting the fee for consultant services since it defines the nature of and volume of services to be performed. A well written scope of services establishes the tasks to be performed, materials to be delivered,



meetings to be attended, schedule to be met, equipment that will be used, standards that will be followed, and responsibilities of both the consultant and the County.

The detail established in the scope of services sets the stage for subsequent negotiations. A detailed and thorough scope of services leads to an understanding of the services needed to complete the assigned project as well as an understanding of the sequence of tasks to be accomplished. This allows for informed development of the staff-hour and expense estimates.

The scope of services should be prepared in standard format. The standard scope of services should be used, where practical, however, modifications should be made to reflect the actual agreed-to terms and requirements for the specific project. This will facilitate preparation and evaluation of staff hour estimates, and any desired modification of the scope during the negotiation process. Following are typical major items within the scope of services requiring negotiation:

- a. Tasks, subtasks
- b. Deliverables
- c. Standards, policies, and guidelines to be followed
- d. Numbers of and types of meetings, presentations, etc. to be attended or provided
- e. Schedule for project services.
- f. Division of responsibilities and relationship between Consultant and County

3. Negotiation of Work Effort:

The objective of this process is to ensure that the proposed staff hours are reasonable for the specific project. It is also critical to determine if a reasonable distribution of work among various levels of staff is proposed to ensure the most economical staffing commensurate with the complexity of the project.

Upon receipt by the County of the Consultant's staff hour estimate, the estimate should be compared with the client department's estimate and the differences evaluated.

Discussions will be conducted with the Consultant to resolve differences between the client department's and consultant's staff hour estimate. Resolution is needed of the level of staff to be used as well as the hours of involvement needed for each staffing element. As with the entire negotiations process, a record of the key points discussed and the resulting resolution should be kept.

The basis for an accurate staff hour estimate is a well developed scope of services. With such a basis, a series of tasks and sub-tasks may be readily identified as staffing elements. Those elements should be used for both the client department and consultant estimates



for ease of reconciliation. The estimates by both parties should be made in the same standard format.

Each project must be evaluated separately to determine a fair estimate of required staff hours. The basis for the estimate should be the specific requirements for the project under consideration together with a history of actual staff requirements for past projects with similar requirements. Where specific requirements can not be identified during the negotiation phase, a provisional estimate will be made to serve as the basis of the contract.

Following are the major items relating to work effort requiring negotiation:

- a. Staff hours, overtime, survey crew days, etc.
- b. Levels of personnel required
- c. Distribution of work among levels of personnel
- d. Subconsultants (Quantity of work effort, personnel)
- e. Delineation of work to be provided by consultant, the County, or others

4. Negotiation of Cost of Services

- a. Wage or billing rates:
 - (1) Identification of the basis for proposed rates
 - (a) The payroll data submitted in support of proposed wage rates must contain a current payroll register certified by a responsible company official.
 - (b) If averages for select employees are used, payroll information and an explanation of how the average wage rate was computed (i.e., straight average, weighted average, etc.) must be provided. When this is the case, care should be taken that only employees actually committed to and needed for the project are used in the average.
 - (c) If the Consultant's average rates for specified job classes are used, appropriate company records which identify employees within the classes and their respective wage rates should be submitted.
 - (d) If the proposed wage rates include inflationary increases, such increases may be negotiated if the term of the contract is long and the current wage rates are competitive. Where such inflationary increases are allowed, typically the rate of increase may not exceed 5 percent.



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- (e) If the Consultant is performing a special service, such as surveying, for which standard billing rates are normally charged, the cost basis for these rates must be identified (i.e. certified wage rates, overhead factors, operating margin, etc.)
 - (f) Consultants (geotechnical, aerial photography, etc.) which normally work on a unit price basis will be required to provide a copy of their standard fee schedule and attest that the fees contained thereon are their normal fees for such services (whether performed for private or governmental clients). In addition, identification of the cost basis for such rates (i.e. labor hours and wage rates, overhead and operating margin, equipment use rates verified by audit, etc.) Should be required where practical.

(2) Negotiation of proposed salary or billing rates

An analysis of the proposed salary or billing rates should be performed to insure that they are in line for prevailing rates for the class of personnel.

Rates may be negotiated for either individual employees or as averages for employee classifications.

For multi-year task assignment type contracts, a separate rate for each year of the contract may be established, but are usually tied to a maximum cost of doing business maximum % per year if necessary.

When actual rates are to be paid subject to a maximum rate, such maximums should be set at the upper limit of the reasonable range for the work class.

b. Overhead

- (1) The County is guided by the overhead rates that have been established by the State prequalification process.
- (2) If the proposed project requires the establishment of a field office, a separate overhead rate for the field office must be submitted. If the Consultant does not have an approved field office overhead rate which has been established through the State prequalification process, a field office overhead rate should be prepared by the Consultant in accordance with the instructions contained in the FDOT or DMS Guidelines.



c. Direct expenses

A lump sum contract is preferred in which all these incidentals are amortized in the fees:

- (1) Sufficient documentation must be provided with the fee proposal to support the basis for all proposed direct expenses. Written quotes from vendors, invoices reflecting prices paid on previous purchases, copies of catalog pages, etc. may be used as support for the proposed prices.
- (2) As a general rule, the method of acquisition for any capital asset (item costing \$500 or more and having a life expectancy of 1 year or more) shall be determined through the use of a lease versus purchase analysis. A copy of the analysis shall be included with the fee proposal. A reasonable allowance for salvage value of the items, based on the term of the project, must be provided for the purchase of such items.
- (3) Unit rates used to compute travel costs may not exceed those authorized for travel in accordance with Florida Statutes. Air fare must be based on coach rates and costs for rental cars must be based on the use of compact cars, unless otherwise justified and approved by the County. Mileage for private vehicles may not exceed the State rate.
- (4) The cost basis for the unit rates used for CADD computer, Facilities Capital Cost of Money, etc. must be fully supported. If the unit rates used for such costs are not verified in an annual State overhead audit. Then such costs are also subject to current State caps.
- (5) The State's Overhead Audit Guidelines require that the Consultant's annual overhead audit certify that costs for in-house produced services, including printing and copying, which are charged directly to projects, are not included in overhead and are consistently charged to all clients. If such services are not addressed as required in the current audit, the Consultant must be required to provide a statement certifying that such costs are not included in overhead and are consistently charged to all clients.
- (6) Analysis of proposed direct expenses should include determination if the proposed costs are competitive as well as to whether the items are necessary for the performance of the required services.
- (7) Discussions with the Consultant should be conducted to resolve any issues regarding either need or pricing for proposed expenses.



d. Subconsultant costs

- (1) Subconsultant costs must be specifically identified in the price proposal and supported in a manner that will allow the Contracting Office to make a determination that the proposed costs are fair, reasonable and competitive. Usually, this will require submission of the same type of data as required for the Prime Consultant. This includes support for wage rates, loaded billing rates, rates per unit of work, direct expenses and overhead. Sub-consultants with fees in excess of \$100,000 must have an approved accounting system prior to contract execution.

The prime consultant should not receive overhead and operating margin for subconsultant services.

5. Negotiation of Operating Margin

The operating margin which is paid in a Consultant contract does not necessarily represent net profit to the Consultant. Operating margin is intended to compensate the Consultant for those normal business expenses which are excluded from allowable overhead by Federal Regulation (e.g., interest, advertising, bad debts, unrecovered direct costs, etc.) as well as provide the Consultant with a reasonable profit.

Operating margin in FDOT contract guidelines is normally calculated as a percentage of direct salaries plus overhead. The percentage is negotiated within a range of 10 to 15 percent. The resulting dollar amount is the total fixed price in a lump sum agreement. The following factors should be considered in negotiating the operating margin.

- Complexity of the project. More complex projects requiring a high degree of expertise and technical skills, or unusual management requirements due to coordination of complex schedules or numerous sub-consultants, may justify a higher operating margin.
- Degree of cost risk assumed by the Consultant. Projects tightly negotiated as lump sum amounts may involve greater risk of loss for the Consultant than projects negotiated as cost plus fixed fee. Typically, subconsultant assignments involve less risk. The greater the risk, the higher the operating margin.
- Cost control efforts. Specific measures taken to control costs and increase productivity on the project should be recognized. The Consultant's history



of accomplishing projects within time and budget constraints as well as low overhead costs should be considered favorably in negotiating operating margin.

- Size and duration of the project. Short term projects which require full time commitment of staff for a brief period, can be costly for the Consultant in terms of staff utilization and may justify consideration of higher operating margin.

Any other factors which impact the cost/benefit of the project to the County or the Consultant may be considered in negotiating the operating margin. If overtime is required on the project, the percentage of operating margin negotiated for the overtime may be less than the percentage used for regular time. Operating margin and overhead are not allowed on the premium portion of overtime.

Operating margin and overhead is not allowed on direct expenses nor sub-consultant expenses. The fee proposal should include a proposed operating margin with justification based on the above requirements.

6. Negotiation of Method of Compensation and other contract variables

Discussions should be conducted with the selected consultant regarding the following:

- a. Method of Compensation: Methods of compensation include lump sum, fee, cost per of unit of work, and specific rates of compensation (billing rates). The specific rate of compensation method should be only used for relatively minor items of work of indeterminable extent
- b. Contract Duration
- c. Payout schedule
- d. Options

7. Documentation of Negotiations

During the entire negotiation process, a record should be kept of all issues raised and their resolution. It is also necessary to document how pre-award audit issues are handled.

*Note: Negotiations which result in modifications to the original proposal shall be documented in Memoranda of negotiations@, and, preferably, supported with a revised proposal from the offeror which clearly demonstrates their Abest and final offer@.



8. Termination of Negotiations:

Compensation should be negotiated within prescribed limits and should be fair, competitive, and reasonable considering the scope and complexity of the project. Should a fair and reasonable fee, as determined by the County, not be obtained by this process, negotiations with the selected consultant should be formally terminated and the process begun again with the second ranked consultant.

9. Pre-award Audits:

The pre-award audit will identify any items which are questionable (unallowable) or unresolved (no basis for proposed cost). If the Consultant cannot provide adequate supporting data for a particular unresolved proposed cost, the price analyst and/or Negotiating Officer may determine that he proposed cost is reasonable based on personal knowledge, experience with similar projects, contacts with vendors, etc.

The Negotiating and/or Contracting Officer may have the Consultant furnish additional data for review and resolution. Narrative explanations of these reviews and resolutions should be maintained.

10. Contract Modifications

a. Supplemental Agreements: (Amendments)

Supplemental agreements may be used to increase, or decrease, total contract fees, where warranted by scope changes. When this occurs, a negotiation process very similar to that involved with the original agreement is required. A scope of services and an independent staff hour estimate is prepared by the using department; A staff hour estimate and fee proposal is requested from the Consultant; and negotiations are conducted to establish a fair and competitive fee. For most supplemental agreements, the wage rates and multipliers have been established in the original agreement. Therefore, negotiations are usually limited to establishing staff hour quantities and direct expenses. Guidelines for the negotiation of original agreements should be applied to supplemental agreements.



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b. Task Work Orders:

For task assignment type contracts, the original agreement typically establishes unit wage rates. As each work assignment is developed, a fee for that assignment is negotiated. Therefore, procedures identical to those for supplemental agreements are followed for task work orders.

c. Work Stoppages:

In the event that a project is stopped or suspended by the County, a reasonable period should be allowed the Consultant to close out the project. Cost associated with such a close out should be negotiated with the Consultant when warranted.