

Ch 8 - Conducting Discussions

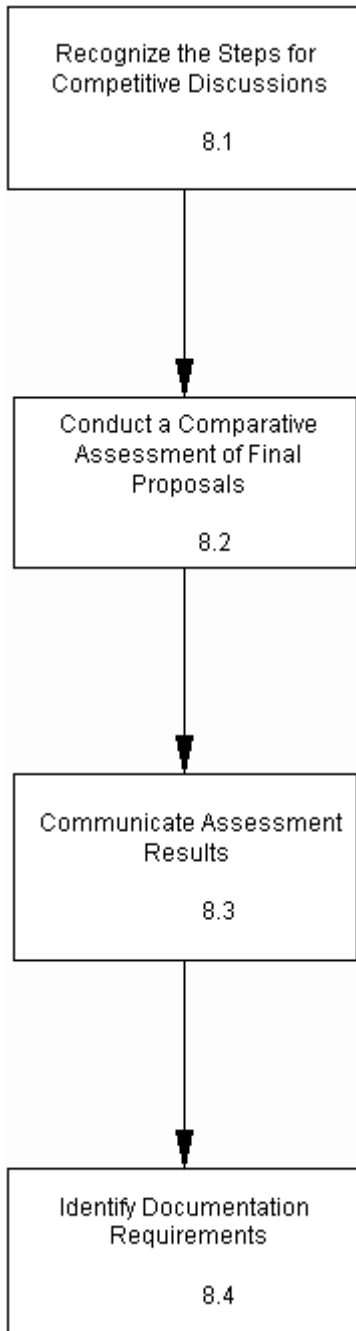
- 8.0 - [Chapter Introduction](#)
 - 8.1 - [Recognizing The Steps For Competitive Discussions](#)
 - 8.2 - [Conducting A Comparative Assessment Of Final Proposals](#)
 - 8.3 - [Communicating Assessment Results](#)
 - 8.4 - [Identifying Documentation Requirements](#)
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8.0 Introduction

Competitive Discussions ([FAR 15.306\(d\)](#) and [15.307](#)). Competitive discussions are meaningful negotiations conducted as part of a competitive acquisition. The primary objective is to maximize the Government's ability to obtain best value, based on the requirement and the evaluation factors set forth in the solicitation.

- Discussions:
 - Are conducted with each contractor determined to be within the competitive range.
 - With each contractor are tailored to that contractor's proposal.
 - Consider significant weaknesses, deficiencies, and other aspects of each contractor's proposal that could be altered or explained to materially enhance the proposal's potential for contract award.
- At the conclusion of discussions, each contractor still in the competitive range must be given an opportunity to submit a final proposal revision by an established cut-off date.
- The final source selection decision is then based on a comparative proposal assessment against all source selection criteria established in the solicitation.

Discussion Steps. The following flowchart shows the steps in conducting competitive discussions:



8.1 Recognizing The Steps For Competitive Discussions

Principal Negotiator Responsibilities. The principal negotiator must assume leadership responsibility during the discussion conference even if the principal negotiator is not the team leader at other times. This includes:

- Actively leading the team throughout discussions;
- Opening the discussion conference;
- Reviewing facts and identifying discussion issues;
- Bargaining on the issues;
- Obtaining interim proposal revisions if necessary;
- Eliminating contractors from the competitive range when appropriate; and
- Requesting a final proposal revision from each contractor.

Actively Leading the Government Team. Your key leadership responsibilities when leading a competitive discussion team are the same as they would be if you were leading a noncompetitive negotiation team. (See [Section 4.1](#) for more information.)

- Assure that preparations are complete before opening the discussion conference.
- Assure that team support is available when needed.
- Control team member participation.
- Use caucuses to maintain a unified government position.
- Use breaks to relieve tension and control the pace of discussions.

Opening the Discussion Conference. Most points that you need to consider when opening a discussion are the same ones that you should address when opening a noncompetitive negotiation. (See [Section 4.1](#) for more information.)

- Greet the contractor's team.
- Take time for introductions.
- Help attendees feel more at ease.
- Briefly review background information.
- Emphasize the goal of a win/win outcome.
- Review the discussion agenda.

However, you do need to emphasize that competitive discussions are not the same as noncompetitive negotiations. Point out that:

- Discussions will not involve the offers and counteroffers common in most noncompetitive negotiations.
- The contracting officer may:

- Request or allow a proposal revision during discussions to clarify the contractor's position for further discussion.
 - Refuse to accept a proposal revision when one was not requested.
- The Government will rely on the forces of competition to obtain a win/win result.
 - After discussions, each contractor will be given an opportunity to submit a final proposal revision.
 - The Government will then make contract award to the firm whose proposal offers the best value given the contract requirements and the evaluation criteria for contract award.

Reviewing Facts And Identifying Discussion Issues. Your initial review of the facts in competitive discussions should be similar to your initial review of the facts in noncompetitive negotiations. (See [Section 4.1](#) for more information.)

- Pay special attention to areas where issues are common.
- Summarize the results of any exchange that took place prior to discussions.
- Conduct additional fact-finding when necessary.

Instead of summarizing the areas of agreement and disagreement as you would in a noncompetitive negotiation, you should summarize issues identified for discussion. Generally, the issues will be related to:

- Proposal deficiencies;
- Significant proposal weaknesses; or
- Other proposal aspects that could, in the opinion of the contracting officer, be altered or explained to materially enhance the proposal's potential for contract award.

Bargaining on the Issues ([FAR 15.301](#) and [15.306\(d\)](#)) (E.L. Hamm & Assoc, Inc., B-250932, Feb. 19, 1993).

Like noncompetitive negotiations, bargaining in competitive discussions includes persuasion, alteration of assumptions and positions. Discussions should address issues related to price, schedule, technical requirements, contract type, or other terms of the proposed contract.

Instead of attempting to reach a final agreement, bargaining in a competitive situation should be directed toward achieving a mutual understanding of the issues that should be addressed in the contractor's final proposal revision (FPR). Any changes in contract requirements will require a solicitation amendment to assure that all contractors are proposing to meet the same contract requirements.

- **Follow Your Discussion Plan.** Maintain the initiative throughout the discussions by following your discussion plan.
 - Use your agenda to address the issues.
 - Ask questions. Listen and evaluate the answers for responsiveness, truth, and consistency.
 - Employ appropriate tactics and countermeasures to achieve win/win results.
- **Explain That Proposal Deficiencies Must Be Corrected.** The term "deficiency" is used to describe a material failure of a proposal to meet a Government requirement or a combination of significant weaknesses in a proposal that increases the risk of unsuccessful contract performance to an unacceptable level.
 - If the proposal contains a deficiency, discussions must lead the contractor to the area of concern so that the contractor will have an opportunity to improve its proposal by correcting the deficiency. For example, if the proposed project manager does not meet minimum contract requirements, point that out to the contractor.
 - Never provide suggestions on how to correct the deficiency.
 - Emphasize that, unless proposal deficiencies are corrected, any proposal evaluation must consider the unacceptable level of performance risk associated with the deficiencies.

Bargaining on the Issues. ([FAR 15.306\(e\)](#))(Pan Am World Servs, Inc., CGEN B-231840, Nov. 7, 1988 and Son's Quality Food Co., CGEN B-244528.2, Nov. 4, 1991).

- **Explain That Correcting Weaknesses Will Improve the Proposal.** A weakness is a flaw in the proposal that increases the risk of unsuccessful contract performance. A significant weakness is a flaw that appreciably increases the risk of unacceptable contract performance.

- If the proposal contains a significant weakness, you should advise the contractor and provide information on the general area of the weakness. For example, if proposed personnel appear only minimally qualified in the skills required for contract performance, point that out to the contractor. Do not merely restate the solicitation requirements.
- You are not required to discuss every aspect of a proposal that receives less than the maximum possible rating. However, you must not conduct prejudicially unequal discussions. For example, you must not discuss every proposal weakness (even the smallest) with one contractor and only significant weaknesses with another.
- Never provide suggestions on how to correct any weakness.
- Emphasize that, unless proposal weaknesses are corrected, any proposal evaluation must consider the increased level of performance risk associated with the weaknesses.
- **Identify Other Proposal Aspects for Possible Improvement**
 - Emphasize that award(s) will be made to the firm(s) whose proposal(s) provide(s) the best value to the Government considering the evaluation criteria in the solicitation.
 - Where the solicitation states that evaluation credit will be given for technical solutions exceeding mandatory minimums, you may:
 - Negotiate for increased performance beyond any mandatory minimums; or
 - Suggest that a lower-priced proposal that meets any mandatory minimum requirements would be more competitive than a higher-priced proposal that exceeds those requirements in ways not integral to the design.
 - If your analysis indicates that the proposed cost or price is unreasonably high, advise the contractor and provide the basis for your analysis.
 - If your analysis indicates that the proposed cost is unrealistically low for the work required, advise the contractor and provide the basis for your analysis (Biospherics, Inc., B-278278, Jan.

14, 1998--[Text of decision available for viewing in PDF Format](#)).

- For cost-reimbursement proposals, remind the contractor that the proposed cost may be adjusted for evaluation based on the most probable cost to the Government.
- For fixed-price proposals, remind the contractor that the unrealistically low price will be considered in appropriate areas of proposal evaluation (e.g., performance risk).
- **Never Engage in Inappropriate Conduct.** Never engage or permit team members to engage in conduct that:
 - Favors one contractor over another;
 - Reveals a contractor's technical solution, including unique technology, innovative and unique uses of commercial items, or any information that would compromise a contractor's intellectual property to another contractor;
 - Reveals a contractor's price without that contractor's permission.
 - Reveals the names of individuals providing reference information about a contractor's past performance; or
 - Knowingly furnishes source selection information in violation of law or regulation.
- **Never Mislead the Contractor.** Never engage in conduct that misleads the contractor into submitting an FPR that fails to address the concerns identified during the initial proposal evaluation. For example, do not press a contractor to review its proposal for additional cost savings when the proposal is already appears unrealistically low. Such discussions could mislead the contractor into submitting an FPR that reduces price without addressing cost realism. That FPR would likely be evaluated as offering less value to the Government than the original proposal.

Obtaining Interim Proposal Revisions ([FAR 15.307\(b\)](#)). Never require contractor's to submit more information than necessary for discussions and proposal evaluation. Normally, that means that discussions will be based on the contractor's initial proposal. However, the contracting officer may request or allow a proposal revision during discussions to clarify the contractor's position for further discussion.

Eliminating Contractors from the Competitive Range ([FAR 15.306\(d\)\(4\)](#) and [15.307](#)). After discussions begin, the contracting officer may determine that a particular firm is no longer among the most highly rated contractors being considered for contract award and eliminate the firm from the competitive range.

- The contracting officer is not required to discuss all material aspects of the proposal with the contractor or provide the contractor an opportunity to revise its proposal before eliminating the contractor from the competitive range.
- When the contracting officer eliminates a contractor from the competitive range, you must not request or accept any further proposal revisions from the contractor.

Requesting a Final Proposal Revision ([FAR 15.307\(b\)](#)). At the conclusion of discussions, you must give each contractor still in the competitive range an opportunity to submit an FPR. All requests for an FPR must be in writing. The request should be brief, but it must:

- Establish a common cut-off date for receipt of FPRs from all contractors still in the competitive range; and
- Advise each contractor that:
 - Its FPR must be in writing, and
 - The Government intends to make award without obtaining further revisions.

8.2 Conducting A Comparative Assessment Of Final Proposals

Source Selection Plan. The assessment of the final proposal revision (FPR) must be conducted in accordance with the source selection plan established prior to solicitation release. The format of the plan will depend on agency and contracting activity policies. However, it should include or provide for the following:

- Basis for the best value decision;
- Source selection organization;
- Proposal evaluation criteria; and
- Evaluation procedures.

Basis for the Best Value Decision ([FAR 15.101-1](#) and [15.101-2](#)). In a competitive acquisition situation, the proposal evaluation and source selection decision process must be designed to foster an impartial and comprehensive evaluation of contractors' proposals, leading to selection of the proposal(s) that provide the best value to the Government. Depending on the acquisition situation, the best value may result from accepting the lowest-price technically acceptable proposal or from considering tradeoffs between cost/price and non-cost/price factors.

- A lowest-price technically acceptable proposal assessment is appropriate when best value is expected to result from selection of the technically acceptable proposal with the lowest evaluated price.
- A proposal assessment process that considers tradeoffs between cost/price and non-cost/price factors (e.g., technical and past performance evaluations) is appropriate when it may be in the Government's best interest to consider award to other than the lowest-priced contractor or other than the highest technically rated contractor.

Source Selection Organization ([FAR 15.303](#)). The source selection organization will vary based on a number of factors including the basis for the source selection decision, agency and contracting activity policies, and the size of the projected contract(s).

- When the lowest-priced technically acceptable proposal assessment is used, the organization is usually informal.
 - The contracting officer is the source selection authority (SSA) responsible for making the source selection decision.
 - Depending on the situation, the contracting officer may or may not require technical or audit support in proposal analysis.
- When a trade-off assessment process is used, the organization is usually more formal.
 - The contracting officer is normally the SSA, but the agency head may appoint another individual as the SSA for an acquisition or group of acquisitions.
 - Support is normally provided by a designated team or teams of experts.

- The team that actually reviews the contractor's proposals may be known as the "source selection evaluation board (SSEB)," "source evaluation board (SEB)," "source evaluation team (SET)," or another similar name. These experts may be further divided into subteams to evaluate different aspects of each contractor's proposal (e.g., cost/price, technical, and past performance) .
- The source selection organization structure may also include a second team of senior-level advisors. These advisors may be known as the "source selection advisory council (SSAC)" or by another similar name. Their purpose is to advise the SSA on the conduct of the source selection and assist the SSA in analyzing the source selection evaluation results.

Proposal Evaluation Criteria ([FAR 15.101-1](#) and [15.101-2](#)). Proposal evaluation must only consider the criteria identified in the solicitation.

- When using a lowest-price technically acceptable source selection assessment, the solicitation must specify that award will be made to the firm that offers the lowest evaluated price for a proposal that meets or exceeds the acceptability standards for non-cost/price factors.
- When using an assessment process that considers tradeoffs between cost/price and non-cost/price factors, the solicitation must clearly:
 - Identify all evaluation factors and significant subfactors that will affect the contract award decision;
 - State whether all evaluation factors other than cost/price, when combined, are significantly more important than, approximately equal to, or significantly less important than cost or price; and
 - Indicate the relative importance of non-cost/price factors.
 - If no other information is provided, non-cost/price factors are normally assumed to have been identified in the solicitation in their relative order of importance.
 - Other information may be provided in the solicitation (e.g., a statement that together

Factors 2 and 3 are approximately equal in importance to Factor 1).

Evaluation Procedures. Proposals must be evaluated using procedures defined before the solicitation is released.

- When using a lowest-price technically acceptable source selection assessment, you must only evaluate technical proposals for acceptability. Never attempt to make tradeoffs between cost/price and non-cost/price factors.
- When using an assessment process that considers tradeoffs between cost/price and non-cost/price factors, the proposal evaluation procedures:
 - Must provide for an assessment of the contractor's ability to successfully perform the prospective contract.
 - Use any rating or combination of methods (e.g., color ratings, adjectival ratings, numerical ratings, or ordinal ratings) acceptable to your contracting activity and appropriate for the contracting situation.
 - Rate each proposal considering all non-cost/price factors identified in the solicitation. For each factor, the assigned rating must consider the proposal's merit in comparison with a standard for acceptability established before the solicitation was released.
 - Evaluate the cost/price reasonableness and cost realism of each proposal.
 - Must not compare proposals against each other.

8.3 Communicating Assessment Results

Differences in Communication Requirements ([FAR 15.304\(c\)](#)). The requirement to effectively communicate findings varies based on the proposal assessment process.

- When award will be made to the responsible firm with the low-price technically acceptable proposal, little documentation and communication is required in the proposal assessment process unless the low-priced proposal is considered unacceptable for some reason. Then the contracting officer must clearly document the rationale for rejecting the lowest-priced proposal

- (e.g., nonresponsible offeror, unbalanced pricing, or unrealistic pricing).
- When award will be made based on a tradeoff assessment, substantially more documentation is normally required.
 - Each technical proposal must be evaluated and a rating assigned in accordance with the source selection plan. The rationale behind the assigned rating must be clearly documented.
 - Past performance must be evaluated unless the contracting officer documents the reason why past performance is not an appropriate evaluation factor. When past performance is evaluated, the evaluation must follow the source selection plan and the results clearly documented.
 - Each cost/price proposal must be evaluated for price reasonableness. In many cases, the cost/price proposal must also be evaluated for cost realism. The rationale behind any decision related to cost reasonableness or cost realism must be clearly documented.

Technical Evaluations for Tradeoff Assessments ([FAR 15.305\(a\)\(3\)](#)). In tradeoff assessments, the source selection plan typically requires the person(s) evaluating each contractor's technical proposal to consider factors such as compliance with solicitation requirements, technical excellence, management capability, personnel qualifications, and prior experience. The evaluation of each contractor's proposal must include:

- An overall assessment of the contractor's ability to accomplish the technical requirements of the contract
- A summary, matrix, or quantitative proposal rating using a rating method or combination of methods (e.g., color ratings, adjectival ratings, numerical ratings, or ordinal ratings) acceptable to your contracting activity and appropriate for the contracting situation.
 - Each proposal's merit must be considered for each evaluation factor based on a comparison with a preestablished standard for acceptability.
 - Each proposal rating must be supported by an appropriate narrative analysis. Ratings indicating that the proposal just met the standard for a particular factor, will normally require less documentation than ratings

indicating superior, marginal, or unsatisfactory status.

Past Performance Evaluation for Tradeoff Assessments ([FAR 15.305\(a\)\(2\)](#)). Past performance information is one indicator of a contractor's ability to perform the contract successfully. The comparative assessment of past performance information:

- Is separate from the contracting officer's determination of contractor responsibility.
- Must consider:
 - The currency and relevance of past performance information;
 - The source of past performance information;
 - The context of the past performance information; and
 - General trends in contractor performance.
- Should consider relevant information related to:
 - Past performance information regarding predecessor companies;
 - Key personnel who have relevant experience; and
 - Subcontractors that will perform major or critical aspects of the requirement
- May not rate a contractor favorably or unfavorably on past performance when:
 - The contractor has no record of relevant past performance; or
 - Information on past performance is not available.

Cost or Price Evaluation for Tradeoff Assessments ([FAR 15.305\(a\)\(1\)](#)). Cost/price evaluation represents the third element in tradeoff analyses.

- Evaluate price reasonableness. Use price analysis and if necessary cost analysis to determine whether the offered price is fair and reasonable. Documentation should alert the SSA to any price that is not:
 - Fair to the buyer;
 - Fair to the seller; and
 - Reasonable considering market conditions, available alternatives, price-related factors, and non-price factors.
- Evaluate cost realism when appropriate.
 - When the proposed contract is cost-reimbursement, cost realism analysis must be used to evaluate:

- What the Government should realistically expect to pay for the proposed contract;
- The contractor's understanding of proposed contract requirements; and
- The contractor's ability to perform the proposed contract.
- When the proposed contract is fixed-price, realism analysis may be used to evaluate the:
 - Financial risk associated with contract performance;
 - The contractor's understanding of proposed contract requirements; and
 - The contractor's ability to perform the proposed contract.

Evaluation Summary. The presentation to the SSA should follow agency and contracting activity requirements.

- As a minimum, the presentation should include an evaluation summary that combines the technical, past performance, and cost/price evaluations for each proposal.
- Some contracting activities encourage evaluation teams to assign overall ratings or to rank proposals based on proposal evaluation criteria. These overall ratings or rankings become recommendations to the SSA. Other contracting activities encourage an SSA decision based on the proposal analyses without further interpretation.

8.4 Identifying Documentation Requirements

Need for Documentation. Documentation of competitive discussions must fully present the rationale use in making the contract award decision. It must identify the significant facts and issues that affected the negotiated contract price.

- It should include the same information required to document a noncompetitive negotiation: (See [Section 4.3](#))
 - The proposals and any related information submitted by the contractors;
 - The Price Negotiation Memorandum (PNM);

- Copies or references to the location of any technical or audit analysis reports considered during the negotiation; and
 - A record of any request for additional contractor information to support the proposal and the contractor's response.
- It should also include:
 - Any documentation related to establishment of the competitive range; and
 - The SSA's source selection decision.

Price Negotiation Memorandum ([FAR 15.406-3](#)), The general requirements for a PNM for a competitive discussion are the same as the requirements for a PNM in a noncompetitive negotiation. (See [Section 4.3](#)) The major difference is related to the number of contractors involved.

- The following PNM elements describe the acquisition situation and only need to be addressed once:
 - Purpose of the negotiation (new contract, final pricing, etc.).
 - Description of the acquisition, including appropriate identifying numbers (e.g., RFP number).
 - To the extent such direction has a significant effect on the action, a discussion and quantification of the impact of direction given by Congress, other agencies, and higher-level officials (i.e., officials who would not normally exercise authority during the award and review process for the instant contract action).
- Other discussion specifics must be addressed for each contractor. Depending on agency and contracting activity policies and the complexity of the negotiations, these specifics may be addressed in the body of the PNM or by using an attachment for each contractor. The information must include:
 - Name, position, and organization of each person representing the contractor and the Government in negotiations.
 - The current status of any contractor systems (e.g., purchasing, estimating, accounting, or compensation) to the extent that they affected and were considered in the negotiation.
 - If the contractor was not required to submit cost or pricing data to support any price negotiation over the cost or pricing data threshold, the

- exception used (e.g. acquisition of a commercial item) and the basis for using it.
- If the contractor was required to submit cost or pricing data, the extent to which the contracting officer:
 - Relied on the cost or pricing data submitted and used in negotiating price;
 - Recognized any cost or pricing data submitted as inaccurate, incomplete, or noncurrent:
 - The action taken by the contracting officer as a result of that recognition;
 - The action taken by the contractor as a result of that recognition; and
 - The effect of the defective data on the price negotiated; or
 - Determined that an exception applied after the data were submitted and, therefore, did not consider the submission to be cost or pricing data.
 - A summary of the contractor's proposal, any field pricing assistance recommendations, including the reasons for any pertinent variances from them, the Government's negotiation objective, and the negotiated position.
 - When the determination of price reasonableness is based on cost analysis, the summary must address each major cost element.
 - When determination of price reasonableness is based on price analysis, the summary must include the source and type of data used to support the determination.
 - The most significant facts or considerations controlling the establishment of the prenegotiation objectives and the negotiated agreement including an explanation of any significant differences between the two positions.
 - The basis for the profit/fee prenegotiation objective and the profit/fee negotiated.
 - Documentation that the negotiated price is fair and reasonable.

PNM Distribution ([FAR 15.406-3\(b\)](#)). Whenever you obtain field pricing assistance to support your negotiation, you must forward a copy of the PNM to the office(s) providing field pricing assistance. When appropriate, you should also

forward recommendations on how field pricing assistance can be made more effective.

Technical and Audit Reports. For competitive discussions, documentation should include the team evaluations of both the initial proposals and final proposal revision.

Establishment of the Competitive Range. Competitive range documentation must clearly outline the rationale used by the contracting officer in establishing a competitive range comprised of all the most highly rated proposals. When appropriate, documentation must also outline the rationale used to further reduce the competitive range for purposes of efficiency.

Source Selection Decision. Documentation of the SSA's source selection decision must clearly outline the rationale that the SSA used in making that decision. Clear documentation is particularly important if the decision does not appear to follow recommendations made to the SSA.