

The  
REQUEST  
FOR  
PROPOSAL  
HANDBOOK

Fifth Edition  
20<sup>th</sup> Anniversary

Michael Asner

## **THE REQUEST FOR PROPOSAL HANDBOOK**

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### **Disclaimer**

Great care has been taken to ensure that the information presented is accurate; however, this information is still subject to errors and subject to change. The examples have been obtained from many jurisdictions throughout North America and may not be applicable in every jurisdiction.

### **RFPs and the law of contracts**

The process of issuing an RFP and receiving proposals does, by design or inadvertently, establish contractual rights and obligations. Each RFP and the associated process should be reviewed by your lawyer or legal department prior to issuing the RFP. The examples and sample RFPs used throughout this text have been used in many different jurisdictions in the past. The author makes no claim about the appropriateness, correctness, or legal consequences of these examples or sample RFPs. Competent legal advice should be obtained to review your Request For Proposal and the associated process.

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# Chapter Eleven

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## THE BUILDING BLOCKS OF THE EVALUATION PROCESS

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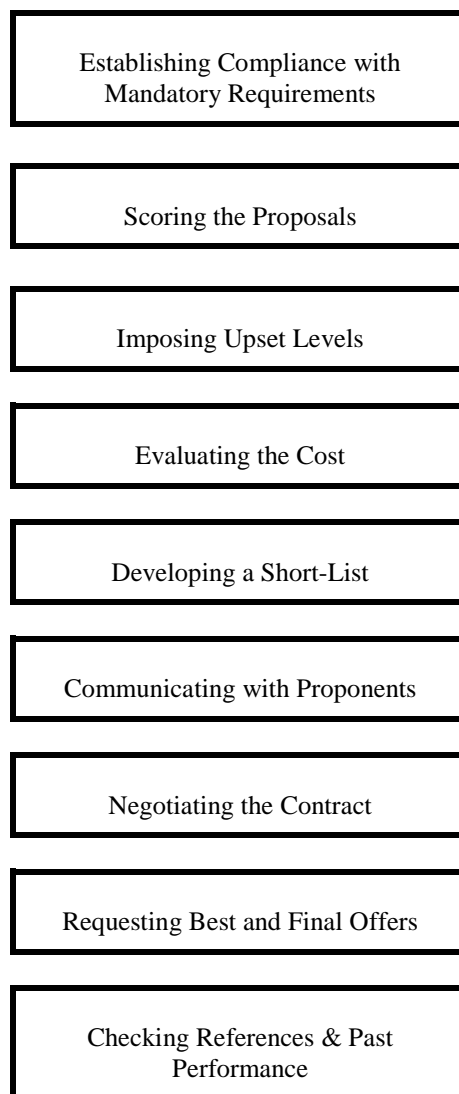
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# Chapter Eleven

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## THE BUILDING BLOCKS OF THE EVALUATION PROCESS

In this chapter, we examine the details of the evaluation process. In reviewing a large number of RFPs, we identified nine different components of the process, such as reviewing a proposal for compliance with mandatory requirements, or interviewing the suppliers. We refer to each of these components as a building block:





Many different evaluation processes, in fact most of them, can be constructed by combining some or all of these building blocks in different sequences. Some procedures use only three or four of these. More complex examples can use all nine and repeat some of them two or three times. For example, one evaluation process commonly used is based on a three-step short-listing process. After each major type of analysis, the list of suppliers still being considered is reduced. This is repeated three times; once, for each type of analysis.

Different processes formed by using different building blocks and different evaluation criteria and weights will yield different results. Purchasers should test their evaluation process before using it on real proposals. Some organizations create hypothetical proposals and "walk through" or "game" the evaluation process. These purchasers are investigating the ability of their intended process to yield an acceptable result. They are seeing how small differences in process or weight can influence the results. For example, if "technical merit" receives 10% more weight, will the results change? Is this acceptable? If cost is included as an evaluation criterion, could a company win the competition but be \$200,000 higher than a close competitor? Is this acceptable?

Often organizations discover that the evaluation process will readily identify those firms capable of doing an acceptable job. The process will identify a group of companies that scores high, say in the 70 to 80 per cent range. The process may not, however, be very good at identifying which of the companies in this group is "the best". Often additional thought, more specific criteria, and additional steps have to be included to establish and confirm the winner.

For many proposals, a face-to-face presentation by the proponents can add value to the process. It is very difficult to determine by reading the proposal "the ability of the project manager to communicate effectively with a wide range of users". This attribute is readily determined in a two hour presentation by the project manager. Presentations provide a quality control check on the selection process. They often reveal issues which have been overlooked or under-valued. While a firm cannot go from last place to first place on the basis of a presentation, the presentation can be useful in differentiating the claimed skills of the top three proponents.

## Establishing Compliance

### Establishing Compliance with Mandatory Requirements

Most organizations establish a set of mandatory requirements in the RFP. These requirements can be administrative, such as "Proposals are due by August 15 and must be received not later than 5:00 p.m. at the specified location." The requirements can also be technical in nature, identifying a critical feature or functional capability. For RFPs with mandatory requirements, the evaluation process is at least a two-step process. First, the evaluators examine each supplier's ability to satisfy the mandatory requirements. Suppliers not able to do this are eliminated from further consideration. Second, the evaluators assign a score to each proposal based on the evaluation criteria (similar to the examples presented earlier).

Typically, evaluators establish compliance before doing the more detailed analysis. During this step, one or more evaluators review each proposal to ensure that all of the mandatory conditions have been met. A mandatory condition is a requirement that must be met without alteration. One example is the submission of the proposal by a specified time. If it is late, it is usually returned to the supplier unopened. Another example is a requirement that the supplier must provide 24-hour emergency service.

Many evaluators are uncomfortable eliminating a supplier from further consideration for failure to satisfy a mandatory condition - especially when the evaluator believes that the requirement is, in fact, only "highly desirable" and not really mandatory. This issue should be discussed by the evaluators prior to releasing the RFP. Mandatory requirements must be precisely defined and must be essential elements in the success of the project. For example, consider the following mandatory requirement: "Suppliers must have a local service office." Now, I presume that the concern of the purchasing organization was prompt service and travel time. As stated, this requirement is poorly defined and could cause a number of problems for the evaluators.

First, the RFP didn't state the type of service required. Was it for equipment repairs, software support, or network support? Second, no service levels were

given. Did they need 8-hour per day support? Or 24 hour support? Third, no mention was made of the level of expertise required locally. Did they require a very expensive, technical expert who might only be found at the supplier's head office or development facility?

It is awkward, risky, and sometimes embarrassing to declare a proposal non-compliant when the mandatory requirement was not stated precisely and could be interpreted several ways. In these cases, evaluators often declare all proposals compliant, examine the actual requirement more closely, and seek clarification from the suppliers. Evaluators often ignore ambiguous mandatory requirements and evaluate each proposal on its merits. (Yes, these actions can compromise the integrity of the evaluation process.)

Some RFPs declare that “proposals not meeting all mandatory requirements will be rejected”; others are less clear and state that “proposals may be rejected”. The use of the word “may” rather than “must” permits the evaluators some latitude. They can waive mandatory conditions which all suppliers failed to meet. They can also waive mandatory conditions which on close examination during the evaluation process have proven to be ambiguous. (These seemingly arbitrary activities may cause a protest from vendors who decided not to submit a proposal.)

In California, I know of one organization that permits the evaluators to give proponents an additional 72 hours to meet mandatory requirements when “. . . (i) the Proposer gains no advantage from the opportunity to correct the deficiency; and (ii) other Proposers suffer no disadvantage.”

When “may” is used, the principle of treating each supplier fairly must prevail. Evaluators should expect complaints and protests from suppliers eliminated for failure to comply with a mandatory condition that was ambiguous, or not an essential part of the solution.

As a result of this process, each proposal is declared to be either compliant or non-complaint. Compliant proposals are evaluated further. Non-compliant proposals are eliminated from the competition after preparing a memo, a determination, for the project file, and for senior management (in anticipation of a protest). Often, discussions are held with legal counsel before eliminating a proposal.

## DEFINITIONS ARE IMPORTANT

To ensure that suppliers understand the significance of key words such as “mandatory” many RFPs define the term and indicate that it will be identified by use of the word "must". Here is some information from three different sources.

### **Nevada**

*Here are the definitions used by the State of Nevada:<sup>1</sup>*

*Definition of Key Words Used in the RFP*

Shall/Must: Indicates a mandatory requirement. Failure to meet a mandatory requirement may result in the rejection of a proposal as non-responsive.

Should: Indicates something that is recommended but not mandatory. If the vendor fails to provide recommended information, the State may, at its sole option, ask the vendor to provide the information or evaluate the proposal without the information.

May: Indicates something that is not mandatory but permissible.

### **NIGP<sup>2</sup>**

**Mandatory Requirements (Conditions)**: May apply to RFP's and IFB's and are conditions set out in the specifications/statement of work that must be met without alteration. Mandatory requirements should be clearly identified. Not meeting mandatory requirements may be grounds for disqualification.

### **British Columbia (Canada)<sup>3</sup>**

The discussion which follows reflects the current thinking related to mandatory requirements

*Mandatory criteria are requirements that a proposal must meet in order for it to be considered. They are objective, project-related or administrative criteria that, when evaluated, will be answered with a 'yes' or a 'no.' If a mandatory criterion is not met, the proposal will not receive any further consideration.*

*If mandatory criteria are too restrictive or too difficult to meet, there is a risk that good proposals may be rejected. Therefore, it is important that mandatory criteria be critical to the success of the project and that the number of mandatory requirements be kept to a minimum. All mandatory requirements should be clearly listed in the RFP. The following are examples of mandatory criteria:*

- Proposal must include evidence that at least one member of the project team is a registered Professional Engineer.*

- The proposed mode of transportation must be able to accommodate at least six adult clients. Proposal must clearly state how many adult clients can be carried in the vehicle at one time.*

- The proposal must be received at the closing location by the specified closing date and time.*

*Examples of mandatory criteria not to use might include the following:*

*The qualifications of personnel on the proponent's project team must be suitable for the role(s) proposed.*

*Proponent must be knowledgeable about government policies and practices.*

*Ministries should also avoid using performance expectations as a mandatory criterion, as they can result in the unexpected rejection of proposals. For example, consider an RFP with the following mandatory criterion: "The Proponent must agree to meet the reporting standards detailed in Appendix D." If a proposal does not specifically assert that it will meet the reporting standards in Appendix D, it will be rejected. It is better to include the performance expectation as a statement, rather than as an evaluation criterion, such as "The successful proponent will meet the reporting standards as detailed in Appendix D."*

*Ministries should also take particular care with the word must. As this is a defined term, it should be used only when describing a mandatory requirement that must be met in order for the proposal to be evaluated. If subjectivity is required in determining whether or not a mandatory criterion is met, it may not be enforceable and should be treated as desirable criteria.*

### HELPING THE VENDORS KEEP TRACK OF MANDATORY REQUIREMENTS

Often, mandatory requirements are distributed throughout the RFP. Some may be obvious but others may be buried in the middle of a page. These ones can be missed, even when the RFP is read several times. It is unfortunate when a vendor simply fails to identify a particular mandatory requirement and is eliminated from the competition.

It is a "best practice" to summarize all of the mandatory terms on one page in the RFP and reference the pages which describe each of the requirements in more

detail. This summary, often in the form of a table, can be used by vendors to ensure that they have dealt with each mandatory requirement.

SOME REQUIREMENTS ARE ONLY HIGHLY DESIRABLE, NOT MANDATORY

The 'best practice' is to keep the list of mandatory requirements short and to take great care to define each requirement precisely and unambiguously. Many stakeholders view their most important requirements as mandatory when these requirements may be only highly desirable. Often, the decision to define a requirement as mandatory contains an element of discretion. Do we define a mandatory requirement that the vendor is a large company or do we evaluate the capacity of the firm to do this work? Do we insist that the company have an office within five miles of our building or do we evaluate the ability of the firm to get to us quickly in case of an emergency?

For example, many years ago, the State of Connecticut issued an RFP to outsource "all IT services . . . so that such Agencies can completely exit the business of providing IT services and focus on their core function - the business of government." It only wanted large, world-class corporations to bid. Rather than imposing a mandatory condition such as "revenue of more than \$1 billion per year", a condition that could be seen as restricting competition, they simply told their story in the RFP and defined the characteristics of the winner as "highly desirable":<sup>4</sup>

*. . . While Connecticut will take receipt of and evaluate all Proposals complying with the RFP requirements, it is unlikely that a Proposal from other than a world-class IT services provider will be considered Acceptable or Potentially Acceptable, as described in Section 1.4. Your organization is discouraged from submitting a Proposal unless it meets each of the following criteria:*

*(a) Your organization, either alone or teaming with other entities, has entered into at least one IT services contract for the provision of IT services where the annual contract value exceeded \$50,000,000;*

*(b) Your organization, either alone or teaming with other entities, has provided services in at least six of the eight services categories described in Section 4.5 of the RFP; and*

*(c) Your organization has had average gross annual revenues in excess of \$1 billion over its three latest fiscal years.*

*The foregoing criteria are only guidelines provided for your consideration, and Proposals will be formally evaluated as otherwise stated in this RFP . . .*

## Scoring the Proposals

### Scoring the Proposals

In most evaluation processes, scoring is performed as the second task, immediately following the determination of compliance.

Most proposals require that the financial information be provided separately. This is to ensure that the technical evaluators have no knowledge of the pricing proposal. This avoids the debate over whether knowledge of the pricing proposal influenced an evaluator's assessment of technical factors.

It is a best practice that, upon receipt of the proposals, the financial section is removed and given to the analyst for evaluation. This person receives the information, establishes the costs to be used in the evaluation, and determines the score (if required). Costing is discussed later in this chapter.

Copies of the technical/management proposal are distributed to the Evaluation Team as required. For small proposals, each member of the Evaluation Team may read the entire proposal (except for cost) and perform the evaluation. On larger or more complex proposals, specific sections are usually assigned to individuals. For example, the communications expert on the Evaluation Team and the Project Manager might be the only people who evaluate the proposed network design

The Evaluators then meet to review each other's evaluations, to resolve differences, and to ensure that they share the same understanding of each proposal. This process results in scores for each evaluation criterion. The purpose of the meeting, and the team effort for that matter, is to discuss, to understand and to resolve differences - not simply to average the scores. If two evaluators, both experts in the same area, score the same response as a '2' and a '6' respectively, there is some fundamental difference in each evaluator's interpretation. It is not good enough to assign a '4', the average of the two scores. Fairness dictates that the two evaluators discuss the issue, identify the differences in interpretation, and agree upon a score. (However, in some jurisdictions, evaluators do their scoring independent of one

another and scores are then averaged. It is arguable as to whether this practice is fair.)

Three components are required to establish a numerical score for a proposal:

- a detailed set of evaluation criteria;
- an assignment of weights to reflect the importance of each factor;
- a method for establishing a score.

Each of these components is discussed in the remainder of this section.

### EVALUATION CRITERIA<sup>5</sup>

*Evaluation criteria are guidelines that aid procuring organizations in assessing responses to an RFP.*

*These criteria serve two primary purposes:*

*They enable project participants to standardize the project criteria to be considered during each reviewer's evaluation of a proposal; and,*

*They provide potential responders with an understanding of how proposals will be reviewed, both individually and in comparison with other proposals.*

Evaluation criteria are as different as people. Some are very specific and easy to assess. Others are vague and highly subjective; and, some would argue, arbitrary.

There are three major families of criteria: Technical, Management and Cost.

**Technical criteria** usually include the following: understanding of the problem, soundness of the approach and solution, ability to satisfy the stated requirements, service and support capabilities, analysis of risks, and testing methodology.

**Management criteria** usually include the following: project plans, management approach, qualifications of key people, project timetable, and corporate experience.

**Cost** is often evaluated in terms of the following criteria: total life cycle costs, cost controls, and consistency with technical and management plans.

As the RFP is developed, the evaluation criteria are identified. There are many sources of details about evaluation factors: similar RFPs from other jurisdictions,



your organization's old RFPs and templates, and RFP handbooks and guides. The specific evaluation criteria to be employed are based on the specific requirements of the RFP. It is important that the RFP demand the information required to perform the evaluation. For this reason, the evaluation process must be finalized prior to issuing the RFP. You want to ensure that you have asked for all of the required data to perform the evaluation.

The quote which follows, from Nova Scotia, is one of the best which I have found that deals with the effectiveness of evaluation criteria:<sup>6</sup>

For evaluation criteria to be effective, they should ideally have the following characteristics:	
Objective:-	not subject to diverging interpretation;
Relate to the requirements definition	all key elements of the project requirements must be covered by evaluation criteria;
Discriminating:	separate best, average and weaker proposals;
Non-discriminatory:	fair and reasonable - mandatory and heavily weighted criteria must be justified;
Realistic:	given the contract nature and/or value;
Measurable:	use measurable standards and have sub-criteria if necessary to simplify evaluation;
Economical to use:	do not consume an unreasonable amount of time or resources;
Justifiable:	makes sense, can be justified on common sense, technical and legal basis.

In developing this book, hundreds of pages of documentation were reviewed. The best description of the critical role of evaluation criteria in the process was provided by Utah. It is an excellent discussion and is reproduced in full:<sup>7</sup>

## *Evaluation Criteria*

*Evaluation criteria are the factors an agency uses to determine which of several competing proposals submitted in response to an RFP will best meet the agency's needs. In establishing effective evaluation criteria, an agency must clearly identify the factors relevant to its selection of a contractor and then prioritize or weight these factors according to their importance in satisfying the agency's needs in the procurement. Together, the proper identification and weighing of the evaluation criteria will form an evaluation plan which will provide the agency with a common standard by which to judge the merit of competing proposals. This allows the agency to rank the proposals received while simultaneously providing offerors with a fair basis for comparison. As importantly, when evaluation criteria are properly selected and weighted, the proposals received will accurately reflect the offeror's understanding of the solicitation and the offeror's ability to deliver what the agency needs.*

*The process of evaluating offers is unique to the RFP method of procurement. This method allows an agency to consider factors other than price in deciding to whom a contract should be awarded. Whenever the RFP method of procurement is used, evaluation criteria should be selected which will provide offerors with a clear idea of the factors that will be important in making award. By properly identifying and weighing evaluation criteria at the outset of the procurement process, an agency can later rely on the evaluation criteria to do the work of selecting and judging the proposals submitted.*

*Evaluation criteria should be individually tailored to each RFP. While the choice of criteria is within the agency's sound discretion, only those factors relevant to the acquisition should be included. Further, evaluation criteria should reflect the agency's minimum needs, and should not be so restrictive as to limit competition. Evaluation criteria often encompass such factors as price or cost, technical excellence, management capability, personnel qualifications, experience and past performance. While price or cost must be included in every procurement and will be the deciding factor in most, price or cost need not be the deciding factor in all acquisitions. This is especially true for cost-reimbursement contracts, in which the contractor's ability to understand the procurement and produce a quality product may well override narrow cost concerns.*

*The establishment of meaningful evaluation criteria is a critical step in choosing the best contractor for a particular procurement. Since the goal of an effective evaluation scheme is to reflect an agency's program needs, an agency must determine what evaluation factors are relevant to the procurement before choosing an evaluation plan.*

*For example, an agency should select different evaluation criteria for a single task, data entry job than for a long term facilities management contract. In choosing the criteria for a data entry job, an agency would select factors reflecting its need for an experienced contractor with sufficient labor and equipment to complete timely*

*performance. Management factors would not be stressed for this type of one shot job. In contrast, for a facilities management contract, an agency would identify factors stressing the management contract, an agency would identify factors stressing the management capabilities of prospective offerors, as well as their technical competence, since the differing circumstances of a long term management contract require proven managerial expertise.*

*The precise evaluation criteria chosen must reflect the particular requirements of the contract. For example, an agency may quickly realize that a contractor's technical capability will be decisive in meeting an agency's need to switch from mainframe to distributed computer processing. As part of technical capability, the agency might further identify a contractor's ability to convert the agency's current programs and data files in a timely manner as critical to filling the agency's mission. Thus, "technical approach" and "conversion plan" might then be broken down into subcriteria such as "delivery schedule," "prior conversion experience," and "conversion facilities."*

*As noted above, in addition to clearly stating what evaluation criteria will be considered in selecting an offeror, the RFP must identify the relative importance or weight of the criteria. Using the above example, an agency might then decide that "Technical approach" is twice as important as the "conversion plan" and thus should be assigned twice the weight in the evaluation plan. To establish the relative importance of evaluation criteria, the RFP may simply state that the evaluation criteria are listed in order of relative importance. Or, the RFP may state that the evaluation criteria listed are all of equal weight. If listed in order of importance, an agency must be sure that the first or second criterion is not assigned predominant importance, since this would not provide offerors with a realistic picture of the procurement. An agency may also assign numerical weight to each of the evaluation criteria listed.*

*Once evaluation criteria are issued, an agency must adhere to its evaluation plan. If the agency realizes in mid-procurement that the evaluation plan does not accurately reflect the agency's needs, then the Purchasing Agent must issue a written amendment to all offerors stating the changed evaluation plan and requesting a new round of proposals.*

*The process of selecting and weighing the evaluation criteria will assist the agency in understanding and defining its own needs. Similarly, the proper choice of an evaluation plan will greatly assist contractors in understanding the agency needs. This will result in the receipt of better proposals from offerors. Moreover, by clearly identifying the evaluation criteria to be used together with the relative weight assigned to each factor, an agency will be able to ward off potential protests from disgruntled offerors who could otherwise claim that the evaluation plan was not properly disclosed.*

*The percentage weighting for the price criteria should not be less than 30%. Any lower percentage to be given for price must be justified in writing and will require prior approval by the Director of Purchasing.*

*Evaluation criteria are an integral and fundamental part of an RFP package and crucial to an orderly procurement. The evaluation plan must closely reflect the RFP Statement of Work and Specifications. When properly selected, weighted and drafted, evaluation criteria can tremendously assist an agency in its procurement of goods and services.*

### A FEW EXAMPLES OF THE AMOUNT OF INFORMATION PROVIDED IN AN RFP

Some RFPs provide the minimum amount of information about the evaluation criteria. They satisfy the law, their policies and their own practices but don't go out of their way to provide additional information. Other RFPs provide extensive descriptions of each evaluation factor. Throughout this text, we have endorsed the belief that "more is better" – the more information you provide in the RFP, the better the resulting proposals. Alternatively, based on detailed information, some vendors may decide not to submit a proposal. This self-selection process saves both the vendors and the evaluators time and money.

The Chartered Institute of Purchasing and Supply (CIPS) and the National Institute of Public Procurement (NIGP) have jointly developed a series of publications entitled Principles and Practices of Public Procurement. One of their publications provides information about Developing Evaluation Criteria. Here is what they recommend publishing in the RFP.<sup>8</sup>

#### *Element 1.3: Notification of Criteria*

*Proper publication and notification of intended evaluation criteria, to potential proposers/ offerors will help the proposers/ offerors to meet the needs of the contracting authority. Furthermore, proper publication and notification protect the authority from challenges on the grounds that the criteria were chosen post notification to favor a particular proposer/ offeror. Evaluation criteria and their associated weightings must:*

*Be agreed to before the solicitation process begins.*

*Be published in the notice for the contract, or within the solicitation documentation, or both.*

*Not be changed once they have been advertised and notification has been sent to the bidders. If changes become necessary, all bidders must be notified of the changes.*

Here are some examples of published evaluation criteria from actual RFPs that range from poor, providing little useful information, to very good, providing vendors with specific questions.

### Example 1

This information about the evaluation criteria is inadequate. This 28-word description only provides broad categories with few details.

*The evaluation criteria for this RFP are as follows:*

<i>Understanding of project and requirements</i>	<i>25%</i>
<i>Ability to meet time frames</i>	<i>15%</i>
<i>Skills and experience with required technology</i>	<i>20%</i>
<i>Support ability</i>	<i>15%</i>
<i>Pricing</i>	<i>25%</i>

### Example 2

This statement of evaluation criteria provides some direction but lacks important details in several areas.

Vendor selection will be based on the following criteria:	
Understanding of the objectives (20%)	an assessment of the vendor's understanding of the objectives of this project;
Appropriateness of approach (20%)	an assessment of the vendor's proposed approach to providing the required services;
Pricing/Contract (20%)	an evaluation based on the prices as bid in the vendor's proposal; acceptance of the standard contract;
Suitability of hardware/software/ Expendability/Flexibility (20%)	an assessment of how easily the systems hardware and software will integrate with the current and future environment; an assessment of how easy it is to add or delete components to the system;
	an assessment of the vendor's suitability; an assessment of the clarity of the vendor's submission;
Suitability of firm and clarity of	an assessment of the qualifications and experience level of

submission (10%)	the vendors; an evaluation of the vendor's references.
Personnel/Experience/References (10%)	

### Example 3

This example provides some direction to the proponents in crafting their proposals.

#### *A. Proposal Evaluation Criteria<sup>9</sup>*

*The Commissioner of DAS will establish an Evaluation Committee to evaluate the Proposals. The evaluation Committee will review the Proposals for format to ensure conformance with the requirements of this RFP. Failure to meet these requirements might result in rejection of your organization's Proposal. The Evaluation Committee can waive minor irregularities if, in its judgment, to do so would be in the best interests of Connecticut.*

*Evaluations will be based on the Proposals, and additional information requested by Connecticut, applying the following criteria as to each Proposal:*

- (a) Proposer's understanding of the project, its purpose and scope, and proposer's plan for performing the IT services, as evidenced by the proposed solution*
- (b) Proposer's ability to perform the scope of the IT services, as reflected by its experience in performing such services and by the qualifications and abilities of the key individuals proposed as proposer's team*
- (c) Proposer's demonstrated ability to make available the key personnel and facilities to perform the IT services at the time of contracting and to keep them on the project thereafter*
- (d) Proposer's specific record of past performance of similar IT services*
- (e) Price competitiveness of proposed solution and cost savings demonstrated*
- (f) Proposer's ability to provide IT services from off-site facilities in Connecticut and to foster job retention and job creation in Connecticut*
- (g) Demonstration of commitment to affirmative action by full compliance with regulations of the Connecticut Commission on Human Rights and Opportunities*
- (h) Previous experience and customer references in government-sector IT services*
- (i) Expertise in managing complex integrated systems and services and implementing and maintaining evolving leading-edge technologies*
- (j) Expertise in business process reengineering, for purposes of developing new system architectures and developing plans for changes in computing environments*
- (k) Expertise in consolidating mainframe environments and in migrating systems (in whole or in part) from mainframe environments to distributed-computing environments.*

- (l) Financial strength and depth necessary to sustain a long-term relationship and long-term growth as Connecticut's IT services requirements change*
- (m) Readiness to assume full accountability to Connecticut, its Agencies and its citizens for performance including commitments to perform IT services at levels that meet acceptable performance criteria, and commitments to an open-book approach and financial-reporting requirements*
- (n) Proposer's demonstrated ability to protect highly sensitive and confidential information of its customers*
- (o) A focus on delivering value-added services*

#### **Example 4**

This approach from Alaska is simple to use and thorough.<sup>10</sup> Only a portion of the text is reproduced below.

##### *7.01 Understanding of the Project (5 Percent)*

*Proposals will be evaluated against the questions set out below:*

- i. How well has the offeror demonstrated a thorough understanding of the purpose and scope of the project?*
- ii. How well has the offeror identified pertinent issues and potential problems related to the project?*
- iii. To what degree has the offeror demonstrated an understanding of the deliverables the state expects it to provide?*
- iv. Has the offeror demonstrated an understanding of the state's time schedule and can meet it?*

##### *7.02 Methodology Used for the Project (5 Percent)*

*Proposals will be evaluated against the questions set out below:*

- i. How comprehensive is the methodology and does it depict a logical approach to fulfilling the requirements of the RFP?*
- ii. How well does the methodology match and achieve the objectives set out in the RFP?*
- iii. Does the methodology interface with the time schedule in the RFP?*

##### *7.03 Management Plan for the Project (5 Percent)*

*Proposals will be evaluated against the questions set out below:*

- i. *How well does the management plan support all of the project requirements and logically lead to the deliverables required in the RFP?*
- ii. *How well is accountability completely and clearly defined?*
- iii. *Is the organization of the project team clear?*
- iv. *How well does the management plan illustrate the lines of authority and communication?*
- v. *To what extent does the offeror already have the hardware, software, equipment, and licenses necessary to perform the contract?*
- vi. *Does it appear that the offeror can meet the schedule set out in the RFP?*
- vii. *Has the offeror gone beyond the minimum tasks necessary to meet the objectives of the RFP?*
- viii. *To what degree is the proposal practical and feasible?*
- ix. *To what extent has the offeror identified potential problems?*

### WEIGHTS

Weights reflect the relative importance of each of the evaluation criteria. The use of weights grew out of the provisions and commentary of the Model Procurement Code<sup>11</sup> which states “The Request for Proposals shall state the relative importance of price and other factors and subfactors, if any.” Their Commentary provides some understanding and insight into the importance of this component of every RFP:

*... the Request for Proposals (RFP) set forth the relative importance of the factors and any subfactors, in addition to price, that will be considered in awarding the contract. A statement in the RFP of the specific weighting to be used by the jurisdiction for each factor and subfactor, while not required, is recommended so that all offerors will have sufficient guidance to prepare their proposals. This Subsection serves two purposes. First, a fair competition necessitates an understanding on the part of all competitors of the basis upon which award will be made. Second, a statement of the basis for award is also essential to assure that the proposals will be as responsive as possible so that the jurisdiction can obtain the optimum benefits of the competitive solicitation. The requirement for disclosure of the relative importance of all evaluation factors and subfactors applies to the areas or items that will be separately evaluated and scored, e.g., the items listed on evaluation core sheets. The requirement does not extend to advance disclosure of*



*the separate items or emphasis that are considered in the mental process of the evaluators in formulating their scores for the factors and subfactors that are described in the solicitation.*

Well, it's clear from this Commentary that the MPC was written by and for lawyers. I believe this example provides evidence that while you don't have to publish the weights, it would be helpful to vendors if you did. And it also states that you only publish the factors that are measurable, not the items that you think about such as "my career", or "approval of my boss".

### **Determining the Weights**

How do we establish the weights for a specific factor? Is Project Plan worth 10% or 20% of the available points? And who has the final word on it?

After having reviewed the weights used in hundreds of evaluations, I've concluded the obvious: the weights for a specific factor are surprisingly similar at the gross level for many agencies, but seemingly arbitrary when examined closely. For example, Project Plan may be 10% in one jurisdiction and 20% in another, but rarely 50%. Similarly, the merits of the technical solution may range between 10% and 25% but rarely get to 70%. There is no agreed-upon standard for the weight of a particular factor. For example, cost can vary from between 10% and 90%!

Many jurisdictions have standardized the weights for each factor. The Procurement people have developed a standard RFP or a standardized evaluation process in which the weights are fixed. To modify the weights, the Evaluation Committee must justify the change.

There is no underlying scientific or economic theory that establishes the weights for each evaluation factor. Simply stated, these weights reflect the importance of the factors in that particular agency and in that specific procurement. The weights reflect the best business judgment of the agency as to how to attain 'best value'.

While most RFP publications deal extensively with the evaluation process, surprisingly little has been written about the weights. There is no formula to determine the weight for a specific factor. Some jurisdictions like Idaho and New Mexico provide their evaluators with a little bit of guidance.

For example, in Idaho<sup>12</sup>, evaluators are presented with weights and factors in the Model RFP and given a little bit of guidance on adjusting the weights to suite the particular situation:

*. . . Generally, weights are assigned based on a 60/40 split, with cost equaling 40% and technical/managerial requirements equaling 60% of the evaluation. The percentages can be adjusted (70/30 or 80/20 or other) to reflect the relative importance of cost to the agency. The purpose of adjusting cost factors downward is to assure that the offeror with the best technical response and reasonable costs is awarded the contract and prevent an offeror from "buying" the business by simply having the lowest cost. Generally, weighting factors are not included in the RFP.*

Evaluation Criteria	Points
Technical Capability and Solution Approach  Understanding of project requirements Ability to meet timelines Other	300
Managerial and Staff Capability  Past performance (experience) Key personnel References Other	300
Cost	400
Maximum Total Points 1000	1000

The New Mexico Handbook<sup>13</sup> devotes eight pages to a discussion of evaluation factors. They provide weights for different types of RFPs and discuss the importance of specific evaluation factors and their reasons for increasing or decreasing certain weights. Here is one example:

### *Balancing the Base Evaluation Factors*

*The evaluation factors and their weights vary depending upon the type of the procurement. The following are the established base factors and their weights which have produced the best result. These recommended base factors and weights are the result of several hundred RFP based procurements:*

<i>Professional Services - Firm Fixed Price Contract</i>	
<i>Experience</i>	
<i>- Corporate</i>	<i>175</i>
<i>- Key Personnel</i>	<i>125</i>
<i>Methodology/Tools Employed</i>	<i>50</i>
<i>Technical Merit of Proposed Solution</i>	<i>50</i>
<i>References</i>	
<i>- Corporate</i>	<i>50</i>
<i>- Key Personnel</i>	<i>50</i>
<i>Project Plan</i>	<i>100</i>
<i>Cost</i>	<i>300</i>
<i>Oral Presentation</i>	<i>100</i>

*The base factors for this type of procurement strike a balance between quality, knowledge and experience of the offeror and key personnel versus cost and proposal work products. The base factors of Methodology and Technical Merit are established for the assessment of “best value” for the procuring agency. For contracts for amounts in excess of \$500,000 a performance bond is recommended for this type of procurement instead of an evaluation of financial stability or retainage as the primary performance protection. The cost factor may be increased to 350 points with a corresponding 50 point total reduction to the other factors. Higher cost factors have produced undesirable results. Compensation is based upon receipt and approval of deliverables in accordance with the approved project plan. The oral presentation should cover all aspects of the offeror’s proposal.*

### **To disclose or not to disclose?**

The answer to this question of whether to publish or not is “yes, we must disclose the weights”, “no, we are prohibited from publishing” or “maybe – we can publish if we want” depending on the jurisdiction. The Model Procurement Code requires that the RFP disclose the relative importance of each factor. This is a generally accepted practice. Typically, the factors are ranked in decreasing order or the importance of each is described in words. For example, “Cost is more important than the technical solution.”

It is a ‘best practice’ to simply publish the actual weights for the major factors. This provides direction to the vendors in understanding the requirements and supports “fair and open competition”.

## SCORING SYSTEMS

Scoring systems are used to establish a numerical value indicating how well the proposal satisfies each selection criterion. Numerical scoring systems are easier to understand and explain than those based on only descriptive phrases. However, there are many different ways to evaluate proposals and establish the best value. These methods include color coding, adjectival ratings, and rankings. None of these methods is without problems and each method has its proponents and its critics. There is no requirement in many jurisdictions to use a numerical scoring system. Whatever method is used, including the common approach described in this text, the method is successful if it leads to an understanding of the deficiencies, weaknesses, strengths and risks of each proposal.

### **Adjectival Systems**

The Louisiana RFP manual<sup>14</sup> provides a good example of adjectival scoring:

*12. Evaluating Risk: evaluates how risky a proposer's approach is in relation to cost and schedule.*

*Risk Scale:*

*Serious - Expected to cause serious disruption of schedule or increase in cost. Will require a significant level of contractor emphasis and government monitoring to overcome difficulties*

*Moderate - Expected to cause moderate disruption of schedule or increase in cost. Will require average level of contractor emphasis and government monitoring to overcome difficulties.*

*Minor - Expected to cause minor disruption of schedule or increase in cost. Will require a low level of contractor emphasis and government monitoring to overcome difficulties.*

*Minimal - Expected to cause minimal disruption of schedule or increase in cost. Will require little or no contractor emphasis and government monitoring to overcome difficulties.*

### **Numerical Systems**

One method that has been found satisfactory in many jurisdictions is a weighted point system in which points are awarded for each proposal's ability to meet predetermined criteria. Many organizations have found, through bitter experience, that it is harder to defend an evaluation based solely on words than on numbers.

Scores seem easier to justify and to defend as being objective. Part of this is reality - often the detailed process for assigning scores is based on well-defined measurable factors. For example: "The proposal will receive one point (to a maximum of 4) for each full-time member of the project team with more than 5 years of directly related experience on similar projects." Part of the attraction of a numerical score is fiction: saying that a proposal received 230 points out of a maximum score of 400 is, to many people, much more concrete than saying that the proposal was "poor". Numbers imply objectivity and fairness, sometimes more than warranted.

Evaluators sometimes have a difficult time deciding on the specific score of a factor. Suppose you were evaluating the plan for a project, or the project manager's experience. When is it worth 5 out of 10? Why isn't it worth a score of 6? Or 4?

The more general question is how do we eliminate personal bias and take some of the arbitrariness out of scoring? Can we ensure that each of the evaluators is using the same scheme? There are two major types of scoring systems. The first is generic; it's the system used for the last 100 years in public schools to grade students' compositions. Ten out of 10 is excellent. Five is acceptable. Most evaluations use some variation of this method.

The second type of system is based on the specific characteristics of the procurement and requires a lot more work to be done prior to issuing the RFP. In this system, positive and negative indicators are developed for each factor. For example, in evaluating the strength of the project team, a positive factor would be the proposed manager's experience with a similar system. A negative factor would be the use of a part-time project manager. After reviewing the proposals and these indicators, the evaluators would assign a score, usually using the zero-to-ten scale. The use of these indicators is a powerful tool in performing an objective evaluation, and one that is easy to justify should it come under public scrutiny. If these indicators are not formally developed and written down when the RFP is being constructed, they always emerge when evaluators are discussing their score for a specific proposal. These indicators simply reflect the concerns that an informed person would have related to each evaluation criterion. For example: Is the project manager experienced? Is the project manager full-time?

The remainder of this section contains three examples of scoring systems. A scoring system when published in an RFP should help the supplier understand the process and create a better proposal. Scoring systems are intended to assist the

evaluators to identify the merits or the deficiencies in a proposal in an unbiased, objective way. They should be easily understood and simple to use.

#### Example #1

This first example is poor. It fails to promote an objective evaluation. It doesn't provide any assistance in differentiating a "good" from a "satisfactory". Unfortunately, schemes such as this are still used in many jurisdictions.

10	Excellent - meets all requirements/very desirable
7	Good - most requirements met, it is good enough
4	Satisfactory - some requirements met, not sufficient
1	Unsatisfactory - requirements essentially not met

#### Example #2

This second example is excellent. It helps the evaluators by providing precise definitions and boundaries on the scoring. It sets the agenda for discussions among the evaluators. The following rules were taken from a U.S. government publication dealing with procurement policy in the U.S. Air Force (Air Force Regulation 70-15). They go a long way towards standardizing the rules for assigning scores. I certainly recommend inclusion of your scoring system in your RFP.

*1. If a requirement (objective) is particularly difficult to meet and the proposal offers an approach which, with little or no risk, will yield a result which exceeds requirements qualitatively, the item should score "8," "9," or "10," dependent upon the level of exceptional features offered.*

*2. If the requirement (objective) is relatively difficult to meet, the majority of the factors are acceptable, no major deficiencies or risks exist therein, and the collective approach yields a qualitative benefit beyond that which is minimal, a score of "6" or "7" should be assigned, dependent upon the benefits to be attained.*

*3. If the majority of the factors meet standards, the requirement is not overly difficult to meet, and the factors which are deficient are of a very minor nature or are susceptible to easy correction, the item should be scored "5".*

*4. If the major number of important factors are acceptable but one or more factors is deficient and some minor risk is involved in the correction thereof, the score for the item should be "4".*

*5. If a majority of the factors for the item are deficient and their correction, either collectively or individually, poses a serious problem in correction or has a "domino" effect on the other design features, or the approach poses a high risk*

*without means for correction, or if the approach fails, a score of "3", "2", or "1" should be assigned, with the lower score indicating a serious or severe condition.*

*6. If the major factors of the item are deficient to the extent that a major reorientation of the proposal is necessary, or if the approach taken is undesirable and correction would require a major and material change in the proposal, the item should be scored "0".*

### Example #3

This final example was developed for a specific RFP. While, at first glance, it seems to require a lot of up-front work, this might be a solid investment. The first time this type of scheme is used, it requires the evaluators to identify their specific requirements. However, in subsequent RFPs, this scheme can simply be revised to suit the particulars. For example, the characteristics of the Project Team in subsequent RFPs can be readily established by beginning with these definitions and then editing the text.

Many years ago, the Ontario Government used the guidelines described in this section to identify the winner in an RFP<sup>15</sup> for re-engineering the procurement function. Each of ten different factors was to be scored by each evaluator. The scores were then multiplied by the corresponding weights to determine the overall total score for each proposal.

The evaluation guidelines contained both positive and negative indicators for each factor. This material was included in the RFP. Many organizations do not specifically identify these negative factors. Here are two of the factors:

Positive Indicators	Negative Indicators
<p>Factor 2: Project Team (Weight = 40)</p> <ol style="list-style-type: none"><li>1. Project Manager is experienced in all 3 key areas</li><li>2. Project Manager has managed large, similar projects</li><li>3. Key assistants (2 or 3) are experience in 3 key areas</li><li>4. Extra (contingency) resources are available</li><li>5. Two or more specialist to assist team</li><li>6. Experience with a similar system</li><li>7. Commitment/dedication of resources</li></ol>	<ol style="list-style-type: none"><li>1. Limited experience of the Project Manager</li><li>2. Poor reference checks</li><li>3. Marginal projects to illustrate qualifications</li><li>4. "Bare bones" team</li><li>5. Part-time project manager</li></ol>

Factor 3: Project Plan (Weight = 15)	
1. Clarity and rationality 2. Deliverables related to project steps 3. Quality checks/reviews 4. Workload data 5. Key issues for each Deliverable are identified 6. Effective use of government personnel	1. Apparent anomalies 2. Illogical flow

### Using Risk as an Evaluation Factor

Simply introducing a paragraph into your RFP demanding Risk Management information will markedly improve the quality of information you receive and your ability to evaluate the vendors and their proposals.

RFPs could benefit from a LARGE dose of Risk Management. RFPs are the greatest risk for procurement people. Let me suggest that your next difficult RFP will attract better proposals if it deals with risk. Don't ask vendors to describe "their understanding of the project". Rather, ask them to provide a three page analysis of risks. Let them identify each risk, its source, and the steps that can be taken by each stakeholder to eliminate or reduce the risk. Then instruct them to include these tasks in their project plan (and cost). And finally, award some points for your evaluation of the probability of success with this proposal. Make risk one of the evaluation factors or part of each major evaluation factor.

The management of risk is a standard business practice. Risk analysis is the process of assessing, managing and communicating risks. It is an established profession with books about the subject, several journals, and associations. Because of the ubiquitous nature of risk, risk analysis is inherently an interdisciplinary subject with many content-specific applications in engineering, finance, health, transportation and military systems.

Risk analysis and knowledge about this discipline is all around us. If you do a search on the web using "risk analysis" or "risk management", you'll get hundreds of thousands of "hits": books, associations, courses, consulting firms, software, articles, regulations, and scholarly papers.

In recent years, risk analysis has emerged from the back room of insurance companies, and disaster planners. It is now a popular and accepted business tool. The military has always included risk analyses in its RFPs. However, few non-



military RFPs mention risk, and even fewer have Risk Management as an evaluation factor.

The remainder of this section contains examples of risk management language used in RFPs as well as a description of several risk management tools.

### THE FEDERAL PERSPECTIVE

The Federal Acquisition Regulations state that the risks associated with each proposal shall be documented in the project file:<sup>16</sup>

*15.304 Evaluation factors and significant subfactors.*

- (a) The award decision is based on evaluation factors and significant subfactors that are tailored to the acquisition.*
- (b) Evaluation factors and significant subfactors must—*
  - (1) Represent the key areas of importance and emphasis to be considered in the source selection decision; and*
  - (2) Support meaningful comparison and discrimination between and among competing proposals.*

#### 15.305 Proposal evaluation.

- (a) Proposal evaluation is an assessment of the proposal and the offeror's ability to perform the prospective contract successfully. An agency shall evaluate competitive proposals and then assess their relative qualities solely on the factors and subfactors specified in the solicitation. Evaluations may be conducted using any rating method or combination of methods, including color or adjectival ratings, numerical weights, and ordinal rankings. The relative strengths, deficiencies, significant weaknesses, and risks supporting proposal evaluation shall be documented in the contract file.*

### **Census Bureau**

The Census Bureau includes risk in its determination of Best Value:<sup>17</sup>

#### **M.1 BASIS FOR AWARD**

*The Census Bureau's source evaluation will be based on best-value principles. Accordingly, award will be made to the responsible and technically acceptable Offeror whose proposal provides the greatest overall value to the Government, price and other factors considered. This best-value determination will be accomplished by comparing the value of the differences in the technical factors for competing offers, based on their strengths, weaknesses, and risks, with differences in their price to the Government. In making this comparison, the Government is more concerned with obtaining superior technical, and management capabilities than with making an award at the lowest overall cost to the Government.*

*However, the Government will not make an award at a significantly higher overall price to achieve slightly superior technical approach.*

### **U.S. Air Force**

As a second and final example, the US Air Force uses Proposal Risk as an Evaluation Factor:<sup>18</sup>

*In accordance with the RFP, award will be made to the offeror proposing the combination most advantageous to the Government based upon an integrated assessment of the evaluation factors and subfactors. The evaluation factors are Past Performance, Proposal Risk, Mission Capability, and Cost/Price. Past Performance and Proposal Risk are equal and each is significantly more important than Mission Capability, which in turn, is significantly more important than Cost/Price. Within the Mission Capability Factor. The Subfactors are of equal importance. All evaluation factors other than Cost/Price, when combined, are significantly more important than Cost/Price. The four subfactors under Mission Capability Include (1) Operation & Maintenance (O&M), Repair, Launch/Power Plan Support (2) Contractor Computerized Management System (CCMS) (3) Reliability Centered Maintenance (ReM), and (4) Phase-In.*

*The Government assessed the offeror's proposal risks inherent in the proposed approach, the impacts on cost and schedule associated with the approach, the subcontractor relationships and arrangements to the approach, and the propose personnel's ability to Implement the approach; plus the approach for minimizing the impact of said risks on the overall success of the requirements defined in the SOW.*

### **STATE & LOCAL GOVERNMENTS**

In contrast to federal RFPs, the RFPs issued by state and local governments and their agencies are often woefully ignorant of risk analysis. Risk is simply ignored as an evaluation factor in almost all RFPs.

For those few public sector RFPs from state and local governments and their agencies that actually identify risk as an evaluation factor, there are two approaches.

First, you can use Risk as a totally separate evaluation factor with separate scoring and its own points. Here is some language used to obtain the information from the vendor:

*Identify the major risks associated with this project. For each risk, identify those activities which can be undertaken to reduce, mitigate or eliminate the risk.*

*Identify the associated responsibilities. Ensure that these activities are reflected in your project and management plans.*

This approach certainly provides much more information than not having risk as an evaluation factor. By establishing a minimum score for this factor, high risk proposals can be eliminated from further consideration.

The second approach is to use risk, not as an Evaluation Factor, but as a subfactor under each major factor. In this approach the RFP would state that:

*For each major evaluation factor stated above (Cost, Technical Solution, Project Management), identify the major associated risks. For each risk, identify those activities which can be undertaken to reduce, mitigate or eliminate the risk.*

The most sophisticated approach that I have come across is a two-stage evaluation process. The RFP indicated that during Stage 1, each proposal would be evaluated using the specified factors one of which was risk. It then stated:

*We will determine a short-list based on the scores from Stage 1. For those proposals that exceeded the minimum required score, a second evaluation will be performed based on only three critical factors:*

	<b><i>Factor</i></b>	<b><i>Weight</i></b>
1	<i>Risk</i>	40
2	<i>Cost</i>	40
3	<i>Environmental Impact</i>	20

### **Louisiana**

The State of Louisiana's Request For Proposal Manual<sup>19</sup> deals with risk. As part of the Evaluation Process, the members of the Evaluation Committee must consider risk:

*5. Members meet in a closed session to discuss their individual review findings and to form consensus scoring of all proposals. OSP will attend as required to ensure adequate documentation of the file and to facilitate the efforts of the evaluation committee as necessary. The committee is encouraged to select someone to document meeting results including methodology of review, scoring, facilitate meetings, etc. during these meetings, members must do the following:*

- (a) identify strengths and weaknesses of each proposal reviewed*
- (b) review responsiveness to the RFP and associated risks with proposal, if any*
- (c) identify clarifications and deficiencies of each proposal, if any.*

The Guide instructs the members that risk is considered when evaluating and scoring proposals. It then provides members with some guidance on the seriousness of a particular risk:

*12. Evaluating Risk: evaluates how risky a proposer's approach is in relation to cost and schedule.*

*Risk Scale:*

*Serious - Expected to cause serious disruption of schedule or increase in cost. Will require a significant level of contractor emphasis and government monitoring to overcome difficulties*

*Moderate - Expected to cause moderate disruption of schedule or increase in cost. Will require average level of contractor emphasis and government monitoring to overcome difficulties.*

*Minor - Expected to cause minor disruption of schedule or increase in cost. Will require a low level of contractor emphasis and government monitoring to overcome difficulties.*

*Minimal - Expected to cause minimal disruption of schedule or increase in cost. Will require little or no contractor emphasis and government monitoring to overcome difficulties.*

### **State of Minnesota**

This state's Office of Enterprise Technology has created four Risk Management Tools:

- Risk Management Work Breakdown Structure Template
- Risk Management Plan Template
- Risk Assessment Questionnaire Template
- Risk Response Plan Template

The Risk Management Plan template<sup>20</sup> could be easily incorporated into an RFP and direct the Proponents to prepare a Risk Management Plan.

*This template defines the risk management methodology to be used on a given project, including: risk assumptions, risk roles and responsibilities, timeframes, risk rating/scoring techniques, risk thresholds, risk communications, and a risk tracking system.*

The Risk Assessment Questionnaire<sup>21</sup> could be used by the Evaluation Team or the Project Manager to increase their understanding of risks. This 13-page document identifies ten specific categories of risks and defines when the risk should be declared as 'Low Risk', "Medium Risk' or 'High Risk'. It then defines a series of responses to mitigate each high risk factor.

Here is how they deal with Schedule.

First, they identify some characteristics, a question about the Schedule:

*Are the project's major milestones and operational dates . . . Flexible - may be established by the project team and recipient personnel*

Then they state that the project is low risk when these milestones and dates are "Flexible - may be established by the project team and recipient personnel". The project is medium risk when these milestones and dates are "Firm - pre-established and missed dates may affect the business". The project is high risk when these milestones and dates are "Fixed - pre-established by a specific operational commitment or legal requirements beyond the team's control".

The document then identifies Potential Problems and the Risk Response. Continuing the example of Schedule. Here is an extract from the Response Table:

<p><b>High Risk factors/ Potential Problems</b></p> <p><b>Schedule</b></p>	<p><b>Risk Response Actions</b></p>
<p>The projects major milestones and/or operational dates are fixed. They were pre-established by an operational commitment or legal requirements beyond control of the project team.</p> <ul style="list-style-type: none"> <li>• Work must be scheduled to fit within this schedule constraint</li> <li>• Given schedule window may be impossible to accommodate required activities</li> <li>• Most likely the schedule requirements will be impossible to meet</li> <li>• Hurried activity and schedule pressures are likely to cause inadvertent errors in work</li> </ul>	<ul style="list-style-type: none"> <li>• Re-negotiate schedule requirement to fit required activities.</li> <li>• Re-negotiate scope to limit to activities deemed doable in allotted time.</li> <li>• Establish new agreements with Customer/Owner/Sponsor based upon realistic estimates</li> <li>• Put aggressive project tracking and monitoring plans in place</li> <li>• Communicate status reports on regular basis</li> </ul>

## Imposing Upset Levels

### Imposing Upset Levels

An upset level is a minimum score that is required to remain in the competition. It is also known as a threshold score. The RFP announces that an upset level will be used and identifies those factors that will be affected. Many RFPs identify the specific value required. "Proposals receiving less than five out of ten on Project Plan will be eliminated from further consideration."

Upset levels may be applied to one evaluation criterion, a group of factors, or the total score.

#### ONE EVALUATION FACTOR

Upset levels are used to eliminate the possibility of a proposal obtaining the most points overall when it has serious deficiencies in one or more categories. Without this technique, a proposal could receive very high marks in several categories and few in a critical area and still win the competition.

Suppose that 40 evaluation points are available for the technical response. An upset level of 20 would indicate that regardless of the scores in other categories, no proposal will be accepted with a score of only 20 in this area.

Sometimes, a critical component, such as Project Plan, is only assigned a few points, say 10 out of 100. Applying an upset level of 7 out of 10 to this factor will ensure that proponents understand its importance.

#### A GROUP OF FACTORS

Upset levels ensure that a proposal with an unacceptably low score in one category, such as Project Management, consisting of Experience, Staff, Training, etc., cannot win the competition. The best practice is to announce in the RFP that, for example, "Proposals must obtain 50 out of 75 points for Project Management to be considered acceptable. Proposals with fewer points will be eliminated from further consideration."

Care must be taken in setting upset levels. If you assign an upset level to each evaluation criterion or group, review these levels carefully before issuing the RFP. Otherwise, you may find that you have published the upset levels (and therefore cannot change them) and every proposal has failed to meet at least one minimum score.

### THE ENTIRE SCORE

Upset levels can be applied to the entire score. “Proposals obtaining less than 75% of the total available points will be eliminated from further consideration.” This strategy ensures that only proposals judged as being “very good” will be considered. (Best and Final Offers can also be used to ensure that proposals are “very good”.)

### **Evaluating the Cost**

#### Evaluating the Cost

Cost is a significant, critical, and sensitive issue. In RFPs, the award is made on the basis of best score that is, best fit with all the requirements including cost. It is never made solely on the basis of cost. So, the winner is often not the least cost proposal. Hence, the value of the contract is an easy target for the disgruntled. The least-cost proponent sometimes makes a claim to senior management that if you had only selected us, your Agency would have saved \$1 million. This firm often neglects to tell senior management that it proposed the highest risk solution, one which would likely fail. In these times of budget constraint and cutbacks, it’s easy to politicize the process. In developing the RFP, always assume that your decision will be challenged, and prepare to answer questions such as: “Why did you select that proposal when the second place one was almost as good and cost \$200,000 less?”

There are several different approaches for incorporating cost into an evaluation. Whichever approach is used must reflect the priorities and the business case related to the project. Cost is almost always isolated from the technical and management parts of the proposal and submitted as a separate document. In many jurisdictions, the inclusion of any cost figures in the technical/management proposal is grounds for declaring the proposal non-compliant and eliminating it from further consideration. In this way, the Evaluation Team, which has been

formed to deal with functionality and other issues, is not tainted by knowing the costs of various proposals.

While cost is usually analyzed separately, there is communication between the Evaluation Team and the Financial Team to ensure that the tasks underlying the costs are reasonable. It is a best practices for the Financial Officer to attend meetings of the Evaluation Team to obtain a better understanding of each proposal's approach and to ensure that all cost items have been identified.

Cost usually means cumulative cost, a total cost of all related activities, goods and services. In some jurisdictions, they use life cycle costing based on a nominal period of five years. Life cycle costs may include the start-up costs associated with a particular approach as well as the “off-ramp” costs (the costs of leaving) at the end of the contract. In other jurisdictions, they determine the costs over the contract period. In still others, they use an 'evaluated cost' based on features and requirements. Cost is often more than simply the costs identified in a proposal. For example, two different solutions may require different amounts of training or different amounts of additional computer processing capacity and these costs might not have been asked for or identified in the proposals.

Usually, RFPs provide detailed directions in terms of the cost proposal. Increasingly, they provide forms or spread sheets to be completed and submitted both in hard copy and in an electronic form (disk, CD or USB memory stick).

Many organizations do not even open the cost proposal until an analysis of the corresponding technical/management proposal has been completed. It is becoming a common practice to review the cost proposals only for those suppliers whose technical/management proposals have been reviewed and found capable of potentially providing an acceptable solution. Here is the wording for this practice from Alaska's RFP Evaluators Guide:<sup>22</sup>

*In most cases cost or cost scores will not be revealed to the PEC (Proposal Evaluation Committee) until after the PEC has completed its deliberation. In general this is done to avoid the possibility of price influencing the scoring when non-cost criteria are being considered. Define PEC*

Some organizations first ensure that the Technical/Management proposal has satisfied the mandatory requirements of the RFP. In other organizations, they evaluate the proposals and eliminate those which failed to achieve a pre-defined minimum technical/management score. “There are 700 points for



technical/management factors. Those proposals scoring less than 500 will be deemed unable to satisfy our minimum requirements and will be eliminated from further consideration. For those proposals, the cost proposal will be returned to the supplier unopened. For those proposals scoring at least 500 points, the cost proposal will be opened and evaluated."

### DIFFERENT WAYS OF HANDLING COSTS

There are many different approaches to handling costs. Cost, as used in this section, means life-cycle costs: the total value of all costs associated with a proposal over the life of the contract or the life of the solution. Each different approach could theoretically yield a different "winner" from the same set of proposals. (Some organizations, including the federal government, have a non-numerical technique in which cost is not assigned a score. Only the technical and management factors are scored.)

The same proposal can "win" in one process, and not even be a serious finalist in another.

#### **Approach 1: The Best Solution Within Budget**

If you are looking for the proposal which provides the "best solution" within budget, determine the score for all the non-cost factors. Then select the proposal with the highest point score that doesn't exceed the budget.

#### **Approach 2: Cost is Just Another Evaluation Criterion**

In this method, cost is simply another factor which is included in the scoring scheme. For example, cost could be assigned 20 points. Based on the particular scoring scheme, points would be assigned to cost for each proposal.

There is a significant argument raised by many jurisdictions against assigning points to cost. These entities argue that it is inappropriate and misleading to rely on a mathematical formula dealing with costs rather than a well-reasoned analysis. This issue is dealt with as a separate topic, Adopting a Non-Numerical Evaluation of Cost, immediately following this section.

The calculation of a proposal's points for cost requires two components: an assigned weight to reflect the importance of cost, and an approach for calculating the points assigned to cost.

*Assigning Weights.* The importance of cost is reflected in the number of points or percentage of the total points assigned to cost. Clearly, the larger the percentage of points given to cost, the more it influences the decision. (When all of the requirements are mandatory, and cost is 100%, the RFP becomes an Invitation to Quote.) There is no agreed-upon weight or range of weights for cost. Cost seems to range from 25% to 60% in most RFPs. In some jurisdictions, the minimum weight is determined by Regulation. In others, it is determined by the Project Team. In Alaska, contract costs are permitted to range between 40% and 70%.<sup>23</sup>

*Agencies are required to give a minimum weight of 40% for professional and non-professional services contracts, 60% for supply contracts, and between 60% and 75% for procurements involving a combination of both.*

*Determining the Score.* There are several ways of determining the points or the score based on the costs of each proposal. If cost is included as one of the evaluation criteria, then we require some way of translating the dollar amount into a score. Suppose cost has been assigned 50 evaluation points out of a total possible score of 200. How many points does each proposal get? How are they calculated?

Here are five techniques that are commonly used. The first is based on the ratio of costs of each proposal to the least expensive one. The second is based on the relative differences in costs among the proposals; the third, on an interval scale. In establishing a costing procedure care must be taken to ensure that an artificially low price can be accommodated as some bona fide suppliers may submit a low bid to obtain the work.

For each of these examples, let's assume we have three proposals each with a different cost: A costs \$300,000; B costs \$250,000; and C costs \$275,000. Let us also assume that cost is worth 100 points.

### **Approach #1 - Ratio of Costs**

Using the first method, the vendor with the lowest cost proposal receives all 100 available points. All other vendors would receive a smaller number of points as determined by the ratio of their costs to the least expensive proposal.

Proposal	Cost	Calculation of Points	Points
A	\$300,000	$(250,000/300,000) \times 100$	83
B	\$250,000	$(250,000/250,000) \times 100$	100
C	\$275,000	$(250,000/275,000) \times 100$	91

### Approach #2 – Differences in Costs

The points are based on the differences in costs. Using the same data, we first determine the difference in cost between the least cost proposal and the one under consideration. We then express this difference as a percentage of the lowest cost proposal.

Proposal	Cost	Calculation of Points	Points
A	\$300,000	$100 - (300,000 - 250,000) / 250,000 \times 100$ $= 100 - 20$	80
B	\$250,000	$100 - (250,000 - 250,000) / 250,000 \times 100$ $= 100 - 0$	100
C	\$275,000	$100 - (275,000 - 250,000) / 250,000 \times 100$ $= 100 - 10$	90

### Approach #3 - Points per Interval

In this method, all proposals within the same range of costs receive the same number of points. For example, those within 10% of the lowest price, receive 100% of the points. Those proposals whose costs are between 10% and 15% greater than the lowest cost receive 80% of the points. Between 16% and 30% greater, 60% of the points.

Proposal	Cost	Calculation of Points	Points
A	\$300,000	Difference: \$50,000 Percentage Premium: 50,000/250,000 (20%)	60
B	\$250,000	Lowest cost receives all the points.	100
C	\$275,000	Difference: \$25,000 Percentage Premium: 25,000/250,000 (10%)	80

#### Approach 4 - 'Bang for the Buck'

*In this approach, we use the concept of value – points per dollars.* Each proposal is evaluated and a score established for it. The score excludes any considerations of cost. Once this has been completed, the Total Score for each proposal is divided by the Total Cost to obtain a "points per dollar" measurement of the proposal. The Proposal with the greatest "points per dollar" represents the greatest value and is selected. Cost is usually the life-cycle or total contract cost.

Let's assume that for Proposals A, B, and C, the scores for the technical/management parts were 650, 730, and 800 respectively. Now let's look at the calculation:

Proposal	Cost	Technical/ Management Points	"Value" Points/\$
A	\$300,000	650	$650/300 = 2.17$
B	\$250,000	730	$730/250 = 2.92$
C	\$275,000	800	$800/275 = 2.91$

Using this approach, proposal B would be selected as it provides the greatest value.

### **Approach 5: Two Steps - First Merit, Then Cost**

This approach represents a workable trade-off between the often divided members of the Evaluation Committee. Typically, the technical people want to select the proposal with the strongest technical appeal, regardless of the cost. The finance people, on the other hand, are not terribly concerned with the technical issues and simply want to spend as little as possible. They often think “least cost” and forget that this is an RFP process.

Also, senior management often focuses on budget. They question selecting the most expensive proposal. It is awkward and difficult to explain to a senior manager or a politician why you didn’t select Proposal D over proposal A. Proposal A got 86 points and costs \$250,000. Proposal D got 82 points and costs \$200,000. What did you get for the extra 4 points? Is it worth \$50,000 which could be applied to a currently unfunded high visibility project?

#### **Identify Acceptable Proposals**

In this two-step approach, we first evaluate the merits of each proposal (but not cost). The Evaluators eliminate any proposals which do not satisfy the organization's mandatory requirements. A mandatory requirement may be the ability to service 500 user terminals concurrently, or the ability to provide a particular set of applications programs. Each of the remaining proposals is evaluated and a score established for the technical and management parts. We now have a table of proposals and their technical and management scores:

<b>Proponent</b>	<b>Technical &amp; Management Score</b>
Company A	86
Company B	75
Company C	70
Company D	82
Company E	65

In discussions with the technical and management stakeholders, they agreed that any proposal scoring more than 72 points was capable of satisfying their requirements. Now they all agreed that a 90-point proposal would be superior to a 75-point proposal, but they were prepared to accept anything above a 72. This agreement was reflected in the RFP which stated that any proposals scoring less than 72 points would be judged as not capable of providing an acceptable solution and eliminated from further consideration.

On this basis, Company C and E were eliminated from further consideration. The remaining three proposals were deemed as potentially acceptable.

### **Select the Least Cost Proposal**

The cost for each of the remaining proposals was then established.

<b>Proponent</b>	<b>Technical &amp; Management Score</b>	<b>Cost</b>
Company A	86	\$250,000
Company B	75	\$225,000
Company C	70	xxx
<b>Company D</b>	<b>82</b>	<b>\$200,000</b>
Company E	65	xxx

The selection is made on the basis of least cost. That is, select the proposal which was acceptable based on the technical & management score and costs less than the others as determined by the life-cycle cost.

In this analysis, D is the winner. It was acceptable based on the evaluation of the technical and management factors. And it costs the least of all those that were acceptable.

## **Adopting a Non-Numerical Evaluation of Cost**

Cost is always an issue, whether you use life-cycle costs or five-year costs. It's always on the radar. Do not ignore the importance of cost and how it is evaluated and scored.

Suppose your recommendation is to award the contract to Vendor A who received a score of 90 and quoted a cost of \$400,000. It is a certainty that management will be interested in the second place vendor, its score and its price. If it was Vendor C who received 88 points and quoted a cost of \$300,000, then questions will be asked of you:

- Why did Vendor A get the contract?
- Why did we pay \$100,000 more for a proposal that scored only two points higher?
- Are two points worth \$100,000 in these times of budget shortfalls, program cuts and staff layoffs and furloughs?
- Can't we revisit this decision?

There are many ways of evaluating cost. The most popular is arithmetic, assigning all of the cost points to the lowest priced proposal and then assigning points to the other proposals on a pro-rata basis. People like numbers. They are easy to understand and we know about scores from our early education. We all know that a grade of 85% is better than a grade of 80%. Numbers add legitimacy to what can sometimes be a somewhat arbitrary process. While the conversion of dollars to points is an arithmetic process, the weight assigned to this factor is arbitrary. There is no theory of costing, or model of how cost contributes to success that requires an Agency to assign 10% of the available points to cost, or 60% to cost. It's just that simple. The weight that an Agency puts on Cost is determined, not by a theory or by an agreed upon standard established by ISO, but by the culture of the organization and the dynamics among the different stakeholders.

Cost can always receive a weight of 23% in an Agency and a weight of 64% in another. Neither weight is 'wrong' or 'misleading' or 'determined by the facts'. It is, simply stated, arbitrary or reflecting the importance one particular agency puts on cost.

I recently conducted an informal survey of public agencies in North America on the weight they put on cost in evaluating proposals. The range was from 20% to 80% of the available points. Some scoring mechanisms had restrictions such as 'cost can never be less than 30%' or 'permission of the Director is required if cost is weighted less than 40%'. The only substantial conclusion from this survey was that for Agencies that assigned a numerical score to cost, there was no consensus about the weight to be assigned.

There is another approach that combines assigning scores and the judgement of the Evaluation Committee. In this approach, the Non-Numerical Evaluation of Cost, we first do some scoring and then assess the relative merits of the costs of each proposal. Here is how it works:

1. Determine the score for each proposal for the Technical and Management Factors.
2. Calculate the cost of each proposal.
3. Analyze the difference in points and the difference in price to see which proposal is 'best value'.
4. Write a narrative discussing the strengths and weaknesses of each proposal, 'best value' and why the recommended proposal represents 'best value'.

Assigning points to cost is almost the universal approach. Because of this, some agencies insist that each Evaluator explain and document his or her decision, 'for the sake of fairness'. This is simply because we all understand that 80 is larger than 70, so a score of 80 wins. It is more difficult to understand why an Evaluator thought that Proposal B was worth the extra \$100,000 over proposal A.

Here is the advice the State of North Dakota (and other states) gives its Evaluators:<sup>24</sup>

#### NON- NUMERICAL SCORING SYSTEMS REQUIRE EXPLANATION

*Non-numerical rating systems are sometimes chosen because evaluation criteria are difficult to categorize or are too uncertain or too subjective to determine a reasonable numerical rating system. If the Procurement Officer has chosen a non-numerical rating system, the decision as an evaluator must be explained and documented. With a non-numerical rating system it is necessary, for the sake of fairness to the competitors, for you to explain in writing how you came to rank the individual offers the way you did. Your explanation must be rational and consistently applied from competitor to competitor. The Procurement Officer will tell you how to exercise your independent judgment, but will make sure your*



*written description of how you ranked the offers is rational, understandable, consistent with your ratings, and is not in conflict with the terms of the or requirement of the RFP. The Procurement Officer will not write or re-write your explanation on your behalf; it must be in your own words.*

There are few articles and studies dealing with this approach. I do like the information published by the Federal Transit Administration<sup>25</sup>. It discusses the futility of assigning points to cost and other related issues. Read this extract to discover why FTA believes that **“The difficulties in trying to assign a predetermined weight to price and then scoring price proposals is that no one is smart enough to predict in advance how much more should be paid for certain incremental improvements in technical scores”**.

It's reproduced below.

*When the agency decides that its requirements are not defined with sufficient precision, or where there are performance risks, so that selection of the lowest priced proposal is not in the best interests of the agency, then a tradeoff process should be used to select the best value proposal. In this case the importance of the non-price evaluation factors that will affect the contract award must be stated in the solicitation. The Federal approach in the solicitation is to state whether all evaluation factors other than price, when combined, are significantly more important than, approximately equal to, or significantly less important than price. This permits the agency to make tradeoffs between price and technical merit. It also permits the offerors to know what is important to the agency - whether to focus on higher quality at the expense of cost, or lower cost at the expense of quality.*

*It is not necessary to publish the specific weights (numerically) of the individual evaluation factors, only their relative importance (i.e., conceptually or adjectivally). Some Federal agencies have found through practice that the approach which gives the greatest degree of flexibility in selecting the best value proposal is to place equal weight on the price and technical factors. This then allows a choice in either direction as circumstances warrant.*

*It is important to note that the perceived benefits of the higher priced proposal must merit the additional cost, and the rationale for tradeoffs must be documented in the file. It is not sufficient to say in the file that company X received a higher total score than company Y, and therefore deserves the award. Scores, without substantive explanations of the relative strengths and weaknesses of the competitive proposals, including the perceived benefits to the agency, are an insufficient basis for paying a higher price. The file must explain why company X represents the best value to the agency. The necessity of documenting the specific reasons why proposal A offers a better value to the*

grantee than proposal B is why a mathematically driven selection decision is not appropriate.

#### *Proposal Evaluation Mechanics*

*There are many different methods of conducting proposal evaluations to determine best value, and many opinions as to which is the best approach. Grantees may employ any rating method or combination of methods, including: color or adjectival ratings, numerical weights and ordinal rankings. Whatever the method, the important thing is that a statement of the relative strengths, deficiencies, significant weaknesses, and risks supporting the evaluation ratings be documented in the contract file.*

*Some agencies have employed a quantitative approach of assigning scores to both technical and cost proposals, thereby compelling a source selection that is basically mathematically derived. Proponents of this method usually argue it is the most "objective," and therefore the fairest, approach to determining a winner. On closer examination, however, all approaches are to one degree or another, subjective. The decision regarding what score to assign any given factor is subjective, and any formulas employed after the initial scoring cannot make the process an "objective" one. Further, grantees must be allowed the flexibility of making sound, factually based decisions that are in their agency's best interests. Any approach that assigns a predetermined numerical weight to price, and then seeks to "score" price proposals and factor that score into a final overall numerical grade to automatically determine contract award, is a mistake. Rather, agencies should evaluate the prices offered but not score the price proposals. Prices should be evaluated and brought alongside the technical proposal scores in order to make the necessary tradeoff decisions as to which proposal represents the best overall value to the agency. Agencies should carefully consider the technical merits of the competitors and the price differentials to see if a higher price proposal warrants the award based on the benefits it offers to the agency as compared to a lower price proposal. This is a subjective decision-making, tradeoff process.*

***The difficulties in trying to assign a predetermined weight to price and then scoring price proposals is that no one is smart enough to predict in advance how much more should be paid for certain incremental improvements in technical scores or rankings (depending on what scoring method is used). For example, no one can predict the nature of what will be offered in the technical proposals until those proposals are opened and evaluated. Only then can the nature of what is offered be ascertained and the value of the different approaches proposed be measured. It is against the actual technical offers made that the prices must be compared in a tradeoff process. Agencies cannot predict in advance whether a rating of "Excellent" for a technical proposal will be worth X\$ more than a rating of "Good," or whether a score of 95 is worth considerably more or only marginally more than a score of 87. It is what is underneath the "Excellent" and the "Good" ratings, or what has caused***

*a score of 95 vs. a score of 87, that is critical. The goal is to determine if more dollars should be paid to buy the improvement, and equally important, how many more dollars those improvements are perceived to be worth. It could well be that the improvements reflected in the higher ratings are worth little in terms of perceived benefits to the agency. In this case the grantee does not want to get “locked in” to a mathematically derived source selection decision. This may very well happen when price has been assigned a numerical score and the selection is based on a mathematical formula instead of a well-reasoned analysis of the relative benefits of the competing proposals.*

*Some agencies have recognized the pitfalls of using arithmetic schemes to make source selection decisions. They have opted to not use numerical scores to evaluate technical proposals and they have gone to adjective ratings instead; e.g., “Acceptable,” “Very Good,” and “Excellent.” They have also heavily emphasized the need for substantive narrative explanations of the reasons for the adjective ratings, and the Source Selection Official then focuses on the narrative explanations in determining if it is in the agency’s best interest to pay a higher price for the technical improvements being offered. In this scenario price is evaluated and considered alongside technical merit in a tradeoff fashion using good business judgment to choose the proposal that represents the best value to the agency.*

Here are the instructions on how to actually carry out this evaluation:<sup>26</sup>

- 2. The individual evaluators will rank each of the proposals reviewed in descending order and provide a supporting narrative, addressing the specific elements of the proposal that are the determining factors (consistent with step 1 findings) for their position within the ranking.*
- 3. Committee members will review and discuss the individual findings and develop a consensus ranking consistent with the evaluation criteria. The committee ranking must also be supported by a narrative that provides the rationale (specific strengths and weaknesses) for their determination.*
- 4. The rank ordered list of proposals will be arrayed in descending order together with the price evaluation figure for each proposal. As the list is reviewed in descending order, any increase in price as technical merit decreases will cause the elimination of the proposal from the list. If more than one proposal remains, the committee will review the trade-offs between descending technical merit and descending price. The committee will then make a decision regarding which of the proposals is the most advantageous to the Procuring Agency, price and other factors considered.*

Let’s see how these rules work in practice.

Suppose we have four proposals, A, B, C and D. Each of these proposals has obtained a combined technical score of 80, 75, 70 and 65 points respectively. And the Costs of each proposal is given in the table below.

First, we have ordered the table as instructed: “The rank ordered list of proposals will be arrayed in descending order together with the price evaluation figure for each proposal.”

<b>Proposal</b>	<b>Technical &amp; Management Score</b>	<b>Cost</b>
A	80	\$400,000
B	75	\$500,000
C	70	\$375,000
D	65	\$425,000

We start at line 1 for Proposal A that costs \$400,000.

We now examine line 2 for Proposal B at a cost of \$500,000. Since \$500,000 is greater than \$400, 000 we eliminate Proposal B. We have applied the instruction: “. . . any increase in price as technical merit decreases will cause the elimination of the proposal from the list.”

We now examine line 3 for Proposal C at a cost of \$375,000. Since \$375,000 is less than \$400,000, we retain line 3.

We now examine line 4 for Proposal D at a cost of \$425,000. Since \$425,000 is greater than \$375,000, we eliminate Proposal D.

We are now left with two Proposals, A costing \$400,000 and C costing \$375,000. We then apply the instructions given above: “If more than one proposal remains, the committee will review the trade-offs between descending technical merit and descending price. The committee will then make a decision regarding which of the proposals is the most advantageous to the Procuring Agency, price and other factors considered.

## Developing a Short List

### Developing a Short-List

After an evaluation score has been determined for each proposal, this step is used to reduce the number of proposals to be evaluated in subsequent steps.

Consider the following illustrative example. Eight proposals were evaluated and the following scores were assigned: 82, 80, 78, 72, 65, 63, 50, and 48.

We now wish to develop a short list. Let's first divide the scores into groups. A group consists of proposals with similar scores. The first group could be 82, 80, and 78. There is some question as to which group the proposal scoring 72 should be in. It is always easier to justify keeping a proposal in the competition than disqualifying it. Since 72 is mid-way between 78 and 65, let's put the proposal with 72 in the first group. The next two groups are easier: one being 65 and 63; the other, 50 and 48.

If we want to keep lots of proposals in the competition, we could eliminate only the lowest group: 50 and 48. If we want fewer proposals, we could eliminate the middle group as well: 65 and 63.

It is neither fair nor defensible to eliminate a proposal that scored better than one that has been kept in. For example, we cannot drop the proposal with the score of 72 if we keep the one with the score of 65. If the proposal with the score of 72 was clearly inferior to the proposal with the score of 65, then our evaluation process was flawed. The proposal with the score of 65 is in fifth place and, most likely, there is little chance that it will emerge as the winner. If it becomes necessary to disqualify this proposal, we have to find some other way of doing it. In some jurisdictions, each major criterion has a lowest acceptable score that must be exceeded to remain in the competition. (See Upset Levels.)

In some jurisdictions, the Evaluators are not strictly bound by the point scores. The Project Manager has the discretionary power to declare whether a one or two point difference in scores represents a significant difference in quality of the proposed solutions. Avoid making important decisions based on small differences in scores.

This short-listing process produces a reduced number of proposals to be evaluated further.

Some agencies avoid all of the problems which can occur when they are asked to justify why a specific proposal was not on the short-list. Their approach is to score all proposals, even the terrible ones. It is often easier to explain why a score of 48 out of 100 was rejected than to explain why a specific proposal was judged as being incomplete and lacking information and was, therefore, eliminated from further consideration.

### **Communicating with Proponents**

#### Communicating with Proponents

Between the time an RFP is issued and the closing date, there are a number of times an Agency can communicate with one or all of the Proponents. These include Clarifications, Presentations, Demonstrations and, for software, Proof of Concept. Each of these is discussed in this section of the book.

#### CLARIFICATIONS

During these sessions, information is obtained to clarify the supplier's proposal but not to modify the proposal. These sessions are not an opportunity for the purchaser to change the requirements or the RFP terms, or for the supplier to submit major modifications. They are not a negotiation session. (Negotiation is often part of Best and Final Offers discussed later in this chapter.)

#### **Massachusetts**

Massachusetts' procedures manual discusses several key aspects of clarification meetings:<sup>27</sup>

*A clarification is defined as an explanation of what is stated in a response. A clarification may not be used as an opportunity for a bidder to submit supplemental information or to change a response unless a department specifically requests these submissions or changes as part of a clarification process made available to all bidders that submitted responses.*

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*If a procuring department requires a clarification of a particular section of a response from one bidder, it must provide the same opportunity for clarification to all bidders. Notification of this opportunity to clarify a particular section must be provided in writing to all bidders in a manner that is fair and consistent. A department may elect to provide this opportunity to all bidders as part of oral presentations, provided that all bidders participate in the oral presentation process and are provided with the notice of an opportunity to clarify the identified section in the RFR. A department is not required to go through the extra work to clarify the RFR if only one bidder misunderstood the RFR or if the ambiguity was not a material element of the procurement.*

*The need for clarification may also arise when a review of responses reveals that a section of the RFR was unclear and that several bidders misunderstood what was intended. Ambiguities are usually identified during the RFR inquiry period (for example, the question and answer period and/or the bidders' online forum on Comm-PASS), but if there was no inquiry period, or if the ambiguity was not identified during the inquiry period, the PMT may choose to provide an opportunity to clarify the section to all bidders who submitted responses and all bidders should be given the opportunity and sufficient time to revise their responses on that section of the RFR.*

*If the PMT determines that the amount of clarification required is significant or has concerns that the clarifications would result in a substantially different RFR from the original, it may decide to cancel and re-issue the procurement to resolve any ambiguity or confusion.*

*No correction or clarification of response prices, terms and conditions or the submission of supplemental information prejudicial to the interests of other bidders or to fair competition shall be permitted. Departments and PMTs must be careful to protect the integrity of the competitive procurement process by treating all bidders fairly and equally during the procurement process.*

## PRESENTATIONS

Presentations provide an opportunity to meet the supplier personnel, to assess their professional and inter-personal skills, and to clarify the proposal. Often, face-to-face presentations add an important dimension to the evaluation process. Sometimes, the presentations provide critical information not readily available or easily determined from a written proposal. For example, the project manager from one of the vendors may, in discussing the details of the proposal, demonstrate a depth of knowledge and experience that far exceeds the description in the proposal. Alternatively, presentations provide some suppliers the opportunity to show how little they know about certain specific aspects of the project.

The Procurement Officer should prepare an agenda for the presentation outlining the objectives of the presentation and any specific requirements. All shortlisted proponents should be given a copy of the agenda far enough in advance to allow them to prepare properly. A set of evaluation criteria should be prepared (prior to issuing the RFP) in order to evaluate the presentations (if a score is assigned to them).

Some jurisdictions revise or finalize the scores based on the information and clarifications provided during the vendor presentations. In some jurisdictions, the presentation itself is given a score. Other jurisdictions only score the presentation when presentation skills are an important factor in the work; for example, if you are selecting a communications firm to present a new project to the public.

Notes should be taken during the presentations, and/or written responses obtained from the proponents. The notes may become part of the documentation supporting the final selection decision. In some jurisdictions, the sessions are recorded.

Here's how these face-to-face encounters are structured in several different jurisdictions.

### **British Columbia (B.C.)**

Here is the advice offered in Guidelines from B.C.:<sup>28</sup>

*The intent is to create a short-list and invite proponents who make the list to deliver a presentation this should be clearly explained in the Evaluation and Selection section of the RFP. The RFP should specify the process for selecting proponents for the presentation phase and it should explain how presentations will be evaluated and scored. The most common approaches to evaluating presentations include:*

- *awarding an additional set of points for the presentations;*
- *including the points for the presentation as part of the original 100%; or*
- *not awarding points but using the presentations to support the evaluation of the information contained in the proposal.*

### **Utah**

Utah's guidelines for structuring presentations help to ensure that all suppliers are treated fairly:<sup>29</sup>



***Schedule oral presentations.** To properly evaluate proposals, oral presentations may be scheduled to answer questions by evaluation committee members. After consultation with the State Purchasing agent, all firms that are acceptable or potentially acceptable are invited to participate in oral presentations. If you want to limit the number of firms invited to the oral presentation, you must specifically identify this restriction in the RFP. The offeror's original proposal cannot be changed in any aspect at the oral presentation. The oral presentation is only to allow offerors to clarify portions of their proposal. During oral presentations, if it becomes evident that offerors may need to amend their proposal, a Best and Final process may be initiated.*

### **Massachusetts**

Once again, the discussion from Massachusetts is easy-to-understand and provides some insight into the value of these sessions:<sup>30</sup>

#### *Oral Presentations or Demonstrations*

*Oral presentations, which are optional for PMTs, provide an opportunity for bidders to highlight the strengths and unique aspects of their responses and provide answers to questions regarding their responses. Departments should state their intention to conduct such presentations in the RFP. Generally, oral presentations are scheduled after departments have determined which responses have met the minimum submission requirements. Departments may limit the invitation to the top ranked bidders.*

*Oral presentations must be conducted in a fair manner with consistency in time allotments and format. However, the location and dates and times for presentations are at the department's discretion. These presentations are not opportunities to submit new information or modify a response; rather, the purpose is to clarify issues that would enable departments to better understand and evaluate responses. Such presentations are particularly helpful when the RFP is for complex services.*

*The Procurement Team Leader may waive the location and other requirements of an oral presentation upon the written request of a bidder due to special hardships, such as a bidder with disabilities or limited resources. In these circumstances, the PMT may conduct oral presentations through an alternative written or electronic medium, i.e., telephone, video conference, TTY or the Internet.*

*A bidder's failure to agree to an oral presentation may result in disqualification from further consideration. Oral presentations may be recorded manually or electronically (with notice to the presenting bidders) by the department as a matter of public record.*

## DEMONSTRATIONS AND PROOF OF CONCEPT

Demonstrations, events in which proponents show how their products work, can provide value. For example, if a vendor claims that its computer system is easy to use, a demonstration can sometimes convey this information more easily than a 5-page written narrative contained in a proposal. However, because demonstrations are controlled by the vendor and the vendor knows the strength and weaknesses of its product, demonstrations often omit features that do not work or work poorly. A better approach to a demonstration is to turn it into a 'proof of concept', an opportunity for your users to participate in the selection of transactions to be demonstrated. In this way, users can confirm that the product will function as described in the vendor's proposal.

There is no universal acceptance of the need for a Proof of Concept or agreement on when it is inserted in the procurement process.

Many software procurement processes incorporate presentations by the proponents. Invariably, these presentations are flawless. They are well rehearsed and carefully avoid known shortcomings.

In recent times, users increasingly demand more than presentations. They demand some form of 'test drive' in which they can view the software processing their own data, or in which they can enter their own data and exercise the software.

These sessions, in which the proposed software is made available to a group of users who, in turn, enter transactions and process user-provided data, are extremely valuable. They can 'make' or 'break' a vendor's proposal. These sessions often highlight problems and expose lies or exaggerations by sales people about functionality and ease of use.

Most procurement processes for complex software contain some form of live test, sometimes called a 'boardroom pilot', or a 'prototype' or a 'proof of concept'.

Richard White, president of Wood River Technologies has got it right when he says:

*The only way to evaluate complex software is to actually exercise the software. There are too many features and benefits with complex interrelationships to rely on only the vendor's proposal and its well-rehearsed perfect demonstration of features and functionality.*

There is agreement among consultants and experienced buyers that some test of the actual software should be incorporated into the evaluation process. These people differ on the timing. Some believe it should be part of the evaluation process; others, part of confirming the winner. Regardless of the placement of this test, it adds essential information about the software's capabilities, its functionality and the skills of the vendor.

The text which follows is an excellent example of a description of the demonstration phase, a Proof of Concept of a system, as contained in an RFP:<sup>31</sup>

*Demonstration*

*At the conclusion of the oral interviews a time and location will be arranged for the live system demonstration(s). The offerors with the highest ratings after the oral interviews will advance to the third and final phase of the evaluation process. This demonstration must take place in Anchorage within 10 working days after the interview data.*

*The selected finalist(s) will present a two (2) day demonstration of their system in action. The demonstration will consist of three steps:*

*The points to be awarded for each section based on the following evaluation criteria:*

*A. Day one. 300 points*

*Structured examples of system transactions will be performed. The specific steps to be performed will be provided by SEF. The vendor will be required to perform a set of transactions. Batch processing will be run, and a bill produced. No deviation from the structured performance will be allowed at this time. Questions from state observers will be held to a minimum. The points will be awarded based on the following criteria:*

- |   |                   |
|---|-------------------|
| <i>- can the software perform the assigned tasks</i>  | <i>100 points</i> |
| <i>- how well the task is performed by the software</i>   | <i>100 points</i> |
| <i>- subjective assessment of general overall system; ease of use, logic in formats and design.</i> | <i>100 points</i> |

*B. Day two. 100 points*

*Prepared Demonstration by the Vendor. The vendor will be given 90 minutes to demonstrate key features of their applications in any format they desire. No questions from state observers will be allowed during this phase.*

*Points to be awarded on the basis of how well demonstrated features apply to this RFP's requirements and the state's need in facilities and equipment management.*

*C. Day two.*

*300 points*

*Question and Answer period, with hands on use of system by state observers. State personnel may address questions to the vendor at this time relating to function of specific application features. The availability of multiple terminals during this phase is desirable.*

*In order to minimally impact the on-going work of DOT&PF employees, the demonstration shall take place in an environment outside the DOT&PF facilities. The vendor shall schedule the demonstration in Anchorage. The vendor shall make all necessary preparations in advance. The vendor should plan on up to 30 observers and should ensure adequate seating and viewing capabilities.*

## Negotiating the Contract

### Negotiating the Contract

Procurement people, especially inexperienced ones, find negotiations difficult, seemingly complex and often intimidating. However, negotiations are an integral part of the RFP process. The simple act of adding a negotiations step to your evaluation process will reduce the risks of failure, improve the quality of the proposals, improve your understanding of the proposals, and, in many situations, lower the price. This step invariably costs little yet provides much value.

With all these benefits, you'd expect negotiations to be greeted with enthusiasm. This is often not the case. Many agencies have only recently discovered the power of using RFPs instead of bids. Even fewer agencies build competitive negotiations or best and final offers into their processes

Most publications about RFPs deal only briefly with competitive negotiations, often in the context of Best and Final Offers. Sometimes, this step is omitted in a description of the RFP process.

There are several seemingly valid reasons for this oversight:

- Few people understand the role of competitive negotiations in the RFP process.

- This process is ignored by many agencies.
- Many procurement people are unaware of this tool.
- Little training is provided for this skill.
- A majority of procurement people do not like to negotiate.
- In some jurisdictions, the laws do not permit or are interpreted not to permit negotiations.

When competitive negotiations are used, they produce revised proposals. Often these revised proposals are submitted as “best and final offers”. In some jurisdictions, such as Idaho, negotiations are conducted as the final step in the procurement process and lead not to a revised proposal but to a contract.

Negotiating is a powerful tool. Yet, it is the neglected child of public procurement. In many jurisdictions it is often ignored, poorly understood and dismissed as inappropriate. (By way of contrast, in other jurisdictions, it is an important tool which produces millions in savings each year! Negotiations, when properly implemented as a standard practice, enhance the worth and prestige of the procurement function.)

Negotiations do more than simply reduce price. Even if you decide to accept a vendor’s price, you can often negotiate improvements in other areas such as training, or technical support or type of software license issued.

While there is little data on the impact of negotiations, anecdotal evidence suggests that negotiations can reduce price or add value of between 10% and 15% to a contract. For many Agencies, the represents tens of millions of dollars each year!!

The issue, as I see it, is not always related to knowledge of the negotiation process as most procurement people have had at least some training in this skill. The issue is, rather, the organization’s approach to negotiations and the experience and confidence of the procurement staff in the process. There are many reasons for procurement staff being uncomfortable with this process, lacking confidence in their own skills, or simply avoiding negotiations:

- Some staff have little or no training;
- Other staff simply do not like negotiations; they are uncomfortable with the process;

- Many organizations do not negotiate as a matter of policy or practice – they just don't build it into their procedures; consequently, no staff are available.
- Vendors, having much more knowledge of their own products and services and much more experience in negotiating complex contracts related to their goods and services, are intimidating.

Building negotiations into your RFP process increases its flexibility dramatically. There are three different levels and types of negotiations.

**As little involvement as possible:** Organizations who don't want to do 'face-to-face' negotiations should simply collect the comments and concerns of the Evaluation Committee and write each vendor a letter. This letter will identify the areas to be improved and invite the vendor to revise its proposal and submit it as its Best and Final Offer.

**A higher level of involvement:** Invite each vendor in to discuss its proposals and the shortcomings identified by the Evaluation Committee. Incorporate the agreed upon changes into your contract (or ask for a Best and Final Offer).

**The most involvement:** full-fledged negotiations resulting in either Best and Final Offers or finalized contracts.

Negotiations is a large topic. Detailed treatment is certainly beyond the scope of this chapter. There are many courses, books, workshops and consultants specializing in this topic. In the remainder of this section, we provide some basic information and several views of this important procurement skill:

- Why negotiations are important in the RFP process
- Some of the legal and policy considerations and the Model Procurement Code
- The negotiation process
- Two exemplary documents related to Negotiations.

#### LEGAL AND POLICY CONSIDERATIONS

In the beginning, there was the Model Procurement Code.

Public sector procurement is subject to many different, often confusing, statutes, regulations, policies and guidelines. The fundamental purpose of this body of rules and expertise is to ensure that competition thrives in a fair and equitable environment - to provide a level playing field and ensure that value is received for taxpayer dollars.

Unfortunately, negotiations are also subject to confusing rules, policies and laws. It is one of the most poorly understood elements of public procurement. In 1979, the American Bar Association introduced its Model Procurement Code. At the time, this was a ground breaking document. Since then, the MPC has had a profound influence on public sector procurement. Unfortunately, the original MPC spent little time on negotiations. It only provided a few words of direction on the subject. Recently, a revised MPC was issued. However, the negotiation section was virtually unchanged. Here is what it said:<sup>32</sup>

*Discussions with Responsible Offerors and Revisions to Proposals. As provided in the Request for Proposals, and under regulations, discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and such revisions may be permitted after submissions and prior to award for the purpose of obtaining best and final offers. In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors.*

The Commentary section also remained unchanged:

- (1) *Subsection (6) provides the procurement official an opportunity to make certain that offerors fully understand the solicitation requirements and provides offerors and opportunity to clarify proposals where necessary so as to assure responsiveness to the solicitation. Price discussions can best be conducted when there is a mutual understanding of the contractual requirements. Clarifications are intended to promote exchanges between the [State] and an offeror that may occur when an award is contemplated without discussions, for example, to resolve minor or clerical errors or ambiguities in proposals.*
- (2) *When discussions or negotiations are contemplated after the receipt of proposals which are expected to lead to the revision of proposal or to best and final offers, fair and equitable treatment of competitors dictates that negotiations be conducted in accordance with ethical business standards. Auction techniques shall be prohibited in discussions with offerors under the competitive seal proposal method. There must be a cut-off for the*

*submission of revised proposals and final offers.. Both Subsection (4) and Subsection (6) are intended to provide that prices; technical solutions; unique technologies; innovative use of commercial items, design construction, or operating techniques; or other aspects of proposals submitted by one offeror must not be disclosed to competing offerors. Safeguards against abuse in the conduct of negotiations must be strictly observed to maintain the essential integrity of the process. Procedures should be specific in regulations in order to achieve these objectives.*

The private sector is not subject to the same policies, laws, and regulations. Their negotiation strategies can incorporate auction techniques, unequal treatment, and disclosure of information about competing offers - all prohibited in the public sector.

The 1979 Model Procurement Code set the direction for public sector negotiations. Since then, some of the concepts have evolved and new procedures have been tried

#### DEFINING THE TERMS OF REFERENCE

Before we can even discuss this topic, we have to agree on some definitions. Now most people understand the meaning of “negotiate”, “clarify” and “discuss”. However, these terms have specific meanings related to procurement. These meanings are more legalistic and somewhat different than the day-to-day usage.

In most jurisdictions, “Clarify” is used to indicate that the offeror will have the opportunity to remove minor errors or provide additional information to resolve ambiguities. A clarification is not a major revision to the proposal. So, when you clarify, you fix the small stuff. This fundamental aspect seems clear and has been adopted in many jurisdictions.

In writing the commentary on this issue in the Model Procurement Code, the lawyers do their best to make this simple concept difficult to understand. If you carefully analyze the words, you will conclude that they intended that “clarifications” be an exchange of information between the buyer and offeror to resolve minor or clerical errors or ambiguities in proposals. And that “clarifications” are *not* “negotiations”.

Alaska has found some words which explain this concept in a simple and straightforward manner:<sup>33</sup>



*During the evaluation process, the procurement officer or the PEC may communicate with an offeror to clarify uncertainties or eliminate confusion. This communication may not result in a material or substantial change to the proposal, but it may result in an adjustment to the procurement officer or PEC's evaluation.*

The NIGP Dictionary defines this term:<sup>34</sup>

*Clarification: A communication with an offeror for the sole purpose of eliminating minor irregularities or apparent clerical mistakes in a proposal; may be initiated by either offeror or purchaser; does not give offeror an opportunity to revise or modify its proposal, except to the extent the correction of apparent clerical mistakes results in revision.*

Massachusetts has provided some direction in their Procurement Handbook to ensure that departments will permit corrections and clarifications, to ensure that all the suppliers are treated fairly and equally, and to ensure that a "clarification" does not become a material revision to the proposal:<sup>35</sup>

*... a procuring department has full discretion to determine whether to allow a response correction or clarification . . .*

*... the procuring department must provide the same opportunity for clarification of the identified response section to all bidders that submitted responses..*

*...No correction or clarification of response prices, terms and conditions or the submission of supplemental information prejudicial to the interests of other bidders or to fair competition shall be permitted....*

### **Corrections or Clarifications to a Submitted Response(s)**

*Pursuant to 801 CMR 21.06(8) a procuring department has full discretion to determine whether to allow a response correction or clarification.*

*A correction is defined as a minor informality or obvious error in a response submission. A correction may include matters of form rather than substance, including clerical, transpositional or mathematical errors or insignificant mistakes that, in the opinion of the PMT, can be corrected without prejudice to other bidders or without changing the substantive elements of the bidder's submission. Provided that all bidders are accorded fair and equal treatment, a PMT may review submissions from any bidder to correct a minor mistake in their response. Mistakes in responses may be corrected either at the PMT or the bidder's request. Departments must be careful that a bidder is not correcting a response that would result in an unfair advantage or result in a lower cost in order to win the award.*

*A clarification is defined as an explanation of what is stated in a response. A clarification may not be used as an opportunity for a bidder to submit*

*supplemental information or to change a response unless a department specifically requests these submissions or changes as part of a clarification process made available to all bidders that submitted responses.*

*If a procuring department requires a clarification of a particular section of a response from one bidder, it must provide the same opportunity for clarification to all bidders. Notification of this opportunity to clarify a particular section must be provided in writing to all bidders in a manner that is fair and consistent. A department may elect to provide this opportunity to all bidders as part of oral presentations, provided that all bidders participate in the oral presentation process and are provided with the notice of an opportunity to clarify the identified section in the RFR. A department is not required to go through the extra work to clarify the RFR if only one bidder misunderstood the RFR or if the ambiguity was not a material element of the procurement.*

*The need for clarification may also arise when a review of responses reveals that a section of the RFR was unclear and that several bidders misunderstood what was intended. Ambiguities are usually identified during the RFR inquiry period (for example, the question and answer period and/or the bidders' online forum on Comm-PASS), but if there was no inquiry period, or if the ambiguity was not identified during the inquiry period, the PMT may choose to provide an opportunity to clarify the section to all bidders who submitted responses and all bidders should be given the opportunity and sufficient time to revise their responses on that section of the RFR.*

*If the PMT determines that the amount of clarification required is significant or has concerns that the clarifications would result in a substantially different RFR from the original, it may decide to cancel and re-issue the procurement to resolve any ambiguity or confusion.*

*No correction or clarification of response prices, terms and conditions or the submission of supplemental information prejudicial to the interests of other bidders or to fair competition shall be permitted. Departments and PMTs must be careful to protect the integrity of the competitive procurement process by treating all bidders fairly and equally during the procurement process.*

*“Discuss” is often used in procurement documents instead of “negotiate”. This confusing use of “discuss” can be traced to the Model Procurement Code’s phrase “discussions or negotiations”. In many places, “discuss” means “negotiate”.*

*“Negotiate” is used to describe the bargaining process when the buyers and offerors sit down and review the proposal. Usually, these discussion lead to a better understanding by both parties and the submission of a revised proposal.*

*There are several concepts embedded in “negotiations”.*

First, it is bargaining. Here is the NIGP definition:<sup>36</sup>

*Negotiation: Conferring, discussing, or bargaining to reach agreement in business transactions. A bargaining process between two or more parties, each with its own agenda and objectives, seeking to reach a mutually satisfactory agreement on, or settlement of, a matter of common concern. A process of planning, reviewing, and analyzing used by a buyer and a seller to reach acceptable agreements or compromises.*

Second, the bargaining is not done with all offerors but with those likely to be selected for award:<sup>37</sup>

*Offerors submitting proposals may be afforded an opportunity for discussion and revision of proposals. Revisions may be permitted after submissions of proposals and prior to award for the purpose of obtaining best and final offers. Negotiations may be conducted with responsible offerors who submit proposals found to be reasonably likely to be selected for award.*

Third, all offerors must receive fair and equal treatments. So, if you negotiate with one, or “hold discussions”, you must do it with all who are similar:<sup>38</sup>

*The procurement officer or PEC may give offerors whose proposals are reasonably susceptible for award the opportunity to meet with the procurement officer or PEC, as set out in 2 AAC 12.290. If you hold discussions under 2 AAC 12.290 you must offer an opportunity to participate in the discussions to all those deemed reasonably susceptible for award.*

Negotiations can be far-reaching. In many jurisdictions, you can negotiate anything in the RFP or proposal that improves the value to the State. Typically, you cannot negotiate changes to prescribed contract terms and conditions, or expand the scope of the RFP.<sup>39</sup>

### NEGOTIATIONS CAN BE SCARY

In some organizations, negotiation is regarded as the poor, neglected step-child of the RFP process. The reasons for this are related more to psychology than RFPs or procurement:

1. Many procurement people receive little if any training.

They aren't taught how to negotiate; they don't know about tactics; they don't structure an effective process; they lose control of the meetings. Lack of training usually carries with it lack of confidence and, therefore, avoidance of the process.

2. The supplier is better prepared.

Most procurement people "own" the process. They aren't the subject experts. The supplier is the expert about the product and service, and has an inherent advantage. Also, suppliers are extremely knowledgeable about contract issues related to their products, service and industry. Many procurement officers have sat in a meeting and concluded that the supplier's team is much more knowledgeable about the details of the implementation, the risks, the negotiation process and contract issues than the buyers. Lack of a knowledgeable negotiation team is a barrier to effective negotiations and erodes the confidence of the procurement person managing the process.

3. Roles and responsibilities are poorly defined.

Often the buyers' team is unsure of its role. How much authority do they really have? Can they end negotiations due to an impasse and will their senior management support them? Or will senior management override their process and decisions? Are they acting within the law? Often, the negotiation team doesn't know how to treat the suppliers, as an adversary or as a potential partner?

4. Many people find negotiations awkward.

As individuals, many of us regard face-to-face discussions to resolve differences as difficult and awkward. Many people simply do not like to negotiate, whether it's a major contract or purchase of a new car. They find the process intimidating, and somewhat unseemly or demeaning. They don't see negotiations as an important part of a process - one designed to acquire "best value" in a fair and open manner.

All of these shortcomings related to lack of training, lack of confidence and lack of an effective process can be overcome.

### **Negotiations are valuable**

They do much more than provide lower prices. The Victoria Government Purchasing Agency has a great perspective on negotiations:<sup>40</sup>

*Post tender competitive parallel negotiations with two or more short listed tenderers is a purchasing strategy that provides substantial benefits to both buyer and seller and is usually used for high value and/or complex acquisitions. The objective is to seek the optimal solution and commercial arrangements, and not merely accept the lowest priced technically complying offer made at the time of tendering. This technique also maintains a competitive market situation throughout the evaluation process which sustains purchasing leverage . . .*

There are many solid reasons for negotiating changes to suppliers' proposals:<sup>41</sup>

- increase the number of complying offers (providing greater competition)
- reduce risk to both parties
- eliminate unnecessary costs
- reduce costs
- improve benefits (better quality, performance, delivery etc.)
- identify alternative solutions
- clarify requirements and proposals
- create better understanding and relationships between the parties
- improve the contract
- improve the tender bid
- to discuss opportunities for partnership

### THE NEGOTIATION PROCESS

By this point in the RFP process, most of the work has been done. You've worked with the user group to develop specifications; you've written a procurement plan; the RFP has been issued and proposals received. You've done most of the evaluation and all that remains is to negotiate the final details with, at most, a few suppliers.

The negotiation process is similar in many different jurisdictions. Typically, as part of the evaluation, the strengths and weaknesses of each proposal are identified. Clarifications of ambiguous or omitted terms have been received. Based on this information, the offers are divided into two groups: those within the competitive range and those outside the competitive range. All those inside have been judged as capable of providing an acceptable solution.

Now it's time to negotiate. You prepare a negotiation plan, and identify the negotiating team and each person's role in the process. You then meet with the offeror to discuss their proposal, to seek a common understanding of the problems

and issues, and to resolve disagreements. Usually the discussions are documented and to formalize the results, you call for a best and final offer. This permits each of the suppliers with whom you have been negotiating to submit a revised proposal. In some organizations, the request for best and final offers follows a written notice from the buyers about deficiencies and concerns in the original proposal.

Albemarle County (VA) has developed an 8-page guide for its procurement people describing the procedure for conducting negotiations:<sup>42</sup>

*The following are general guidelines for conducting negotiations, during which the selection committee should:*

Control: Control all discussions.

Identify deficiencies: Advise the vendor of deficiencies in its proposal so it has the opportunity to satisfy the RFP's requirements. (See section 16-8 below)

Resolve uncertainties: Attempt to resolve any uncertainties concerning the technical proposal and other terms and conditions of the proposal. (See section 16-8 below)

Resolve mistakes: Resolve any suspected mistakes by calling them to the vendor's attention as specifically as possible, without disclosing information concerning other vendors' proposals or the evaluation process. (See section 16-8 below)

Opportunity to revise: Provide the vendor a reasonable opportunity to submit any cost, price, technical or other revisions to its proposal that may result from the interviews (goods or nonprofessional services only).

Cost or price: Inform a vendor that its cost or price is considered to be too high or unrealistic (goods or nonprofessional services only).

Negotiation is a four step process:<sup>43</sup>

1. Preparation
2. Fact Finding
3. Bargaining
4. Agreement

In many jurisdictions, negotiations are not restricted. Any element of the procurement can be negotiated so long as in doing the review, all offerors are treated in a fair and equal manner. However, radical changes in scope can end in litigation initiated by aggrieved suppliers.

In California, their Acquisition Manual sets the scope of negotiations:<sup>44</sup>

*Negotiations are conducted on all procurement transactions as permitted by law and when practical, as determined by the Buyer (and the Buyer's management). . . Negotiations may address all aspects of the anticipated contractual arrangement (or change) including technical requirements, contract terms and conditions and/or price. ..*

Only people with training and experience in negotiations should lead these efforts.

### **1. Preparation**

Preparation involves assembling a negotiation team, knowing the details of the proposal being considered, and establishing the boundaries of an acceptable agreement. The team, in turn, identifies a negotiation strategy and objectives, and develops a negotiation plan.

Usually, negotiations are conducted by a team consisting of user representatives, technical specialists, sometimes a lawyer, and a procurement officer.

As part of the pre-negotiation preparation, before meeting with any offeror, the team has to do its homework. It has to develop a complete understanding of the contractual requirements and the offeror's response in its proposal, a unified team approach to various topics, and a position from which to negotiate. The team usually identifies its negotiating objectives and a minimum and maximum limit for each objective.

All of this information is often incorporated into a Negotiation Plan - a written document prepared by the chief negotiator describing the objectives for the negotiations and the corresponding rationale.

In developing a Negotiation Plan, the following questions should be answered:<sup>45</sup>

- *With whom am I negotiating?*
- *What are the key issues?*
- *What am I trying to accomplish?*
- *What are the strengths, weaknesses and deficiencies of the proposal?*
- *What is the negotiating environment?*
- *What is the negotiating process?*
- *What information do I need?*
- *What is my negotiating strategy?*

- *How will the agreement be reached?*
- *How will the agreement be implemented?*

## **2. Fact finding**

Fact finding is when each side asks questions to ensure that they share a common understanding of the requirements, RFP, and the offer. It is to obtain both clarifications and additional information on issues of concern to either party. At the end of this phase, both parties should agree on the specifications, requirements or statement of work.

## **3. Bargaining**

This is the difficult step. It is during the bargaining phase that each party puts forward its negotiating positions and seeks resolution of disagreements. Usually, the agenda is set by the chief negotiator and often deals with the most important issues first.

There are many different tactics which can be employed during this process. Some are ethical, others are borderline. Some are dangerous and can jeopardize the process. These tactics are available to both sides and astute negotiators quickly recognize their use and diffuse their effectiveness. Tactics include the classical “good guy/bad guy” routine; intentionally delaying the process; claiming a lack of negotiation authority, and bluffing.

Price is always an issue in negotiations. Often it is the most important issue and sometimes it is the only issue. Many procurement officials, especially in smaller agencies, are at a disadvantage when they negotiate. They think it is somehow wrong to challenge prices, or for a supplier to set prices to generate large profits. These buyers are not effective as negotiators. Here is the advice that Victoria Government Purchasing Board gives to all procurement officers in their government:<sup>46</sup>

*Price is an obvious focus for tender negotiations. However, it should not be regarded as unethical for a buyer to challenge the prices quoted. It is not immoral or wrong for a supplier to price a bid to the highest level which the market or purchaser can withstand. The seller has a responsibility to maximise company profits and departments have a corresponding duty to minimise cost/expenditure to an extent compatible with the purchase of a reliable product and/or service. Price negotiation should be done in a professional, objective and forthright manner.*



Conducting negotiations is a vast topic addressed by books, articles, training courses, professional associations. Treatment of this topic in more than a cursory manner is beyond a text dealing with RFPs. As an illustration of some of the factors and issues that may arise in conducting negotiations, consider the following list of good negotiating tactics:

*Conducting Negotiations<sup>47</sup>*

- *Aim for a good result for buyer and supplier.*
- *Agree on the issues and the way to proceed.*
- *Maintain confidentiality and treat suppliers fairly.*
- *Be careful about using tactics which may undermine your own negotiating position.*
- *Ensure the bidder is fully aware of, and understands, the real requirements.*
- *Ensure that the competitive element is maintained whenever possible, e.g. that inappropriate information regarding the contract or order is not revealed to other competing parties.*
- *Do not give the supplier the impression that the contract/order is a certainty.*
- *Maintain an ethical approach according to the standards of conduct both expected by and required of you.*
- *Ensure your overall strategy is flexible and adaptable to changing circumstances, but seek to settle differences within your team outside the negotiation venue.*
- *Behave so that ways exist for both sides to reach agreement without loss of face.*
- *Aim to use negotiating techniques which better enable you to find common ground with the other party, e.g. discuss the argument/rationale both for and against the views adopted by either party on a particular issue. This approach can help in more easily obtaining all the relevant facts, considering all available points of view, and providing a summary of views.*
- *Recess to caucus when the team needs to confer privately.*
- *Be open-minded and make concessions when good reason exists to do so.*
- *Look for long-term consequences.*
- *Use standard forms of agreement whenever possible. Where they are modified or new clauses written, legal advice may be necessary to ensure the changes achieve the intended results. Ensure changes are considered in the light of the whole document.*
- *Be careful not to reject offers which you may wish to accept later.*
- *Make clear that negotiations are 'subject to contract' until you are ready to commit your organisation.*
- *Ensure that the essential terms have been actually agreed to and entered into the contract document.*

#### 4. AGREEMENT

Once the major issues have been negotiated and resolved, the details usually fall into place. And once there is agreement on all the items, the negotiations are concluded and the contract signed.

Upon completion of negotiations, the chief negotiator writes a Negotiation Memorandum which often contains the following:

- Identification of the proposal and the players
- Summary of the negotiation objective, results, and the proposal
- Important details for each negotiated item

In some jurisdictions, the final step after completing negotiations is for the offeror to modify its proposal – in essence, to submit a Best and Final Offer. This revised proposal is then given to the evaluators so they can prepare their final report.

#### A STRATEGY FOR NEGOTIATIONS

Consider this example - you receive three proposals for the county enterprise financial system:

- Proposal A meets or exceeds all of the stated requirements and has most of the desired optional features but is \$250,000 over budget.
- Proposal B meets all of the stated requirements, a few of the desired optional features and is within the program budget.
- Proposal C meets most of the stated requirements, a few of the desired optional features and is half the price of its nearest competitor.

What do you do? Score the proposals, using your handy-dandy price formula and award the contract? Big mistake! Proposal A is obviously the best alternative but it is too expensive. Proposal B is probably OK but it represents old technology. Proposal C misses the mark but it will leave money in the budget for consultants to fix it.

Many procurements officers ignore one of the most important features of the RFP process, NEGOTIATION! If you are not negotiating, you are not taking advantage of the RFP process.

The American Bar Association Model Procurement Code for State and Local Governments is the foundation for many state and local government procurement codes. Model Procurement Code RFP process permits discussions and best and final offers. The NIGP Dictionary of Terms defines “discussions” as “an oral or written exchange of information, other than simple clarifications, for the purpose of obtaining information essential for determining the acceptability of a proposal, or to provide the offeror an opportunity to revise its proposal. Discussions are negotiations and negotiating is bargaining to reach mutual agreement.

There are some important rules for negotiating. Negotiations must be fair, allowing all offerors who are in the competitive range or reasonably susceptible for award to participate. Avoid revealing details from competing offers. Point out all significant weaknesses to each offeror and encourage improving the offer. Avoid auctioning techniques to make all offers equal.

Negotiations are not easy. They require planning and patience. Let’s set up a negotiating strategy for our three proposals:

**Proposal A meets or exceeds all of the stated requirements and has most of the desired optional features but is \$250,000 over budget.** Although it exceeds our budget, it appears to be our best proposal. The purpose of the RFP process is to award the contract to the most advantageous offer. This could very well be it! When negotiating, we should inform the offeror that its proposal exceeds budget and discuss methods for reducing the price, without sacrificing any required or highly desired features. If all else fails we might seek more money.

**Proposal B meets all of the stated requirements, a few of the desired optional features and is within the program budget.** This proposal meets our current requirements but represents old technology that may be obsolete in a few years. We may want to seek some assurance that the contractor will provide maintenance and upgrades for ten years and customization, additional options and other features and price concessions.

**Proposal C meets most of the stated requirements, a few of the desired optional features and is half the price of its nearest competitor.** This offer may be well be not susceptible for award. It does not meet our minimum requirements and has few desired options. Chances are, the offer cannot be improved enough to win the contract. If we choose to negotiate, we have a lot of work to do. We need to point

out all significant weaknesses and recommend improvements. We should also encourage additional desired options.

Best and final offers or final proposal revisions come after negotiations. This is the formal process for obtaining written confirmation of the discussions. This is our “meeting of the minds”. Once we receive the best and final offers, we can return the proposals to our evaluation committee and let them recommend the most advantageous offer.

### DO’S AND DON’TS

There are some do’s and don’ts to competitive negotiations:

Don’t negotiate with just one offeror, unless you have no reasonable choice. Competitive negotiations require competition. To be fair, we should negotiate with all offerors who are susceptible for award or are in the competitive range.

Don’t negotiate with offerors who are not susceptible for award. Negotiations should be efficient. Don’t waste the valuable time of your negotiators and evaluators. Release the unacceptable offerors to seek other business opportunities.

Do negotiate to improve weaknesses but don’t compare details from each proposal. The goal is to help each offeror meet your requirements, not to match up with a competitor.

Do appoint a negotiation team. Evaluators evaluate and negotiators negotiate. Assemble a competent negotiation team with technical advisors. The team leader should be a skilled and competent procurement negotiator.

Do plan the negotiation strategy. Identify weaknesses and desired characteristics. Study your offerors and identify their needs. Hint: Money is not the only motivator for prospective contractors. Understand the environment. The more you know, the better you will do.

Don’t try to negotiate the same things with each offeror. Each proposal is different and demands a different negotiation strategy. Discuss price only when price is a weakness. In many situations, we can expect price to climb as we negotiate to improve weaknesses.

Do keep good notes. It is acceptable to request the contractor take notes, for approval by the government negotiators.

Don't lose control of negotiations. Appoint a competent and skilled negotiation team leader. Negotiate in government offices. Regulate team dialog. Don't join prospective contractors for lunch or drinks. This is business.

Do negotiate for mutual understanding and "win-win" solutions.

Don't negotiate if you don't need to. If your number one offer meets government requirements and does not require improvements, leave it alone and award the contract.

Don't issue "Surprise BAFO's". The Best and Final Offer should only be requested after negotiations are done.

We are just scratching the surface. This article is not the consummate guide to government negotiating. If anything, this article should make you curious and encourage you to become a good negotiator. There are many good negotiation books and workshops.

Please remember, if you are just evaluating proposals and awarding contracts, without negotiation, you are only doing half the procurement. Negotiations bridge the gap between what the government requires and what the offeror proposes.

## **Exemplary Documents**

This section describes two solid documents produced by public sector organizations that deal exclusively with negotiations.

### **The Albemarle County (VA)**

Their Purchasing Guide<sup>48</sup> is great and one of its chapters deals with negotiations. This chapter contains insights into the process to assist negotiators. It begins with "essential information", a summary of the key points in the guide:

<b>Essential Information in this Chapter</b>
<ul style="list-style-type: none"><li>• Before negotiations begin with the selected vendors, the selection committee should request any additional information from the vendors, provide advance information to vendors, arrange a tour of the site or the facility, if appropriate, schedule the negotiations, identify who should attend, and</li></ul>

visit each vendor's office and recent projects, if appropriate.

- Negotiations must be confined to the vendor's proposal and its identified deficiencies in relation to the requirements of the RFP, and the requirements and format of the proposed written contract.
- The vendor may elaborate on its qualifications during negotiations and may revise, modify or alter its proposal. The evaluation criteria established by the selection committee guide the negotiations.
- Negotiations should be conducted in a way to arrive at a complete agreement on all basic issues, and not leave any issues for later negotiation.
- If there is a concern about cost or price being too high or too low in the procurement of goods or nonprofessional services, the selection committee should advise the vendor during the negotiations so that the vendor may submit a revised cost proposal.
- The evaluation criteria established by the selection committee guide the negotiations.
- Negotiations should be conducted in a way to arrive at a complete agreement on all basic issues, and not leave any issues for later negotiation.
- If there is a concern about cost or price being too high or too low in the procurement of goods or nonprofessional services, the selection committee should advise the vendor during the negotiations so that the vendor may submit a revised cost proposal.

The guide provides a clear, comprehensive definition of 'negotiations':

*For simplicity, negotiations, discussions and interviews and presentations are referred to as "negotiations."*

The guide defines the scope of negotiations by restricting the activities of the negotiators:

*Negotiations must be confined exclusively to the vendor's proposal and its identified deficiencies in relation to the requirements of the RFP, and the requirements and format of the proposed written contract. During negotiations, the vendor may elaborate on its qualifications and may revise, modify or alter its proposal so that the County can obtain the best and final offer.*

*For the procurement of goods and nonprofessional services, the County may discuss nonbinding estimates of total project costs, including, but not limited to, life-cycle costing, and where appropriate, nonbinding estimates of the price for services.*

*The selection committee shall not:*

- *Help a vendor bring its proposal up to the level of other proposals through successive rounds of discussion.*

- *Disclose technical information to a vendor that results in improvement of its proposal.*
- *Indicate to a vendor a cost or price that it must meet to obtain further consideration.*
- *Disclose proprietary information, technical information or ideas, or cost information of another vendor.*
- *Advise a vendor of its price standing relative to another vendor.*
- *Disclose the relative strengths and weaknesses of competing vendors.*
- *Ask for nonbinding estimates of costs for professional services at this stage of the procedure.*

*During the negotiation process, the selection committee must be sensitive not to disclose any unauthorized information that may provide an unfair advantage to one vendor over other vendors.*

The guide provides a framework for the negotiation process:

*Conducting Negotiations: Addressing Deficiencies, Uncertainties and Mistakes in a Proposal*

*Negotiations should address deficiencies, uncertainties and mistakes in a proposal, and provide the vendor the opportunity to revise its proposal. The selection committee should be specific when identifying deficiencies, uncertainties and mistakes, but must do so without advising the vendor of the corrections required. The selection committee should strive to assure that it has reasonably communicated the specific deficiency, uncertainty or mistake to the vendor.*

*Deficiencies:* *A deficiency is any part of a proposal that does not satisfy a minimum requirement of the RFP, rather than a weakness of the proposal based on a comparative evaluation of the relative strengths and weaknesses of competing proposals. Disclosure of a deficiency should be made so that the vendor may correct the deficiency, thereby resulting in a better proposal and better competition. All deficiencies that may be proposals. The selection committee is not required to disclose deficiencies that cannot be corrected. Examples of deficiencies in a proposal include, but are not limited to, the vendor's proposed personnel being considered to be unqualified; the vendor's proposed costs being unrealistically low; and the vendor's estimated level of effort and proposed price being considered unreasonably high.*

*Uncertainties: Uncertainties in a proposal may arise from a proposal not providing adequate information, and the selection committee being unable to determine the extent of the vendor's compliance with the requirements of the RFP. Discussions should be thorough to address uncertainties. An example of an uncertainty in a proposal includes, but is not limited to, the selection committee being unable to determine the extent of a proposal's indirect costs.*

*Mistakes: A mistake is an error in a proposal. Discussions should resolve suspected mistakes by bringing them to the attention of the vendor as specifically as possible without disclosing information about other vendors' proposals.*

*The selection committee shall not instruct a vendor how to correct a deficiency, uncertainty or a mistake.*

One of the guide's most valuable entries deals with the negotiation of price – what to tell a proponent, and what not to tell and proponent

*If there is a concern about cost or price being too high or too low in the procurement of goods or nonprofessional services, the selection committee should advise the vendor during negotiations so that the vendor may submit a revised cost proposal.*

*It is proper for the selection committee to reveal the County's estimate or price goal, to disclose the amount of funds available for the project, or to inform a vendor that its proposed cost greatly exceeds the County's budget limits.*

*It is improper for the selection committee or any County officer or employee to indicate to a vendor that it must meet a certain cost or price in order to receive further consideration, to advise a vendor of its price standing relative to other vendors, to reveal the identity of the low vendor or that all vendors are in the same price range, or to otherwise furnish information about other vendors' prices.*

### **The Negotiation Process Guide<sup>49</sup> (CA)**

The State of California's procurement group has published a 14-page guide, the Negotiation Process Guide (for IT Goods & Services), to explain "the issue of negotiations in a clear and concise manner". And this guide does just that. More importantly, the Guide is accompanied by a 16-page Contract Negotiation Plan for a hypothetical company.

First, let me tell you about the Guide.

It establishes three different negotiation scenarios. First, when you negotiate from the outset of a procurement; second, when you negotiate during a procurement;



and, finally, when you receive no responsive bids. The second, the most common use of negotiations occurs when you receive at least one responsive, responsible bid:

*Procedure when conducting negotiations during a procurement and at least one responsive, responsible bid is received.*

*When at least one responsive, responsible bid is received, only bidders that have submitted such bids may be allowed to negotiate. It is possible to negotiate with only a sub-set of responsive, responsible bidders only if the bid document (as otherwise amended) outlined a procedure for doing so prior to opening bids.*

*By way of example, if the acquiring agency believed that it was likely to receive many responsive, responsible bids and that it would be necessary to negotiate to obtain best value for the State, that agency could set forth a rule in the bid indicating that the state may opt to only negotiate with bidders in one of the following configurations,*

*Only bidders within 3% of the low bid*

*Only the 3 highest ranking bidders*

*Only the lowest priced bidder and then, if unsuccessful, with successive bidders in order of rank until an agreement could be reached.*

It then describes the Roles and Responsibilities of each of the participants from the State as well as the overall process.

#### *Negotiation*

*Reaching an agreement is the overall goal of contract negotiations. There are two aspects of reaching an agreement. It is essential for the State to speak with one voice. Prior to the beginning of contract negotiations, the State will reach internal agreement on as many issues as possible and those will be included in the Negotiations Briefing Binder. . . .*

*The negotiation process is a dialogue which may include persuasion, alteration of assumptions and positions as necessary, and may apply to several areas including but not limited to:*

*Price*

*Schedule*

*Requirements*

*Pay points*

*Definition of deliverables*

*Development methodology*

*Period of Maintenance*

*The State may discuss other aspects of the Bidder's proposal that could, in the opinion of the State, be altered or explained to enhance materially the proposal's potential for award. However, the State is not required to discuss every area where the Bidder's proposal could be improved.*

*In the course of the negotiation process, the State will be asked to reexamine its position regarding particular issues in response to the vendor's position. It is important to allow either party to leave the room to go "caucus" privately in another room, where they can speak freely before returning . . .*

*Negotiations may be completed after a single round, or may be done in several rounds. Negotiations may be conducted face-to-face and/or in writing. Face-to-face negotiations are generally the most effective but conference calls, or the use of video or web conferencing are acceptable alternatives.*

*The process of reaching an agreement with the vendor should proceed in a methodical fashion. The Chief Negotiator may list all "open" or unresolved issues on the agenda. If an agreement is not reached on language or more drafting is needed, that item should fall to the bottom of the agenda to be re-examined at a later time in the negotiations process. Each item will be examined in this fashion until agreement is reached on all outstanding issues. Issues may also be elevated in accordance with issue escalation instructions from the Executive Management Team.*

*At any point in the negotiation process the State may terminate negotiations and/or the solicitation at any time. Also, an unsuccessful bidder does not have the right to protest the results of the negotiating process.*

### **Sample Contract Negotiation Plan<sup>50</sup>**

The Guide emphasizes the need for a Negotiation Plan and provides a sample Negotiation Planner as well as a detailed example of a negotiation plan. The sample negotiation plan is 16-pages in length and deals with Software Maintenance Renewal for Generic Computer Company Inc.

This sample plan is valuable as it illustrates the level of detail required when planning and organizing a negotiation effort in a large organization with many stakeholders. The scope of this plan is ambitious:

*The scope of this plan is managing seven (7) basic activities:*

- *preparation for contract negotiations*
- *drafting the contract terms, conditions and attachments*

- participation in contract negotiations
- negotiation of the terms, conditions and attachments
- contract negotiation document control
- reaching an agreement on the price, terms, conditions, and attachments between the State and Generic Computer Company Inc.
- approval of the terms, conditions and attachments

The last page of this plan provides information about their rules of conduct for the negotiators as well as a valuable reference publication:

#### *Rules of Conduct*

*An important strategy in effective contract negotiations is for members of the same team to “speak with one voice” when addressing the opposing side. Perceived fissures in the State’s position make the State vulnerable to the Generic Computer Company Inc. taking on a “divide and conquer” offense. While reasonable minds often differ and discussion is important, it is essential that State’s representatives agree to follow the rules of conduct set forth below:*

*Rule No. 1 - All differences of position shall be discussed and escalated outside the presence of the Generic Computer Company Inc.*

*Rule No 2 - If members of the Negotiation Team identify a situation where a difference of opinion is arising, a short recess should be called and members of the Negotiation Team should caucus.*

*Rule No. 3 - If the Negotiation Team is unable to resolve the issue during the caucus, the issue should be tabled and further discussion discontinued until the Negotiation Team can resolve or escalate the issue in private or with members of the Executive Management Team.*

*Rule No. 4 – Members of the State Negotiation Team who repeatedly violate the rules of conduct will be asked to excuse themselves and designate a substitute.*

*In his text on Cutting Edge Negotiation Strategy for Lawyers, David G. Gold lists the traits shared by effective negotiators:*

1. *Prepared*
2. *Honest/Ethical*
3. *Adheres to customs and courtesies*
4. *Perceptive and skillful at reading cues*
5. *Rational*
6. *Realistic*
7. *Reasonable*
8. *Analytical*
9. *Convincing*
10. *Self-controlled*

*Exercising these traits as much as possible is probably the best advice any of us will ever find with regard to conducting ourselves in contract negotiations and perhaps beyond.*

## Requesting Best and Final Offers

### Requesting Best and Final Offers

According to the procurement people in New Mexico, “The best and final offer step has produced some truly amazing results over the years saving the State literally millions of dollars.”

The RFP process is highly flawed. Buyers issue documents that often provide a distorted, incomplete, or inaccurate description of the problem. This is not their intention but often results from (i) many different people trying to describe a complex requirement or a difficult problem, or (ii) lack of knowledge by the users related to the information required in a Statement of Work. Suppliers then take this information and interpret it in the light of their own knowledge and product offerings and develop their proposals.

Our evaluation processes attempt to compensate for these systemic problems by basing the award on a number of factors: not simply the least cost, nor only the best project management plan, nor just the best technical solution. We combine all of these factors so that we often award the contract on the basis of *least apparent risk*. The winning proposal often does not represent the best value but rather the proposal with the fewest “holes”, the fewest ambiguities, the fewest weak sections. In short, the proposal that seems to solve the problem and is most credible.

The systemic problem is easy to define. Many of the critical details of a solution cannot be articulated by buyers until they have reviewed the suppliers’ proposals. Until this time, the buyers do not have sufficient insight or knowledge of potential solutions to make an informed decision. But it is fundamental to one type of RFP process that suppliers can’t revise their proposals; evaluators can only evaluate the submitted material. And evaluators hate it! For example, you issue an RFP and get six proposals. Only three are anywhere close to the mark. They are o.k. but not great. One of the proposals lacks the depth of technical information which would inspire confidence in the solution. The second lacks project management depth. The third is simply too expensive.

Best and Final Offers (BAFO) is often used when the Evaluation Team believes that the price could or should be better, when some elements of a proposal are confusing and need further definition. It is also used to obtain additional

information which will provide a larger point difference between competitive proposals with similar scores.

Wisconsin has a 4-page description of its BAFO procedure in which it identifies uses for BAFO:<sup>51</sup>

*The best and final offer (BAFO) process represents an optional step in the selection process in the request for proposal (RFP) process and is not part of the contract negotiation process.*

*The BAFO process may be useful when:*

- A. No single response addresses all the specifications.*
- B. The cost submitted by all proposers is too high.*
- C. The scores of two or more proposers are very close after the evaluation process.*
- D. All proposers submitted responses that are unclear or deficient in one or more areas.*

Vendors hate the traditional RFP process – the one without BAFO. Losing a major contract because one section of their proposal was rated a ‘6’ rather than an ‘8’ is difficult to understand. Vendors often complain that “If we had only known more details and understood the buyers’ reasons, then we would have proposed a different solution.”

There is a process - Best and Final Offer (known as “BAFO”) - designed to solve this problem. This procurement strategy permits buyers to get revised proposals from vendors. In the U.S., this process is defined in the procurement statutes of many states and in the ordinances for many cities. In Canada, BAFO has been underutilized in the past. It is only in recent times that public bodies have begun including BAFO as part of the RFP process. It is now used by several provinces, cities and public entities for high-risk, high-value or high-visibility RFPs.

When BAFO is used, it is used with a well-defined procedure. The concern is that all suppliers be treated fairly, and that no information be transmitted from one supplier about the other suppliers’ offers.

Here’s how it works. First, the RFP contains language that properly defines the rules and the process. Typically, the evaluators identify those proposals capable of delivering the required results. This evaluation is the same as would normally be done to develop the short-list of finalists. These finalists are then provided detailed questions related to their proposals, informed of those parts of the proposals that

are deficient, or invited to discuss (negotiate) the proposal with the agency. The suppliers are then given the opportunity to redo their proposals. They are provided with the opportunity to improve their offering and to eliminate unacceptable conditions contained in their original proposal. The amended sections are then re-evaluated and re-scored according to the evaluation process defined in the RFP.

It is a best practice to formalize the invitation to a vendor to submit a BAFO. North Dakota has developed a 3-page template for this request.<sup>52</sup> This template provides instructions to the Project Manager/Procurement Officer on how and when to use BAFO. The template also states that the Agency must:

*PROVIDE SPECIFIC INFORMATION ON WHAT IS BEING REQUESTED. OFFERORS MAY BE ASKED TO REDUCE COST OR PROVIDE ADDITIONAL CLARIFICATION TO SPECIFIC SECTIONS OF THE RFP (I.E. TECHNICAL PROPOSAL, COST PROPOSAL, EXPERIENCE AND QUALIFICATION) INDICATE RFP SECTION NUMBERS, IF APPLICABLE.*

There are several different ways in which BAFO is employed:

- In some jurisdictions, such as Arizona, competitive negotiations precede BAFO. In this way, the revised proposals reflect the agreed upon changes resulting from the negotiation process.
- In some jurisdictions, such as New Mexico, competitive negotiations are not used. Rather, vendors are sent a letter indicating the weaknesses in their proposals and invited to submit a BAFO.

New Mexico's RFP Guide<sup>53</sup> provides some insight into the use of BAFO:

*The best and final offer is the only step in the process where the proposal can be amended. If the offeror's proposal contains unacceptable contract terms and conditions, this is the step in the process where that problem is resolved. If an offeror stamped every page of the proposal "proprietary" or "confidential", this is the step in the process where that problem is corrected. If costs were not proposed on exactly the same basis as the other offerors, this is the step in the process to correct that problem.*

New Mexico uses BAFO to ensure that the winning proposal receives at least 90% of the available points – they simply do not accept mediocre proposals. Here are the rules that they have published:

## A. NOTIFY FINALISTS

*This step is an extremely important part of the procurement process as this is the only place in the process where offerors can amend their proposals. They may amend their proposed costs as well as other portions of their proposals. Offerors should be encouraged to improve their proposals. The recommended technique is to collect questions about the offeror's proposal from the Evaluation Committee. The Procurement Manager divides the questions into two groups: 1) questions to be addressed in the best and final offer; and 2) questions for the oral presentation. If the Procurement Manager took good notes during the evaluation, the notes may suffice as the basis for the notification letters.*

*The Procurement Manager must provide each finalist a written notification letter that contains the following:*

*The date, time and location of the oral presentation or system demonstration, along with instructions as may be appropriate for the conduct of the session including an agenda.*

*Specific areas of the offeror's proposal that the Evaluation Committee may request to be addressed as part of the submission of best and final offers. For example, the Evaluation Committee may request that the offeror readdress important aspects of the proposal such as the implementation schedule, level of support, type or amount of resources proposed, or contract terms and conditions.*

*Specific areas of the offeror's proposal that the Evaluation Committee may require to be addressed as part of the submission of best and final offers. For example, unacceptable terms and conditions may have to be amended or withdrawn as part of a best and final offer. Confidential or proprietary designations on non-proprietary portions of an offeror's proposal must be removed. Unacceptable licensing or other restrictions on the use of the product must be eliminated through a best and final offer amendment.*

*The due date and time for submission of best and final offers.*

*The final paragraph should emphasize the fact that the best and final offer is an opportunity for the offeror to improve the proposal by submitting revised proposed costs as well as other amendments.*

*If the best and final offer contains meaningful revisions to the original proposal, then all of the revised portions of the proposal must be reevaluated and points reassigned accordingly. The best and final offer step has produced some truly amazing results over the years saving the State literally millions of dollars. The step works best on single source awards. However, it is valuable every procurement as it is the only step in the process where the offeror is given an opportunity to amend the proposal. The RFP document encourages the offerors to*

*respond to the contract with specific wording changes and additions. Some of these changes and additions could preclude the signing of a contract. That is why they are required to be submitted up front as part of the proposal as opposed to the more traditional negotiation process that corporate attorneys thrive upon. For example, offerors have required that the contract be governed under laws of some other state than New Mexico. That requirement is not acceptable. The offerors were given the opportunity to amend their proposals eliminating the requirement. In some cases the proposals were amended, in others they were not and the offeror was eliminated from the process, deemed non-responsive. In other cases offerors have required payments in advance, which is prohibited by statute. There have been almost endless variations. That is why the Procurement Manager is responsible for reviewing the offeror's changes and additions with in-house counsel before this step in the process. Another area that causes serious problems is workmanship or other warranties that impact the offeror's proposed costs. For example, the contract may require that the contractor be bound and honor a six-month workmanship warranty where errors will be fixed during the warranty period at no additional cost to the agency. If one finalist agrees to the requirement and another does not, what does that do to the points awarded for cost by the formula? Obviously, the cost formula works only when the costs are proposed on an identical basis. Since, in this case, proposed costs are not on the same basis, the Procurement Manager has an obligation to get the inequity fixed as part of the best and final process. The Procurement Manager may demand that the second offeror resubmit costs and a written amendment eliminating objections to the six-month contractual workmanship warranty. The Procurement Manager may ask both offerors to propose costs on a new basis, e.g. a three-month workmanship warranty.*

*The key point of this discussion is that the model RFP best and final paragraph uses the phrase "offerors may be required to submit revisions...", and this step in the process is where proposal inequities and unacceptable conditions are eliminated.*

**DON'T ACCEPT RESPONSES SUCH AS "SUBJECT TO NEGOTIATIONS" AS AN ANSWER.**

*If the best and final offer request contains instructions for reproposing the offeror cost on a basis other than what was contained in the RFP document, then the change should be treated as an RFP amendment and identified as such.*

*After the award the Procurement Manager is responsible for preparing the proposals for public inspection. This simply means that one or more of the competing offerors may request copies of one or more of the proposals submitted by the other offerors. Of course, the winning proposal is the one most often requested. Public disclosure has to be timely. The problem arises when the offeror has designated all or sections of the proposal as "proprietary" or "confidential" when they do not meet the requirements for such designations. The best and final offer step in the process should be used to correct this type of problem. The Procurement*



*Manager should require that the extraneous designations be removed from the proposal as a condition of award. After the award it is generally difficult to get even the winning offeror to cooperate with the public disclosure requirements. This situation can extend the protest period and delay contract initiation. Finalist notification letters should be sent via facsimile or e-mail and U.S. Mail.*

#### **B. NOTIFY NON-FINALISTS**

*Non-finalists need to be notified too. They probably have a procurement response team on standby awaiting notification of the selection. Therefore, prompt notification of the non-finalist is required so that the procurement teams may be released for other duties.*

*The recommended notification procedure is a telephone call from the Procurement Manager followed by a written letter of notification. "This letter is notification that your company's proposal in response to RFP # was not selected as a finalist. On behalf of Secretary and the members of the Evaluation Committee, I want to express our sincere appreciation for the time and effort you and your staff have taken to respond to our Request for Proposals."*

*If the company representative requests a critique of the proposal, schedule the critique after the expiration of the protest period. The notification letter should be sent via facsimile and U.S. Mail.*

#### **C. COLLECT BEST AND FINAL OFFERS**

*The model RFP language states that the best and final offer must be submitted on a given date and time. This deadline is treated exactly like the proposal submission. Best and final offers submitted after the deadline are not accepted. There is no reason to hear an oral presentation from an offeror who is going to be deemed non-responsive for failure to adequately address required "best and final" offer requirements. The best and final offers must be verified for compliance with the requirements.*

*Disqualification decisions are made by the Evaluation Committee and disqualification letters must be promptly sent as well.*

*Best and final offers may need to be clarified which is another good reason for having them early for review prior to the oral presentation. The Procurement Manager may request a written clarification or the offer may be amended via hand written notes which are dated and signed by a qualified representative of the offeror's organization. Since the amended offer is binding, it must be signed by someone who has the power to contractually obligate the organization.*

*Best and final offers, as amended, are accepted only once. They are discussed and clarified at the oral presentation which concludes the contact with the offerors' organizations. For some unknown reason, some jurisdictions require a sealed best*

*and final offer that is opened sometime after the oral presentation has been concluded. That is not the way this process is conducted. The best and final offer must be submitted by the specified due date and time. The best and final offer should be discussed and clarified, if necessary, before the oral presentation/demonstration has been concluded.*

The University of Texas at El Paso's Purchasing Department has published an easy-to-understand description of its BAFO procedure:<sup>54</sup>

1. *A Best and Final Offer (BAFO) may be used on following negotiations, clarifications, oral presentations, site visits, etc. to clarify UTEP's requirements and/or the Proposer(s) proposal and pricing. BAFOs may be restricted to only those Proposers in the competitive range of scores after the initial evaluation of all proposals. The BAFO must allow the Proposer to:*

- *Modify the initial offer*
- *Update pricing*
- *Include any added value*

2. *The BAFO may be in the form of a letter with attachments. Regardless of format, the BAFO must address all pertinent changes and all submittal instructions.*

3. *The Buyer may include in the BAFO a list of modifications to the requirements of the RFP agreed to by UTEP. While the BAFO may, in some cases, be tailored to individual Proposers, care must be taken that all Proposers remain on the same competitive level and are proposing to substantially and materially the same conditions and requirements.*

4. *All discussions, negotiations, and clarifications cease upon issuance of BAFOs. Changes are not allowed in proposals or prices after BAFOs are received unless the Purchasing Agent makes a written finding that re-submission would be in UTEP's best interest.*

5. *After receipt of the BAFO, all Proposers submitting a BAFO shall be evaluated by the evaluation team based on the evaluation criteria.*

6. *Upon completion of the scoring by the evaluation team, the Buyer will tabulate the results and identify the top rated respondent(s) for award consideration. The results will be tabulated by taking the average of the evaluation team scores for each evaluation criteria.*

## Checking References & Past Performance

### Checking References and Past Performance

There are tremendous variations in how past performance information is used in evaluating vendors and their proposals. Some procurement people don't use this information at all in determining the winner of a competition; others use it only to

confirm the winner. Some use this data as a pass/fail criterion; others score the information.

Here are five different people's views of past performance:

Past performance is the best indicator of future performance (usually).

...the results are often not useful. People are often unwilling to provide completely honest appraisals...

We don't score past performance but always ask 'what worked well and what didn't?'

I have never seen the case where the past performance has changed the course of a contract award...

(past performance) could be a game changer....

This Section deals with these sometimes opposing views of the use of and approach to past performance information.

This Section is divided into two parts. In the first part, John Adler, an acknowledged expert in public procurement, provides a high level view of past performance and the current debate underway about how this information should be used. The second section provides more detailed information about current practices related to past performance.

### THE GREAT PAST PERFORMANCE DEBATE

BY JOHN ADLER<sup>55</sup>, CPPO

**To check references or not to check references** - Is there a boiling debate over past performance in government contracting? It seems like every few years, this issue rises up in arguments among procurement professionals. In reality, past performance and reference checks are centuries old best practices. Past performance is the most reliable measure for forecasting future performance. Past performance is gauged through reference checks. References checks are commonly used for determining the character of potential employees or students. References are used to determine the number of stars for a restaurant or hotel. It is even rumored the Banks family checked references for Mary Poppins before they offered a contract and I have it on good authority that royalty checked professional references for the pyramid designers. Most of us check online for comments on car

dealers or realtors before we make a big purchase or sale. There is no question that past performance and reference checks are important in contracting.

**So what is all this fuss about references?** There was a hot debate over how past performance was applied in federal procurement. For many years, past performance only applied to determining responsibility. FAR Part 9 continues to require consideration of past performance in determining responsibility of bidders or proposers. It is pass or fail. For efficiency, the reference check was done only for the lowest bidder or most qualified or advantageous proposer.

This all changed with Federal Acquisition Streamlining Act (FASA) in 1994. While FAR Part 9 continues to apply, FASA now requires consideration of past performance as an evaluation factor in all negotiated procurements. This means, reference checks should be scored and compared when evaluating proposals. Does this mean the beleaguered contracting officer needs two reference checks for every procurement? No, but it does mean that past performance is applied in two different ways.

**Past Performance and Responsibility** - A responsible contractor is one that has the capability to perform the contract, including resources, personnel, facilities, capacity and INTEGRITY. We check references to discover how the contractor performed on other recent and similar contracts. If the contractor amassed a record of poor performance on multiple contracts, it will probably perform poorly again. Therefore the contractor is not responsible and we are compelled to reject the bid. This is not subjective. It is pass or fail and we are obligated to reject the failing contractor.

**Past Performance in RFP's** - Generally, the information we receive in a proposal is the proposer's representation of what it will do if awarded a contract. The proposal is filled with claims and statements attesting to the quality of the product or service, capabilities of the proposer and qualifications of key personnel. Evaluating past performance helps us validate the proposal claims and statements. When using past performance as an evaluation factor, we gain access to all sorts of valuable information that we can use in our discussions and evaluation. We can ask about the quality and timeliness of performance, if and why work was rejected, the nature, value and validity of claims, number of scope changes and price increases. We can even check past performance of subcontractors and key personnel.

**Past Performance Myths** - There is really no doubt as to the importance and utility of checking past performance. Unfortunately, there are a number of myths relating to past performance that need to be explored:

**One bad reference will ruin an otherwise good record.** False! Any business is capable of earning a bad reference. We should look for a pattern when reference checking. One bad reference, when the others are satisfactory should not result in a negative finding. References should also be recent and relevant. References older than three years are of marginal value, especially when compared to more recent references. A reference for window washing service may be relevant for a custodial contract but not so much for a fleet maintenance contract.

**We can only check the references provided in the proposal.** False! Any reference is fair game. We can check with any source who has recent and relevant contracting experience, including our own internal staff.

References are not likely to share information on poor experiences. False! Unlike with personal references, businesses and governments are usually more than willing to share good and bad experiences with contractors.

**A new firm is at a clear disadvantage without references.** Maybe! No references means we need to check elsewhere for our responsibility determination. We cannot use a lack of references as a basis for a not responsible determination. However, a proposer must have some basis for supporting its qualifications to perform a contract. This experience might have come as a subcontractor or employee on another contract. Claiming experience without providing a reference raises a red flag in any procurement.

**We can always use past performance when evaluating proposals.** False! While past performance is always fair game when checking for responsibility, we can only use past performance as an evaluation factor when it is stated as an evaluation factor in the RFP. Just to be safe, we should include a statement in every solicitation that we reserve the right to check references.

**Past performance is used only when evaluating proposals.** False! As previously discussed, past performance is one tool we use to determine responsibility. We also have an obligation to check responsibility when negotiating emergency or sole source contracts. If anything, information discovered in a reference check may be valuable leverage in negotiations.

**Summary** – When applied appropriately, past performance is a valuable tool to aid in determining a contractor’s responsibility and for evaluating proposals.

## CURRENT PRACTICES

### **The Gold Standard**

Imagine if one of the proponents responding to your most recent RFP had successfully completed an almost identical project using the same people, the same technology for a similar organization. Clearly, many of the risks related to completing this project on time, within budget and having the anticipated deliverables would be reduced significantly. Imagine if you were certain that this proponent had successfully completed a similar project! This is why past performance is the gold standard in evaluating proposals.

Past performance information can be extremely valuable when it is accurate, complete, timely and applicable to the proposal being evaluated. This standard, while easily described, is extremely difficult to achieve. Few organizations, including the U.S. federal government, have put in place the infrastructure which can deliver this assessment.

The award of contracts in the private sector is heavily influenced by a vendor’s strong performance record.

Let’s start with a description of past performance, what it is and how is it used. Here is one view from the perspective of the US Federal Government.<sup>56</sup>

### **How to use past performance information**

*When used in the source selection evaluation process, past performance evaluation criteria must provide information that allows the source selection official to compare the “quality” of offerors against the agency requirement and assess the risk and likelihood of success of the proposed solution and success of contractor performance. This requires the information to be relevant, current and accurate. For example, the information requested of the contractor and evaluated by the integrated project team should be designed to determine how well, in contracts of similar size, scope and complexity, the contractor —*

- *Conformed to the contract requirements and standards of good workmanship.*
- *Adhered to contract schedules.*

- *Forecasted and controlled costs.*
- *Managed risk.*
- *Provided reasonable and cooperative behavior and commitment to customer satisfaction.*
- *Demonstrated business-like concern for the interest of the customer.*

### **Sources of Past Performance Data**

*Past performance information can come from multiple sources. The two most familiar methods are asking the offerors to provide references and seeking information from past performance information databases. . .*

*There are other means of obtaining past performance information for evaluation. One very important means is through market research. Call counterparts in other agencies with similar work and ask them for the names of the best contractors they've worked with. Are there industry awards in the field of work? Who has won them? In fact, ask offerors to identify their awards and events of special recognition. Look for industry quality standards and certifications, such as ISO 9001:200 and SEI CMMI® (discussed in Step Five). Ask offerors what they do to track customer satisfaction and to resolve performance issues. Is there an established and institutionalized approach? In short, the integrated project team must take past performance more seriously than just calling a few references. Make the answers to these questions part of the request for proposals. Rather than have a separate past performance team, integrate this evaluation into the technical and management proposal evaluation effort.*

In the remainder of this section, we will describe how reference information and past performance assessments are used in a variety of governments and agencies.

### **In the US Federal Government**

The Federal Government has established infrastructure, policies and procedures to capture and utilize Past Performance data in evaluating proposals. While a detailed discussion of this topic is beyond the scope of this publication, it is important to understand the role of Past Performance in federal procurement.

Recently, the Congressional Research Service published a report on Legal Requirements and Issues related to Past Performance. Here are some of the highlights:<sup>57</sup>

- *Congress enacted the Federal Acquisition Streamlining Act (FASA) of 1994, which established a statutory basis for agency evaluation of past performance.*
- *The requirement that agencies evaluate contractor performance was imposed, in part, because "performance assessment is a basic 'best*

*practice' for good contract administration, and is one of the most important tools available for ensuring good contract performance."*<sup>9</sup> Additionally, Congress and the executive branch hoped that written evaluations of contractor performance would "improve the amount and quality of performance information available to source selection teams," which would, in turn, "enable agencies to better predict the quality of, and customer satisfaction with, future work."

- *A copy of the evaluation should be provided to the contractor "as soon as practicable after [its] completion,"<sup>21</sup> with the contractor then having "a minimum of 30 days to submit comments, rebutting statements, or additional information." Disagreements between the contractor and the contracting officer are reviewed "at a level above the contracting officer," although "[t]he ultimate conclusion on the performance evaluation is a decision of the contracting agency."*
- *Because of the potential use of agency performance evaluations in source selection decisions, contractors are generally concerned about the contents of their evaluations and want to ensure that these evaluations are accurate and unbiased.*
- *Congress and the executive branch required agencies to consider past performance in source selection decisions in the hope that the government would obtain better performance under its contracts—and better value for its procurement dollars—by shifting the basis of its source selection decisions. Previously, agencies conducting negotiated procurements had relied heavily on what some commentators described as "complex technical and cost proposals," which these commentators asserted had "no correlation to the contractor's ability to perform the job."*
- *Consideration of past performance in source selection decisions was seen as an alternative to reliance on such proposals, especially by those who characterized past performance information as the best indicator of a contractor's ability to provide quality goods and services at a reasonable cost.*
- *Agencies sometimes also consider contractors' past performance in source selection decisions in ways that do not entail use of the past performance evaluation factor. For example, agencies may consider past performance as a component of other evaluation factors (e.g., experience, mission capability), as well as its own factor.*
- *If the proposed amendments are adopted, agencies would be required to evaluate contractors' performance on the following factors as "exceptional," "very good," "satisfactory," "marginal," or "unsatisfactory":*
  - I. *Technical (quality of product or service.)*



- II. *Cost control (not applicable to firm-fixed-price or fixed-price with economic price adjustment arrangements.)*
- III. *Schedule/Timeliness.*
- IV. *Management or Business Relations.*

There are significant problems associated with the current systems related to the collection and use of past performance data. For example:

- **Grade Inflation:** In order to avoid conflicts with Contractors, an agency awards higher scores than warranted by the Contractor's performance.
- **Stale Dated Information:** Evaluators consider information that is greater than three years old and may not be accurate or relevant.
- **Failure to Identify Source of Information:** Evaluators obtain information informally and fail to identify the source of the information or whether the information is reasonable and fair.
- **Failure to Select Appropriate Information:** Evaluators do not use performance information that applies to 'same or similar projects'.
- **Use of Untrue or Unsupported Information:** Evaluators use performance data provided by a disgruntled reference or one with a personal grudge against the contractor.
- **Failure to Discuss Information with Contractor:** Contractors are entitled to be informed of and provide input about negative performance issues.

### **What do I say in the RFP?**

The State of Idaho's RFP Guidelines represent the most common approach. They require each offeror to submit a specified number of references and provide the offerors with a questionnaire for each reference.<sup>58</sup>

*References: Industry references may be required and used as an evaluation tool if identified as such in the RFP. A minimum of three references where the offeror has provided similar products or services should be used*

*Suggested Wording: The offeror shall provide a minimum of three (3) trade references including names of persons who may be contacted, position of person, addresses, and phone numbers where similar products or services similar in scope to the requirements of this RFP have been provided.*

*Optional Wording: Included with this RFP is a questionnaire that must be sent to any references cited in your proposal response. The questionnaire instructs references to fill out and return the document directly to the Division of Purchasing office. The offeror shall send this questionnaire to a minimum of three (3) trade references where similar products or services similar in scope to the requirements of this RFP have been provided. The offeror shall provide a listing of references where the questionnaires were sent, including names of persons, position of person, addresses, and phone numbers*

Here's another approach used by Santa Clara County (CA):

#### *PAST PERFORMANCES / REFERENCES*

*The Offeror's proposal shall include three different external references from clients who have completed their projects in the last three years, who are willing to validate the Offeror's past performance on similar projects of size and scope. The minimum information that shall be provided for each client reference follows:*

- 1. Name of the contact person;*
- 2. Name of the company or governmental entity;*
- 3. Address of the contact person;*
- 4. Telephone number of contact person;*
- 5. Email address of the contact person;*
- 6. Description of the services provided and dates the services were provided*

#### **What are the rules?**

The state of Massachusetts has developed some specific rules for obtaining and using past performance information:<sup>59</sup>

#### *References*

*Pursuant to 801 CMR 21.06(9), a PMT may verify any references included in a bidder's response and conduct any other reference or credit checks it deems appropriate. Further, it may consider any documented references, including documented performance records of a bidder on file at the procuring department or solicited from other departments or entities. The PMT may conduct reference checks in a manner that it deems most appropriate and efficient. However, all such reference checks must be documented. Departments should use the same script or format of questions when conducting reference checks so that the results are consistent and fair to all bidders. A Sample Reference Review Form is available on the OSD Forms page and can be modified as needed. The team may also decide to accept unsolicited references. Reference checks may be made at any time during the procurement or contract.*

### **Using the information – the process**

Invariably, someone from the selection team makes the calls. If this is your job, what do you say? What questions do you ask? What is the purpose of the exercise? Clearly, you want to verify that the supplier did, in fact, do a very good job at that company.

Only the most naive evaluator would assume that a supplier will submit the name of a bad reference. The existence of a few solid references only demonstrates that the bidder has the potential for excellent work. It seems obvious that vendors will only submit the names of companies which they know will provide them with wonderful references. This is not always true. Occasionally, you will contact a reference that endorses the competition or doesn't remember the vendor at all.

There is another, more aggressive tactic. Phone the reference accounts, not only to learn about the vendor, but to learn the names of other purchasers. (Alternatively, ask for an extensive list of customers in the RFP.) Once this has been accomplished, call all of the purchasers who weren't listed as references.

The purpose of these calls to "non reference" accounts is to learn about the supplier from a broader range of customers. These customers will relate both good and bad stories about the bidder, and its products or services.

The purpose in contacting "non reference" accounts is not simply to identify problem situations (which may have been caused by the supplier or its products, the purchaser, third parties, etc.). The purpose is to learn what the supplier did when difficulties were encountered? What did the supplier do when its project leader left? What happened when the key user became ill? What did the supplier do when the customer required more support on short-notice? Did the supplier act in the customer's best interest? Did the supplier simply disavow responsibility? Did the supplier and purchaser solve the problem by working as partners?

If these conversations cause you to be concerned about the risks in dealing with a particular supplier, then discuss the information with the supplier. You may want to listen to the supplier's side before accepting the information.

If you do decide to incorporate this approach to reference checking into your evaluation procedure, you should modify your RFP so that the vendors are aware of the process.

Here's how one RFP informed the bidders that the reference checking would include a broad range of customers, not just the names they provided: "Our evaluation will be made primarily via checks with the bidder provided references and other industry sources and users known to the evaluation team."

### **Different Approaches to Past Performance Data**

There are at least four different approaches to Past Performance data and numerous variations on each:

- Do nothing.
- Use references to confirm the winner.
- Evaluate references as a Pass or Fail analysis.
- Assign a score to references and past performance.

Each of these is discussed in the remainder of this Section.

#### Do nothing.

Some organizations don't bother asking for references in the RFP. Others, ask for references but don't use them. These organizations believe that their evaluation, without using any reference material, is sufficient to determine the best value proposal.

(Asking for references but not using this information can raise questions of fairness. Why ask for data from Proponents if it is not to be used?)

The use of reference information is not usually required by an agency's procurement policies or procedures. However, a disgruntled vendor could easily politicize an intended award by claiming that had references been checked, then the contract would not have been awarded to the recommended vendor. Also, should the selected Contractor fail to perform, management of the agency could challenge the competency of the Procurement Officer for not having checked references.

#### Use references to confirm the winner.

Some organizations complete the evaluation, identify the apparent winner and then check the references submitted by the apparent winner. And they only do this so that they can say that they did check references. Since they only do a cursory examination of the references provided by the vendor, it is reasonable to assume

that they never get bad news and the references do confirm that the vendor did a good job for them.

This naïve approach adds no value to the process and, in fact, is a sham.

Evaluate references as a pass or fail factor.

Some organizations evaluate Past Performance and either pass or fail vendors.

The State of Montana<sup>60</sup> has an RFP template that gives the author the option of evaluating references on a pass/fail basis:

*Use this section if you want references to be evaluated on a pass/fail basis.*

*4.2.1 References. Offeror shall provide a minimum of (insert number) references that are currently using or have previously used supplies and/or services of the type proposed in this RFP. The references may include state governments or universities for whom the offeror, preferably within the last (insert number) years, has successfully completed (insert language pertaining to this type of contract). At a minimum, the offeror shall provide the company name, location where the supplies and/or services were provided, contact person(s), contact telephone number, e-mail address, and a complete description of the supplies and/or services provided, and dates of service. These references may be contacted to verify offeror's ability to perform the contract. The State reserves the right to use any information or additional references deemed necessary to establish the ability of the offeror to perform the contract. Negative references may be grounds for proposal disqualification.*

The State of Mississippi's Dept. of Information Technology Services has adopted this approach. Here are the key features and the specific language they use in their RFPs:<sup>61</sup>

Vendors must provide at least five references.

*The Seller must provide at least five (5) references consisting of Seller accounts that the State may contact. Required information includes customer contact name, address, telephone number, email address, and engagement starting and ending dates. Forms for providing reference information are included later in this RFP section. The Seller must make arrangements in advance with the account references so that they may be contacted at the Project team's convenience without further clearance or Seller intercession.*

An unfavorable rating from one of the references can cause their proposal to be 'removed from further consideration'.

*Any of the following may subject the Seller's proposal to being rated unfavorably relative to these criteria or removed from further consideration, at the State's sole discretion:*

- *Unfavorable references that raise serious Failure to provide reference information in the manner described;*
- *Inability of the State to substantiate minimum experience or other requirements from the references provided;*
- *Non-responsiveness of references to the State's attempts to contact them; or*
- *concerns about material risks to the State in contracting with the Seller for the proposed products or services.*

References must be current and for a project 'similar in scope'.

*References should be based on the following profiles and be able to substantiate the following information from both management and technical viewpoints:*

- *The reference installation must be for a project similar in scope and size to the project for which this RFP is issued;*
- *The reference installation must have been operational for at least one (1) year.*
- *Sellers seeking "Value-Add" status must include Mississippi references. If there are no Mississippi references, then Seller must submit those that are within the 200-mile "Value-add" area.*

The State can request information from any previous customer.

*The State reserves the right to request information about the Seller from any previous customer of the Seller of whom the State is aware, including the procuring agency and/or other agencies or institutions of the State, even if that customer is not included in the Seller's list of references, and to utilize such information in the evaluation of the Seller's proposal.*

#### Assign a score to references and past performance.

Some organizations assign a score to the references and include the points in the overall evaluation. Sometimes, there is a minimum acceptable score, say 12 out of 20. Firms receiving 12 or fewer points would be eliminated from further consideration.

Typically, references are worth between 5% and 25% of the total points. The references are contacted for the “winner” or the “finalists”, the information is often obtained using a checklist or questionnaire, and a score is assigned.

This section contains two examples of how different organizations determine a score for past performance. The first example, from Idaho, is simple and straightforward; the second, from Washington State, is more complex.

### **State of Idaho<sup>62</sup>**

The state requires that each Vendor contact three references and have each complete a Reference Questionnaire that was included in the RFP. The References email or fax the form back to the Procurement RFP Lead from the State.

Their 2-page Reference Questionnaire asks the reference to rate the vendor on a scale of 0 to 10 (where 10 is excellent) on 9 different factors: quality of the vendor’s services, response time, meeting the schedule on time, providing deliverables on time, customer service, quality of the vendor’s staff, accuracy of the bills, ability to resolve problems, flexibility in meeting business requirements, and the likelihood of recommending this company to others.

### **Washington State**

Here is how a Washington State agency described the process in its RFP:<sup>63</sup> The good news is that they provided the bidders with details of the reference information sought and the weight or score that was being assigned to references. The bad news is that this section is legalistic and difficult to understand. I expect that more than one of the vendors read this section two or three times and still didn’t understand it fully.

#### *References*

*Points for References (700 sub category points, 560 minimum sub category points required to be considered responsive) Proposer(s) must provide 5 references with experience under existing and prior contracts of a scope similar to this RFP. The scoring is based off the 5 references provided, a maximum value of 140 points per reference.*

*Qualified bidders will be evaluated on performance under existing and prior contracts of a scope similar to this RFP. Performance information will be used for both responsibility determinations and as an evaluation factor against which*

*bidder's relative rankings will be compared to assure best value to the state. The state will focus on information that demonstrates the bidder's performance relative to the size and complexity of the procurement under consideration. References other than those identified by the bidder may be contacted by the state with the information received used to replace any of the 5 references provided by the bidder, in the evaluation of the bidder's past performance.*

*Past performance will receive relative consideration as designated in each segment. All subfactors are of equal importance. The bidder is responsible for providing a copy of Attachment "C" "Past Performance Questionnaire" to no less than 5 references for completion and delivery of completed sealed surveys with their RFP proposal response, and with a signed copy of Attachment "B" for each reference. The references will be evaluated and scored on the following categories. If bidder fails to provide references at the time the RFP is submitted the RFP may be deemed non-responsive.*

*The state will make additional copies of the completed sealed evaluations.*

*Product and Service – compliance with contract requirements*

*Timeliness of Performance – met interim milestones, responsive to technical direction, completed on time, including wrap-up and contract administration, met repair response times, etc.*

*Cost Control – within budget – current accurate and complete billings – relationship of bid costs to actual costs – cost efficiencies...*

*Business Relations – effective management, reasonable/cooperative behavior – flexible effective contractor recommended solutions – business like concern for customer's interests.*

*Community Relations – Citizen like concern for community safety.*

*Performance for non-cost factor (past performance) will be scored as raw points from 1(lowest) to 7 (highest) using the following definitions: (N/A responses = 0) The points will be totaled.*

*Performance Level 7: Performance indicates excellent capability and support of the contract. Performance stands above all others. There are no critical shortfalls.*

*Performance Level 6: Performance is above expectation, far exceeds desired quality, and stands out. May have shortfalls in a few non-critical areas.*

*Performance Level 5: Performance is slightly above expectations and for the most areas exceeds desired quality. Has exhibited some shortfalls in a few non-critical areas.*

*Performance Level 4: Performance meets minimum expectations and is generally adequate. Has exhibited shortfalls in performance in non-critical areas and does not stand out.*



*Performance Level 3: Performance is seldom complete, deficiencies exist in critical areas and limited shortfalls exist in non-critical areas.*

*Performance Level 2: Performance is not complete and serious shortfalls in capability exist.*

*Performance Level 1: Performance is non-existent in critical and non-critical areas.*

*Assessment of the bidder's past performance will be one means of evaluating the credibility of the bidder's proposal, and relative capability to meet performance requirements.*

*Information utilized may be obtained from the references listed in the proposal, other customers known to the state, consumer protection organizations, and other who may have useful and relevant information. Information may also be considered regarding any significant subcontractors, and key personnel records.*

*Evaluation of past performance will be based on consideration of all relevant facts and circumstances including litigation and investigation history. It will include a determination of the bidder's commitment to customer satisfaction and will include conclusions of informed judgment. Litigation and investigation 10-year history concerns may reduce reference scores, or may cause proposals to be considered non-responsive.*

*Award may be made from the initial offers without discussions. However, if discussions are held, bidders will be given an opportunity to address unfavorable reports of past performance. Recent contracts will be examined to ensure that corrective measures have been implemented. Prompt corrective action in isolated instances may not outweigh overall negative trends.*

*Bidder shall send their listed references (with a copy included with proposer(s) to the state) a letter to the following effect, authorizing the reference to provide past performance information to the state. The letter shall be given to each reference at the time they are given the survey (refer to Attachment B).*

The Past Performance Questionnaire contained 5 categories of questions and required the reference to assign a performance score of between 1 ("non-existent") to 7 ("excellent capability; there are no critical shortfalls") for each. Here are the five categories of questions:

- Product and Service – 11 questions
- Timeliness of Performance – 2 questions
- Cost Control – 2 questions

- Business Relations – 3 questions
- Community Relations – 2 questions.

## **An Ending Comment**

In this chapter, we've examined each of the nine different components of the evaluation process from the perspective of best practices. By adopting these best practices, you can reduce the risk that your process is flawed, or doesn't work properly, or is not "fair and open".

## **End Notes**

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1. Reference 102. State of Nevada, Department of Administration, Purchasing Division, RFP Template, July 2012, pg 5, 41 pgs,  
<http://purchasing.state.nv.us/Contracting/agtemp.doc>
  2. See NIGP Online Dictionary of Procurement Terms,  
[http://www.nigp.org/eweb/DynamicPage.aspx?Site=NIGP&webcode=pd-ep\\_online\\_dict](http://www.nigp.org/eweb/DynamicPage.aspx?Site=NIGP&webcode=pd-ep_online_dict)
  3. Pg 18, Reference 93.
  4. This RFP is no longer available on the web. State of Connecticut, Request for Proposals for Information Technology Services, Feb. 1997, 90 pgs.
  5. Reference 103. Integrated Justice Information Systems Institute, Pre-RFP Toolkit, 3rd Edition, 2013, pg 103, 119 pgs,  
[http://www.ijis.org/docs/pre-rfp\\_toolkit\\_v3.pdf](http://www.ijis.org/docs/pre-rfp_toolkit_v3.pdf)
  6. Page 3, Reference 89.
  7. This discussion is from the 2009 version of Utah's Request for Proposal Manual. Unfortunately, the revised version of this manual, Reference 26, does not contain this discussion.
  8. Reference 104. NIGP and CIPS, Public Procurement Practice, Developing Evaluation Criteria, 3 pgs,  
<http://www.nigp.org/eweb/docs/Practices/DevelopingEvaluationCriteria.pdf>
  9. See footnote 4 above.
  10. Reference 42.
  11. Page 27, Reference 20.
  12. Reference 105. State of Idaho, Division of Purchasing, Guidelines to Developing and Evaluating a Request for Proposal, 2007, pg3, 40 pgs,  
[http://purchasing.idaho.gov/pdf/publications/guidelines\\_for\\_rfp.pdf](http://purchasing.idaho.gov/pdf/publications/guidelines_for_rfp.pdf)
  13. Page 36, Reference 43.
  14. Pgs 16-17, Reference 92.

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15. This RFP is no longer available on the web. Management Board Secretariat, Government of Ontario, Strategic Procurement Management Request for Proposal Tender No. 93. PS.1, 1993, 128 pgs.
  16. Reference 106. Federal Acquisition Regulations, This subpart prescribes policies and procedures for selection of a source or sources in competitive negotiated acquisitions, [https://www.acquisition.gov/far/html/Subpart 15\\_3.html](https://www.acquisition.gov/far/html/Subpart%2015.3.html)
  17. Reference 74.
  18. Reference 107. Source Selection Decision Document for Launch Operations Support Contract (LOSE)F04684-Q2-Ra0024, 7 pgs, <http://www.foia.af.mil/shared/media/document/AFD-090515-027.pdf>
  19. Pgs 12, 16-17, Reference 92.
  20. Reference 108. Minnesota risk management plan template, 3 pgs, [mn.gov/oet/images/Risk\\_Management\\_Plan\\_Template.doc](http://mn.gov/oet/images/Risk_Management_Plan_Template.doc)
  21. Reference 109. Minnesota Risk Assessment Questionnaire, 13 pgs, [mn.gov/oet/images/Risk\\_Assessment\\_Questionnaire.doc](http://mn.gov/oet/images/Risk_Assessment_Questionnaire.doc)
  22. Page 33, Reference 100.
  23. Pg 33, Reference 42.
  24. Reference 110. North Dakota, RFP Evaluators Guide, 10 pgs, <http://www.nd.gov/spo/legal/docs/rfp-evaluators-guide.pdf>
  - 25 Pgs 84-86, Reference 76.
  - 26 Appendix B1, pg 13, Reference 77.
  27. Page 40-41, Reference 77.
  28. Page 22, Reference 93.
  29. Page 14, Reference 26,
  30. Page 18, Reference 78.
  31. This RFP is no longer available on the web. State of Alaska, Transportation and Public Facilities, Request for Proposals ASPS #90-0154, For Automated Management System(s) for the Alaska State Equipment Fleet (SEF) and for the Alaska International Airport System (AIAS), 1990, 142 pgs.
  32. Page 28, Reference 20.
  33. Section 81.470(5), Reference 40.
  34. See NIPG Online Dictionary of Procurement Terms, [http://www.nipg.org/eweb/DynamicPage.aspx?Site=NIPG&webcode=pd-ep\\_online\\_dict](http://www.nipg.org/eweb/DynamicPage.aspx?Site=NIPG&webcode=pd-ep_online_dict)

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35. Pages 17-18, Reference 79.
36. See NIPG Online Dictionary of Procurement Terms,  
[http://www.nipg.org/eweb/DynamicPage.aspx?Site=NIGP&webcode=pd-ep\\_online\\_dict](http://www.nipg.org/eweb/DynamicPage.aspx?Site=NIGP&webcode=pd-ep_online_dict)
37. Reference 111. 13-1-115 NMSA 1978 New Mexico Statutes Annotated, 122 pgs,  
<http://www.cityofclovis.org/wp-content/uploads/2012/10/State-of-NM-Procurement-Code.pdf>
38. Section 81.470(6), Reference 40.
39. See Reference 78 for a discussion of these issues.
40. Reference 112. Page 1, "Post Tender Negotiations Guideline", Victoria Government Purchasing Board, 1996. While this document is no longer available, it has been used as background in a discussion on issues related to post tender negotiations,  
<http://commercialissues.blogspot.ca/2009/09/best-practice-advice-in-post-tender.html>
41. Page 2, Reference 112.
42. Reference 113. Albemarle County (VA) Purchasing Manual, Chapter 16, Section 6,  
[http://www.albemarle.org/upload/images/Forms\\_Center/Departments/County\\_Attorney/Forms/Purchasing\\_Manual\\_Chapter16\\_Negotiation\\_General.pdf](http://www.albemarle.org/upload/images/Forms_Center/Departments/County_Attorney/Forms/Purchasing_Manual_Chapter16_Negotiation_General.pdf)
43. Some of the ideas and material in this section are based on Chapter 18, Negotiations, Proposals That Win Federal Contracts, Barry L. McVay, Panoptic
44. California Administrative Manual, CAM 3.5.6.
45. Page 21-22, Successful Negotiating, Ginny Pearson Barnes, Career Press, 1998.
46. Page 3, Reference 112.
47. Pages 11-12, Reference 112.
48. See footnote 42 above.
49. Reference 114. California Department of General Services, Procurement Division, Negotiation Process Guide, April 2013, 14 pgs,  
[http://www.documents.dgs.ca.gov/pd/delegations/pac042313\\_P-06-13.pdf](http://www.documents.dgs.ca.gov/pd/delegations/pac042313_P-06-13.pdf)
50. Reference 115. California Department of General Services, Procurement Division, Example Contract Negotiation Plan, 16 pgs,  
<http://www.documents.dgs.ca.gov/pd/poliproc/6611%20Negotiations%20Guidebook/Negotiation%20Detailed%20Plan%20Example.docx>
51. Reference 116. Wisconsin State Procurement Manual, Best and Final Offers Procedure, 2007, 4 pgs,  
<http://vendornet.state.wi.us/vendornet/procman/proc39.pdf>
52. Reference 117. North Dakota, Sample Request for Best and Final Offer, 3pgs,  
<http://www.nd.gov/spo/agency/docs/best-and-final-offer.doc>
53. Pg 102, Reference 43. Pgs 99-102.

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54. Reference 118. University of Texas at El Paso, Purchasing Dept., Best and Final Offers, <http://admin.utep.edu/default.aspx?PageContentID=5623&tabid=67908>
55. John Adler is currently Vice President, Procurement, Dallas Area Rapid Transit (jadler@dart.org).
56. Reference 119. Department of Commerce and the Office of Federal Procurement Policy, Seven Steps to Performance-Based Acquisition. This is a project conceived several years ago in discussions between acquisition leadership in the. This web site deals with Step 6, Emphasize past performance in evaluation.  
<http://acquisition.gov/sevensteps/about-project.html>
57. Reference 120. Congressional Research Service, Report for Congress, Evaluating the "Past Performance" of Federal Contractors: Legal Requirements and Issues, Feb. 2013, 23 pgs, <http://www.loc.gov/crsinfo/>
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58. Reference 105.
59. Reference 79. pgs 18-19
60. Reference 121. State of Montana, Request for Proposal template, pg 15, 26 pgs, Page 15, <http://gsd.mt.gov/content/Docs/AgencyRFPTemplate.doc>
61. Reference 122. Information Technology Services, State of Mississippi, RFP 3760, May 2014, 139 pgs, pgs 94-96, <http://www.its.ms.gov/procurement/rfps/3760rfp.docx>
62. Reference 123. State of Idaho, RFP Template, 22 pgs, pgs 21-22, [http://purchasing.idaho.gov/pdf/forms/RFP\\_Template\\_010114.doc](http://purchasing.idaho.gov/pdf/forms/RFP_Template_010114.doc)
63. Reference 124. State of Washington, Department of General Administration, Office of State Procurement, Request for Proposal 14600, Sept. 2001, 87 pgs, pgs 20-21, <https://fortress.wa.gov/ga/apps/contracting/bids/14600b.doc>