

CHAPTER 7. CONTRACT ADMINISTRATION

SECTION 8. PRENEGOTIATION OBJECTIVE MEMORANDUM

7.8.1 General.

a. The pre-negotiation objective memorandum (POM), is an official documentation of the negotiation objectives set forth in a memorandum and signed by the negotiator. It is the negotiator's general plan for conducting negotiations, although it need not contain details of planned strategy, e.g., minimum or maximum negotiating position. The POM contains the negotiator's "fair and reasonable" price and time objectives, cost element objectives when a cost analysis is required, and the rationale and justification underlying these objectives. The POM justifies the negotiator's proposed settlement to reviewers, the Contracting Officer, the approving official (if applicable), and for the record. If the negotiator is the ACO or Contracting Officer, the memorandum also records their logic or rationale. The POM memorandum, with the Price Negotiation Memorandum (PNM), documents who, what, where, why, and how the action was anticipated and settled.

b. Pre-negotiation objectives are necessary for all negotiated pricing actions (FAR 15.406). Objectives represent the negotiator's pre-negotiation assessment of a fair and reasonable price and time settlement, after considering:

(1) Analyses of the contractor's proposal, as follows:

(a) Price: Always required. (See Chapter 7, Section 3 - Modification Process and Chapter 7, Section 7 - Truth in Negotiations, for procedures.)

(b) Technical: Required for all modifications more than \$100,000 (CEHNC Policy); recommended for modifications less than \$100,000, depending upon the scope and complexity of the action; required for modifications of \$100,000 or less if the negotiator does not have a working estimate to make a comparison with the proposal.

(c) Results of an audit and any exceptions allowed by the negotiator.

(d) Cost analysis: Incorporating the results of technical analysis, audit, market surveys, experience, etc; required for all modifications more than \$100,000 (CEHNC Policy); recommended for all modifications less than \$100,000 depending upon scope and complexity of the action; required for modifications of \$100,000 or less when there is no working estimate.

(e) Elimination of proposed costs which are inconsistent with normal accounting practices, unallowable or non-allocable under FAR Part 31.

(f) The facts of the situation: Cost impacts on the unchanged work; concurrently with other delays; acceleration; efficiencies; the effect on the schedule; knowledge of the contractor's operation; whether the work is forward priced or "after-the-fact," etc.

(g) Results of scope or fact finding sessions with the contractor, as appropriate.

(2) Comparison with the Government's Estimate.

(3) Price histories.

(4) Previous modifications for the same or similar work.

(5) Addressing profit objective when cost analysis is required, FAR 15.404-4. Compare proposed profit using the Corps of Engineers' Weighted Guidelines Method (EFARS 15.971).

(6) When a substantial portion of the work ordered under an undefinitized contraction modification (change order) is completed before final price is negotiated, the contractor assumes less risk. Consider this when developing a profit objective.

c. State the pre-negotiation objectives in terms of dollars and days time extension, showing the basis of each objective that will be considered during negotiations. When a cost analysis is required, separate cost objectives and profit objectives are necessary (explained later). In addition, a bottom line price objective is necessary for all pricing actions.

d. Without definite objectives, the negotiation will flounder and a successful settlement will be difficult, if not impossible to achieve. This could result in a settlement based on conditions that can neither be explained nor defended. Objectives such as "a fair and reasonable price," "the lowest price we can get," or "a price about 10% below the proposal," do not qualify as good objectives because they are too indefinite. State the cost and price objectives in terms of definite dollar amounts reflecting the team's evaluation of the terms and conditions of the intended contract action. If the team is considering alternative sets of conditions, each alternative set should have its own objective.

e. The POM's are pre-decisional material, marked "FOR OFFICIAL USE ONLY," and protected from release to the contractor prior to negotiations. See paragraph h below.

f. POM's are usually developed from a combination of factual and judgmental factors. The more judgment involved, the more flexible your negotiating position becomes. Everyone should know that POM's are only guides for the negotiation team and nothing more. If those who evaluate performances use POM's to measure success, they lose their significance. In such an event a team is likely to hedge and hesitate to produce honest estimates or estimates will be less definite. When an objective is based on a particular set of conditions, it is a reflection of the best judgment at the time and does not mean that it must remain rigid. If there is good reason to change judgment, based on different factors, the objective can be revised accordingly. A change in judgment may occur prior to or during the negotiation session. On the other hand, the change in judgment may emanate from the contractor's input or the Government team's interpretation of the projections. However, Government personnel should document all changes in the price negotiation memorandum and the revised Government estimate, if applicable, to clearly track the basis for the changes. Since the objective is a position hidden from the contractor's negotiators, a change in objectives does not indicate vacillation.

g. It is permissible, but not mandatory, to state a range for the cost, price, and time objectives between alternate positions. Some negotiators prefer to cite a minimum to maximum range for the objectives, explaining the basis for the range. Sometimes this technique can be dangerous, i.e., should a bilateral agreement fail, the contractor might obtain the POM in the "discovery" process of claims resolution or through the Freedom of Information Act. A unilateral modification containing the Contracting Officer's final assessment of the equitable cost or time adjustment for less than the highest objective(s) becomes more complicated to defend against a subsequent claim. At least at the pre-negotiation time frame, the range maximum was considered to be a "fair and reasonable" position. This is not to say that a unilateral modification containing less than the most liberal position will not be sustainable; it may well be. The problem becomes one of fully justifying why the previous position was later found to be incorrect or unreasonable. As a result, some experienced negotiators document only their most defensible or lowest position in the pre-negotiation objective, preferring to justify subsequent flexibility and more liberal settlement in the price negotiation memorandum (or unilateral modification). This is another reason why negotiators and reviewers should not measure success by how closely the final settlement parallels the pre-negotiation objectives. The key to justifying and selling a successful settlement is a clear presentation of how you applied good judgment, considering what you learned during negotiations, combined with the facts to form a sound rationale for the settlement.

h. Do not contrive "after the fact" or faked objectives, almost exactly matching the settled cost element, price, time, or profit agreements. It is impossible to consistently meet all pre-negotiation objectives. Negotiations are, by definition, a give-and-take process, leading to a mutually satisfactory conclusion. The negotiator should not be afraid to admit that the settlement was not exactly as planned. Contrived objectives always invite criticism from inspectors, reviewers, internal and external auditors and the Contracting Officer because they are not truthful. The negotiator and the Government both lose credibility in subsequent claim actions, when use of POM memorandums become necessary to reconstruct job history and to develop and support the Government's position. Integrity and honesty in practice and on record are fundamental principals of contract administration.

i. When negotiating a price based on a straight fixed-price contract, it is usually essential to plan more than one position. This holds true, especially if the Government is dealing with a contractor for the first time. Other positions may be necessary so that government negotiators may have some "bargaining room" or have any opportunity to "feel out" the contractor through the exchange of information in the negotiation process. When negotiating with a contractor with whom the Government has dealt for some time and has found reasonable, planning other positions may not be as significant.

j. There should be a logical flow from the pre-negotiation objective memorandum through the price negotiation memorandum allowing the reviewer to fully reconstruct the pre-negotiation plan and settlement.

7.8.2 Analyses Inclusion in the POM.

a. When cost analysis is required, the POM shall include a summary comparison in columnar format of (i) the proposal (ii) audit recommendations, (iii) cost/technical analysis, (iv) the Independent Government Estimate and (v) the cost objectives. Consider cost elements like the following, (but not limited to), as applicable:

- (1) Materials
- (2) Labor
- (3) Equipment
- (4) Subcontracts
- (5) Job Site Overheads
- (6) Other Costs
- (7) Extended Job Overhead
- (8) Impact
- (9) Acceleration
- (10) Home office overheads
- (11) Profit
- (12) Bond

b. State the bottom line cost objectives

c. When cost analysis is not required, summarize the results of the mandatory price analysis and the objective. When cost analysis is performed, as a minimum, analyze prices to determine that the overall cost objectives are fair and reasonable.

d. When multiple bid items or unit priced items are involved, the negotiator should use detailed work sheets for negotiating each, as necessary.

e. The columnar summaries and detailed cost objectives may be attachments to the POM. They do not necessarily have to be typed documents. They could also be marked-up copies of the proposal.

f. Include a summary of the time analysis and objectives.

7.8.3 Audit Exceptions. In addition to the summary listing of any applicable audit cost elements, the negotiator must explain in the detailed remarks any exceptions taken to the audit in developing the objectives.

7.8.4 Profit. AFARS require documentation of the profit analysis. When a cost analysis is required, related supplements to FAR 15.404-4 require basing the profit objective on the Corps of Engineers' Weighted Guidelines, and the pre-negotiation objectives shall include the profit analysis with a comparison of the proposed rate and amount to the objective rate and amount. Note that it is not mandatory to reach an agreement on the profit element of the overall settlement. FAR 15.404-4 advises not to attempt to obtain specific agreement during negotiations on exact values or weights assigned to the individual profit-analysis factors.

7.8.5 Format. Exhibit 7-8*1 depicts some sample formats for the Pre-negotiation Objective Memorandum. POMs for modifications which are expected to be completed and approved within the field ACO's authority will be signed by the Lead Negotiator and filed in the field's official copy of the contract modification. For those modifications, which are expected to exceed the ACO's authority, the Lead Negotiator will sign and forward the POM to CD-CA for proper staffing and signature by Office of Counsel and the HNC ACO. See Exhibits 7-8*1 and 7-8*2.