***Text Legend*** *Delete this legend before finalising the document*

*Red text is an instruction and should be deleted after reading*

*Blue text should be edited or deleted as required. Change Blue text to Black if keeping*

*Black text should generally be considered as fixed text*

*[Goods/services/works procurement template - Negotiation Plan]*

Negotiation Plan

Title: [Title of Request]

Request Number: [XXX]

State Agency: [name of State Agency]

Date Prepared: [Day Month Year]

Prepared By: [State Agency Officer Name]
[State Agency Officer Title]
[Email]
[Phone number]

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# Purpose of the Plan

The Negotiation Plan has been designed to assist agencies with low to medium value/risk procurements. For high value/risk procurements or negotiation items, agencies should contact their Department of Finance procurement facilitator (if applicable), their in-house legal team (if applicable) or the State Solicitor’s Office, for further advice.

The aim of this Plan is to outline how the [name of State Agency] (the Agency) will manage the negotiation process with a Preferred Respondent prior to finalising the award of contract. The Plan also lists the various do’s and don’ts of the negotiation process.

This will assist the negotiation team to comply with the legal, operational and ethical requirements consistent with relevant Government legislation, regulations and policies and to comply with the terms of the Request and other terms and conditions of the contract subject to the negotiation.

Where further clarity is required, this Negotiation Plan should be read in conjunction with:

|  |  |
| --- | --- |
| **Document** | **Location / Record Number** |
| Procurement Plan or Project Definition Plan | [XXX] |
| Business Case | [XXX] |
| Request document and addenda | [XXX] |
| Evaluation Report | [XXX] |
| Respondent’s Offer | [XXX] |
| [Any additional document/s] | [XXX] |

# Requirements in the Request Document

## Background

Below is a brief summary of the Request:

|  |  |
| --- | --- |
| **Proposed Contract Term** (including extension options) | [Insert Proposed Contract Term] |
| **Estimated Contract Value** (including extension options and GST) | $[Insert Contract Value] |
| **Contract Framework** (e.g. sole supplier, panel) | [Insert Contract Framework] |
| **Summary of Requirements** | [Insert summary of requirements. This may include:* Summary of specifications;
* Purpose / Intention of the Request; and/or
* Outcomes required]
 |

*[NB: Information should be detailed enough to provide someone at arms length with a clear understanding to the background of the Request. Depending on the nature of the Request, a certain level of flexibility may have been built into the requirements for the proposed good/service and this would require negotiations between the Agency and the Preferred Respondent to clarify and finalise matters such as service delivery and service standard, the scope of services etc, prior to award of contract.]*

# Negotiation Teams’ Details

For significant purchases, a team of negotiators may be appropriate. Consideration should be given to the composition and the type of expertise or skills required. For example, experts in technical and financial areas, ICT consultants, end users or the contract manager. A lead negotiator needs to be selected and roles of members need to be established and clarified.

## The Agency’s Negotiation Team

### Agency’s Lead Negotiator

Name: [Full name]

Position: [Position]

### Other Members of the Agency’s Negotiation Team

| **Name** | **Role / Responsibility** |
| --- | --- |
|  | *[e.g. technical expertise, probity advisor, facilitator]* |
|  |  |
|  |  |

## Preferred Respondent

*[Duplicate this section if negotiations are being held with more than one Respondent]*

|  |  |
| --- | --- |
| Name: | [Provide name of legal entity and ‘trading name’ if applicable] |
| Tender Sum: | [Provide amount that would be awarded to Respondent] |
| Preferred Respondent’s Representative: | [Full name]  |
| Position: | [Representative's position] |
| Telephone: | (0X) XXXX XXXX |
| E-mail: | [Representative's email address] |

### Other Members of the Preferred Respondent’s Negotiation Team

| **Name** | **Position** |
| --- | --- |
|  |  |
|  |  |
|  |  |

# Classifications

For the purposes of this guidance:

|  |
| --- |
| **Clarification** |
| Description | A clarification is contact between the Agency and a (potential) Respondent to clarify aspects of the tender or Offer which are unclear or abnormal. Clarifications cannot be used to fix deficiencies or material omissions in an Offer, materially alter the technical or cost elements of an Offer, and/or otherwise revise an Offer. Clarifications should not be used to seek additional information.  |
| Typical timing | From Request advertisement to contract award. |
| **Shortlisting** |
| Description | Shortlisting can be part of an evaluation process. Typically, offers are first assessed based on compliance and competitiveness. Offers that are non-conforming, non-compliant or non-competitive in comparison to other Offers that demonstrate value for money are excluded from further evaluation. The remaining Offers are shortlisted and subject to further evaluation. The inclusion of a shortlisting process in a procurement should be communicated to Respondents before Offers are submitted and detailed in the Request document. The rationale for exclusion or inclusion should be documented for each Offer. |
| Typical timing | During evaluation, before award. |
| **Negotiation** |
| Description | A negotiation is a strategic discussion that seeks to resolve an issue in a way that both parties find acceptable. Generally, negotiations with Respondents should take place after the Offers have been evaluated and, as a result of this evaluation, a Preferred Respondent(s) has been identified. Negotiations can also occur during contract management between the Contractor and the Agency when changes to the contract are required. |
| Typical timing | Usually after evaluation, when a Preferred Respondent has been determined, or after contract award. |

# Principles of Negotiation

Government must maintain its role as a model contracting party at all times and comply with the [WA Procurement Rules](https://www.wa.gov.au/government/multi-step-guides/western-australian-procurement-rules), including the need to obtain the best value for money for the taxpayer whilst maintaining integrity and accountability.

The following principles should be considered:

## Act Ethically with Integrity and Accountability

1. Negotiations should be carried out in a fair and equitable manner and in compliance with relevant Government legislation, regulation and policies. Please refer to the [WA Procurement Rules](https://www.wa.gov.au/government/multi-step-guides/western-australian-procurement-rules) and the [Act Ethically – With Integrity and Accountability Guideline](https://www.wa.gov.au/government/multi-step-guides/procurement-guidelines/procurement-planning-guidelines/act-ethically-integrity-and-accountability-guideline) on wa.gov.au.
2. Negotiations must be conducted in accordance with the process outlined in the Request document (including the Request Conditions).
3. The negotiation team will not for themselves or others seek or accept gifts or benefits from the preferred Respondent(s), or any other party associated with the negotiations.
4. Both parties should avoid negotiating on items that would effectively alter the scope of the Request or substantially amend the terms and conditions of the proposed contract. In some cases, there may be a need to negotiate a reduction in scope in certain circumstances (i.e. budget constraints), however care must be taken to ensure that Respondents are treated fairly. Negotiation on total price, itemised pricing or pricing structure or service standards must be carefully managed.
5. Negotiations should only be undertaken with a Preferred Respondent if there is genuine intent to award that Preferred Respondent to the contract.
6. The Agency should not provide one Respondent an opportunity to improve their bid if the Agency does not give the same opportunity to the other Respondents that submitted compliant Offers.
7. Negotiators should not attempt to pit one Preferred Respondent against another.
8. Outcomes of the negotiations, as well as any associated working papers or documents, are to be treated as confidential.
9. Members of the negotiation team, including independent advisors, are to notify the lead negotiator if any conflicts of interest (whether actual, potential, or perceived) arise prior to any negotiations or during the negotiations. If this occurs, a decision will be made as to whether the member should remain as part of the negotiation team.
10. Where a member of the negotiation team has not previously completed a Declaration of Interest and Confidentiality form, they are to complete the form at Attachment C prior to being provided with any information or documentation related to the negotiations. Where a completed form declares an interest, how the interest will be managed should be documented and put on file. There are conflict of interest guidelines available from the Integrity Coordinating Group webpage at [www.wa.gov.au/government/document-collections/integrity-coordinating-group](http://www.wa.gov.au/government/document-collections/integrity-coordinating-group).

## Be Prepared

1. All parties to the negotiations must be given adequate written notice of the issues to be negotiated. The period of notice would depend on the complexity of the issues to be negotiated.
2. If the Preferred Respondent elects to bring along their technical or legal advisor, adequate notice must be given to the Agency to provide an adequate response.
3. All items that the Agency and/or the Preferred Respondent wish to negotiate must be agreed upon beforehand and adequate time must be allowed for both parties to prepare their cases.
4. Minutes of the negotiations should be taken and copies provided to both parties to ensure they are an accurate reflection of the negotiation outcomes.

# Considerations for Planning the Negotiation

## Conduct Negotiations in Accordance with the Request Conditions

The [WA Procurement Rules](https://www.wa.gov.au/government/multi-step-guides/western-australian-procurement-rules) states in Rule D6 that:

State agencies must only conduct negotiations during the evaluation of offers if:

1. The right to negotiate was included in the Request; or
2. No offer obviously represents the best value for money, and the Request documentation does not preclude negotiation.

For this reason, it is important to be aware of the negotiation clauses within the Request document *before* entering into negotiation. For instance, the goods and services Request Conditions and General Conditions of Contract states that negotiation can occur at the preferred respondent stage and includes details of how this process will be undertaken.

## Insurance Commission of Western Australia Contractual Liability Cover

The Insurance Commission of Western Australia (ICWA) provides [contractual liability coverage](https://www.icwa.wa.gov.au/government-insurance/what-is-covered/liability) to Agencies contributing to the RiskCover Fund, which applies automatically unless:

* the Agency waives or limits its right of recovery (i.e. agrees to cap liability) or indemnifies another party;
* the indemnity, liability and/or insurance clauses in the Department of Finance Request templates, Request Conditions and General Conditions of Contract have been varied or departed from; or
* the contract establishes a joint venture or partnership in which the State is one party of the joint venture or partnership,

in which case the cover is voided. Agencies should consult with ICWA prior to engaging in negotiations for indemnity or liability clauses. A risk assessment needs to have been undertaken prior to engaging ICWA. Agencies should notify ICWA if any of the above situations arise, and ICWA will evaluate reinstating cover.

## Negotiating Price

Negotiating on price is not considered standard practice for WA State Government. If Preferred Respondents are offered an opportunity to provide a better price than what was included in their original Offer, then there is an argument that certain Respondents are allowed to improve their bid and this opportunity is not being extended to all Respondents. This may mean compliance with the policy requirement to act ethically with integrity and accountability is not being met.

Price negotiation must be considered on a case by case basis and balanced with the motivating factors which have prompted the need to negotiate on price. For instance, there may be a need to negotiate price where a project or contract requirement has a fixed, publicly advertised budget. Each scenario will invoke different considerations, however this must be weighed against not changing the scope too much as to be acting unfairly to other Respondents. Ultimately a rationale for the decision should be documented in each case.

A Best and Final Offer (BAFO) process refers to a multi-stage procurement process in which Respondents' Offers are subject to clarification, shortlisting and/or negotiation, and the Respondents are then asked to submit their final Offer, which would not be subject to further negotiation. If a decision is made that a BAFO process is required, the process for doing so must be clearly documented in the Request document. This is not standard practice and a rationale for the decision, and the transparency of the process from Offer to award, must be documented.

## Negotiating with Multiple Respondents

Negotiating with multiple Preferred Respondents at the same time should generally only be undertaken if there is genuine intent to award all Preferred Respondents to the contract (i.e. for a panel contract). As an example, the Agency should not negotiate with two Respondents at the same time if the Agency only intends to award one Respondent to the contract.

If negotiations with a Preferred Respondent are unsuccessful, then the Agency can determine if there is an alternative suitable Respondent to begin negotiations with. If there are no alternative Respondents considered suitable, all Offers should be declined. Negotiations should be exhausted with the Preferred Respondent before proceeding to negotiate with the next Preferred Respondent.

Where time constraints require a decision to be made and the contract awarded, negotiations may take place with multiple respondents if this is allowed for in the Request documentation. Agencies should review the Request documentation to ensure this practice will not breach the process contract. Generally, negotiation with multiple respondents should be considered as an exception rather than common practice.

Note that a shortlisting process is not considered a negotiation for the purpose of this guidance.

## Directly Engaging One Supplier

Procurement processes where the Agency directly engages one supplier without seeking competitive quotes may have greater flexibility for negotiations. This is mainly undertaken through an exemption or an exception to the procurement methods in the [WA Procurement Rules](https://www.wa.gov.au/government/multi-step-guides/western-australian-procurement-rules) (Rule C4.2 & Rule C5).

This flexibility primarily relates to changing the terms and conditions of the Request or allowing the Respondent to alter their bid, as there are no other Respondents in the process that would need to be offered the same opportunity.

Guidance for direct negotiations in community service procurements can be found [here](https://www.wa.gov.au/organisation/department-of-finance/buying-journey-9-preferred-service-provider).

## Accountable Authority

The Agency’s negotiation team should seek approval from the Agency’s Authorised Officer regarding final positions agreed with the Preferred Respondent. Unless the Agency’s Authorised Officer is present at the negotiation and is in a position that they can agree to revised conditions, no promises can be made by the Agency’s negotiation team during the negotiation. This should be conveyed to the Preferred Respondent.

# The Negotiation

## Items for Negotiation

The items identified for negotiation arerecorded in Attachment B*.*

*[All items for negotiation should be clearly identified before the commencement of the negotiation. A recommended spreadsheet layout is provided in Attachment B, which demonstrates the original clause/position, the proposed clause by the Respondent, and the Agency’s position. If negotiations are being held with multiple Respondents, Attachment B should be completed for each Respondent.]*

## Strategy for Negotiation

For more complex negotiations, a developed negotiation strategy may be useful for the Agency to determine how to approach the negotiation. Attachment A – Negotiation Strategy, outlines some considerations for each negotiation item. These considerations are outlined in more detail below.

*[If negotiations are being held with multiple Respondents, Attachment A should be completed for each Respondent.]*

### Objective

What do you want to achieve from the negotiation. For example, it may be requiring a supplier to increase insurance requirements to reduce the risk to the Agency or reducing their delivery timeframes to meet government priorities.

### Most Desirable Outcome (Best Case Scenario)

The best possible outcome for the Agency.

### Least Desirable Outcome (Worst Case Scenario)

The minimum the Agency is willing to accept.

### Zone of Possible Agreement

An area where two or more negotiating parties can find common ground is considered to be the zone of possible agreement (ZOPA) or bargaining range. It incorporates at least some of each party’s ideas and is most likely where both parties will reach an agreement.

The ZOPA exists between each party’s Least Desirable Outcome. It is recommended that the Agency’s negotiation team consider the Preferred Respondent’s best case and worst-case scenario when determining the ZOPA.



Figure 1. Diagram demonstrating zone of potential agreement.

If a ZOPA cannot be established by the negotiating parties, they are in a negative bargaining zone. In a negative bargaining zone, an agreement cannot be achieved since the needs and aspirations of both parties cannot be fulfilled.

### Best Alternative to a Negotiated Agreement (BATNA)

If the negotiations fail and an agreement cannot be reached, consider all the alternatives and determine what is the best option for the Agency. Some considerations could include:

* Is this item a must have?
* Do you have alternative Respondents that contain favourable positions on these items?
* What would be the associated costs involved with each alternative option. Which one represents the best value for the Agency?

The BATNA is the walk away point. If the proposed negotiated offer is better than your BATNA, then you can feel comfortable accepting it. If the proposed offer is not better than your BATNA, you should continue negotiation until it is clear that an agreement cannot be reached. At this point, you should consider withdrawing from negotiations and pursuing your BATNA.

Having a strong BATNA improves your negotiation power. If you have a strong alternative, then you do not need to concede as much to the Preferred Respondent and can push for a better deal. On the other hand, if your alternative options are not that great, or even non-existent, the Preferred Respondent can make increasing demands that you may have to accept. Therefore, it is important to continually consider and review you BATNAs.

### Other Considerations

**Industry**

Consider key information about the Preferred Respondent and the industry that should be kept in mind whilst negotiating and may be used as leverage. For example, if there are a lot of suppliers in the market that can provide what you are looking for, this may provide more leverage to the Agency.

**Communication**

Consider how you are going to communicate your position to the Preferred Respondent, including what information the Preferred Respondent needs to know and what information should not be shared. Also consider who in the negotiation team should be responsible for leading each negotiation item.

# Conclusion

*[Describe the main points that were negotiated and agreed between the Agency and the Preferred Respondent/s and confirm that the agreed positions have been incorporated in the contract and notified to the Preferred Respondent in the Award of Contract letter.]*

The outcome for each negotiation item is recorded in Attachment B.

Overall, the negotiation/s was/were consideredun/successful*. [If negotiations were unsuccessful, explain here the items that could not be agreed upon and what the next course of action will be.]*

Relevant records to the negotiation are located here:

|  |  |
| --- | --- |
| **Document** | **Location/Record Number** |
| Negotiation Plan | [XXX] |
| Written correspondence with Preferred Respondent/s *(e.g. emails discussing the negotiation).* | [XXX] |
| Minutes from any face-to-face meetings | [XXX] |
| Award Letter/s | [XXX] |
| Decline Letter/s | [XXX] |
| [Any additional document/s] | [XXX] |

Attachment A – Negotiation Strategy

**[Insert Respondent's Name]**

|  |
| --- |
| Negotiation Strategy Template(*Not to be shared with the Preferred Respondent*) |
| Request: [Request Number and Title] Date: XX/XX/XX |
| Rank | Negotiable Item | Objective | Most Desirable Outcome | Least Desirable Outcome | Zone of Potential Agreement | Roles and Responsibilities |
| *1. [Rank items by importance]* | *[State the item to be negotiated]* | *[What do you want to achieve i.e. reduce risk, etc].* | *[Most desirable outcome]* | *[Acceptable outcome, however undesirable]* | *[Where you estimate the Respondent and you will finally agree]* | *[Who will lead this negotiation item]* |
| 2. |  |  |  |  |  |  |
|  |  |  |  |  |  |  |
| **Notes:**1. *Include notes on key messages that need to be communicated to the Respondent*
2. *Include key information on the Respondent and the market that should be kept in mind whilst negotiating and may be used as leverage*
 |
| **BATNA**: *[Best Alternative to a Negotiated Agreement] What is the alternative if the negotiation falls through?*  |

Attachment B – Summary of Negotiation

**[Insert Respondent's Name]**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Clause Ref:** | **Original Clause in Request or General Conditions** | **Proposed Clause by Respondent** | **[name of State Agency] comment/position (including legal advice if appropriate)** | **Final agreed position and date** |
|  |  |  |  |  |
|  |  |  |  |  |
|  |  |  |  |  |
|  |  |  |  |  |
|  |  |  |  |  |
|  |  |  |  |  |

Attachment C – Declaration of Interest and Confidentiality

|  |  |
| --- | --- |
| Request Number: |  |
| Request Title: |  |

I (please print full name)

of (please print organisation details)

**(Declaration of Interest)[[1]](#footnote-2)**

1. Declare that neither I nor any of my immediate family[[2]](#footnote-3) has any interests, pecuniary or otherwise, other than that mentioned below or described in the attached sheet(s), which could reasonably be construed as having any influence on the proper and objective performance by me of my duties in relation to the above specified Request. Note: Interests to be declared include but are not limited to: affiliations; conference funding; equipment donations; financial assistance; travel assistance; rebates; hospitality; relationships; shares; company ownership; training and development; consultancy services; gifts; and/or sponsorships.

Declared Interest:

Additional Information attached? Yes / No (Please circle and initial as applicable)

1. Agree to truthfully declare, in writing to the Accountable Authority or delegate, any changes which may occur that relate to the matters stated in clause 1 of this Declaration, as soon as practicable after I become aware of the same;

**(Declaration of Confidentiality)**

1. Agree to keep all information and documents relating to the Request planning, development, evaluation or negotiation process confidential, and not to disclose or communicate the same to any person or persons except in the course of my duties without the prior written approval of the [name of State Agency];
2. Agree not to make copies of, or take any extracts of information except as may be necessary and essential for the due and proper performance of my duties;
3. *(Include the following clause if the agency’s negotiation team includes representatives external to the Western Australian State Public Service)* Agree to comply with all processes and protocols established by the [Insert the name of the State Agency] from time to time to maintain the confidentiality of information and documentation relating to this project. The processes and protocols will include those for the security of documentation, communications between the [name of State Agency] (and its officers, employees and consultants/contractors) and other parties;
4. Agree to return all documents, papers and other materials (including the negotiation plan) given to me relating to this project to the [name of State Agency] lead negotiator immediately when requested to do so; and
5. Acknowledge that conflicts of interests, breach of confidentiality and unauthorised disclosure are subject to the provisions and penalties contained in the *Public Sector Management Act 1994* and *The Criminal Code*. Unlawful disclosure of official information is a criminal offence punishable by up to 3 years imprisonment.

This declaration is made by me on the understanding that I will not be taken to have breached its terms if I am legally required to disclose the information referred to.

|  |  |
| --- | --- |
| Signed:.............................................................................................. | Dated……………………. |
| Witnessed By:..............................................................................................Witness Name (Printed)Signed:.............................................................................................. | Dated……………………. |

1. Conflict of interest guidelines available from the [Integrity Coordinating Group](https://www.wa.gov.au/government/document-collections/integrity-coordinating-group) webpage. [↑](#footnote-ref-2)
2. Immediate family members are spouses, de factos, children, parents, brothers and sisters. [↑](#footnote-ref-3)