**Pre-Award Negotiations**

1. Pre-award negotiation (“hereinafter referred to as “Negotiation”) is the process in which the business unit discusses certain aspects of the bid with the bidder who has been recommended for the award of the contract, with the aim of understanding the rights and obligations of both parties and to achieve a mutually beneficial agreement. Negotiation is not a mandatory step in a procurement process. It shall be undertaken on an exceptional basis, and shall be only initiated by UNDP[[1]](#footnote-1) subsequent to review of the procurement process by the relevant procurement authority and in accordance with this policy. UNDP General Terms and conditions for goods and services are generally not to be negotiated. If there is an exceptional need to do so, the Legal Office in HQ must be contacted immediately by the business unit before any commitments are made to the supplier.

**Negotiation Principles**

1. Negotiations may involve some changes to the specified terms and requirements in the solicitation document and/or to the submitted offer from the recommended bidder. As such, negotiations should not be confused with requests for clarifications on offers which can be undertaken with any of the bidders during the evaluation process in order to gain a better understanding of the offers and/or to remove any non-material deviations from the stated requirements. It should also be distinguished from normal administrative contract finalization discussions with the winning bidder.

UNDP shall initiate a negotiation only with a bidder who shall be either of the following:

1. a bidder recommended for a contract award based on the evaluation criteria and selection method specified in the solicitation document (either the lowest priced responsive offer or the highest combined score when using the cumulative analysis; or
2. a bidder being considered for direct contracting or sole sourcing, whose offer has been evaluated and found to be substantially responsive to the requirements.

Negotiations shall be conducted with the recommended bidder, after the conclusion of the evaluation process and with the approval of the appropriate procurement authority. It shall not be undertaken for the purpose of effecting a change in the ranking of the bidders and it shall not be undertaken simultaneously with two (2) or more bidders.

Negotiations may result in the modification of the recommended offer but such modification must be achieved and agreed in a manner that is fully aligned with the principles of public procurement, and well within the rights and obligations of both parties.

**Obtaining Approval to conduct Negotiations**

Negotiations on procurement actions below the CAP threshold shall be initiated after authorization by the Head of Business Unit or personnel delegated with Procurement Authority.

Negotiations on procurement actions above the CAP threshold shall be initiated after authorization by the Procurement Authority (Head of BU or RCPO or CPO), based on the recommendation of the appropriate Procurement Review Committee (CAP, RACP or ACP).

Upon the completion of the negotiation, the BU is required to submit the final result of the negotiation to the Procurement Review Committee or to the Procurement Authority if the procurement action falls below the CAP threshold, with the following information:

1. the highlights of the negotiation process; and
2. the points agreed by both parties on each of the negotiation subjects and duly supported by the appropriate documentation including the minutes of negotiation meetings.
3. A contract that results from a negotiation process can be awarded after final recommendation from the Procurement Review Committee and approval by the delegated authority.

**Unjustifiable Reasons to Initiate Negotiations**

1. Negotiations are not required when all aspects of the recommended offer are responsive to the requirements of UNDP, and the final price remains within the budget for the activity.
2. Negotiations should not be conducted for any of the following reasons:
3. To create an opportunity for bidders to modify their offers in order to give undue preference to one bidder over another; or
4. To force bidders to accept additional work or supply additional goods that were originally not included in the Schedule of Requirements or TOR; or
5. To force the compliance of at least one offer, when all offers received are rejected or non-compliant (i.e., all offers failed to meet the technical requirements).

**Types of negotiations and Strategies**

1. Depending on the circumstances, negotiations can be classified as either substantive or non-substantive as indicated in the table below:

|  |  |  |
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|  | Description | Requirements |
| Substantive negotiations | These negotiations should be on exceptional basis and fully justifiable as they may significantly affect the scope of the requirements, terms and/or price beyond UNDP’s right to vary the quantity up to 25%. In principle, when the scope is significantly changed and beyond 25% in value, a new competitive process should be considered. | 1. The submission of the procurement action to the Procurement Review Committee or to the Procurement Authority (if less than CAP threshold) shall include the Negotiation Strategy using the template attached to this Policy. The Strategy shall provide the following:   1. the justification for initiating the negotiation, which should refer to a situation that was not foreseeable at earlier stages of the solicitation process. Justification should also address why a new competitive process would not add value or make sense in the actual situation, and how the intended negotiation would not affect the outcome of the competitive process conducted in terms of the recommended offer representing best value for money. 2. the objectives of the negotiation, 3. an exhaustive list of subjects for the negotiation, 4. expected results and options of the negotiation, 5. participants to the negotiation, indicating their roles during the negotiation.   2. Procurement Review Committee or the Procurement Authority if less than CAP threshold, after clearing the procurement process, endorsing the evaluation outcome, and being satisfied with the negotiation strategy, shall recommend an approval-in-principle to proceed with negotiations.  3. Upon completion of negotiation, the BU is required to submit the final result of the negotiation to the Procurement Review Committee or the Procurement Authority for final endorsement before the issuance of the contract with the information in line with Clause 7 above.  **NOTE:** The process review on ACP Online (where applicable) before and after the negotiation will be done through the same submission, i.e. **there is no need for a separate submission on ACP Online for the outcome of the negotiation.** |
| Non-substantive negotiations | These are negotiations that do not significantly affect the scope of the requirements, terms, result in price revision and are within the right to vary the quantity by 25%. | * + - 1. Negotiations strategy is not required, only the items to be negotiated shall be identified in the Evaluation Report and highlighted in the submission of the procurement action to the Procurement Review Committee or to the Procurement Authority (if less than CAP threshold), prior to negotiations.       2. The Procurement Review Committee or the Procurement Authority, after clearing the procurement process and endorsing the evaluation outcome, shall recommend approval to award the contract following the negotiations.       3. Further clearance by the Procurement Review Committee or Procurement Authority is **not** required. |

1. Adhering to procurement principles and upholding the rights and obligations of both UNDP and the bidder, the following are some examples of items that may be negotiated with the recommended bidder if required. The requesting unit shall determine if the items for negotiation are substantial or non-substantial based on the criteria in the above Clause 11:

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| **Examples of Items for Negotiation** | |
| 1 | Adjustments in the requirements (e.g., TOR, specifications, etc.) in order to meet the budget for the contract, or increase the quantity of some requirements to leverage on volume discounts |
| 2 | Terms of payment, which may include assigning the appropriate percentage of payment per milestone output, advance payments, retention amounts, requirement for bank guarantee in exchange for advanced payment or retention amounts, lead time to settle invoices, and setting the conditions for disbursement of payment; |
| 3 | Refinement or adjustment of the Work Plan and Implementation Schedule, aimed at ensuring completion of the work in a timely manner, increasing focus on critical activities, re-allocation of available resources and avoiding cost overruns that may arise from extending work periods/contract duration; |
| 4 | Organization and staffing of the team, aimed at achieving optimal use of personnel, distribution of person-hours, allocation of tasks and the level of effort required on various activities; |
| 5 | Counterpart staffing, facilities or other logistical support to be provided or facilitated by UNDP, when it has comparative advantage; |
| 6 | Scope of obligations or any corporate risks; |
| 7 | Special Conditions of Contract, but only to the extent that they will not be in conflict with the General Terms and Conditions of Contract; |
| 8 | Scope of warranties, guarantees and other after-sales support, and their duration, additional maintenance services at no additional costs; |
| 9 | Performance Indicators / Service Level Agreements / Quality of Service Standards; |
| 10 | Supplying the latest models available in the market, when the goods being procured are technological products in a field where breakthroughs, improvements and changes in features are very frequent excluding off the shelf items. |

**Exceptional negotiation of price and the required conditions**

1. **Price alone, under normal circumstances, should not be negotiated** especially in cases of open competition, which is considered as the essence of demonstrating best value for money. An exception may be made in a situation where the prices quoted by the recommended bidder is deemed as being higher than market rates, especially in an RFP. The benchmark rates, internal estimates or market prices must be judiciously established and verifiable in order for them to be valid basis for comparison.
2. When the negotiation pertains to price components of the offer, the prices of goods and services should always be benchmarked using fair market value[[2]](#footnote-2), published awards of national authorities or other UNDP rates (e.g., DSA, International IC benchmark rates, locally established IC rates, if available, national salary surveys, etc.) as references in establishing the competitiveness and reasonability of a financial offer. This may include published price lists and established commodity market prices. A mere comparison of a bidder’s price with that of another bidder should not be used as basis for initiating negotiations.
3. If the negotiation is required because the prices quoted by the recommended bidder is deemed higher than market rates, BUs may initiate negotiations by requesting the recommended bidder to provide the following:
   * 1. financial or administrative basis for pricing, which may include a detailed breakdown of all costs; and
     2. evidence and/or basis for charging the rates/prices that are higher than market prices, such as Government controlled prices, legislated price rates, or other reasonably established price references.
4. In the event that negotiations lead to a change in the price offer, even if price was not among the subjects of the negotiations, then the resulting total price (if it is an increase) will be subject to meeting both of the following conditions before the procurement action is approved:
   * 1. The recommended offer remains the lowest priced bid or the highest cumulative score for RFP; and
     2. The resulting increase in price can still be accommodated by the budget allocated for the contract and will not adversely impact the budget allocations for other project activities.

If the two conditions above are not met, a new procurement process should be conducted subject to the possible application of Clause 27.

1. When the procurement method is Direct Contracting, whereby UNDP is evaluating only one offer, the price can and should be negotiated whenever necessary. In such instances and on an exceptional basis, the negotiation should be undertaken as part of the procurement process to establish value for money prior to the submission of the procurement action to the Procurement Review Committee or the Procurement Authority.

**Setting up the negotiation team**

1. The Operations Manager or other senior staff shall appoint the negotiation team consisting of at least two (2) UNDP staff, considering factors such as involvement in the evaluation of the offers and skills in conducting negotiations. Negotiation should only be undertaken by professional procurement staff with experience in handling negotiations with bidders and they are to be supported as required by programme or subject matters experts.
2. It is important to ensure no conflict of interest arises. The Declaration of impartiality shall be signed by all negotiating team members.
3. The team shall ensure that they are fully knowledgeable on the following:
4. the details of the requirements,
5. the full contents of the offer submitted by the bidder,
6. the findings and recommendations of the evaluation team, including the subject of the negotiation; and
7. the negotiation strategy approved by the relevant Procurement Authority based on the recommendation of the Procurement Review Committee, if applicable.

**Preparing for the Negotiation**

1. The negotiation team must exercise due diligence and prepare adequately prior to conducting the negotiation.
2. Every negotiation should have a clear and unequivocal list of subjects for negotiation. Prior to commencing a pre-award negotiation, the recommended bidder that is being called for negotiations should be duly notified in writing of the following:
3. Realistic and feasible date, time and list of subjects for the negotiations, avoiding unnecessary delays;
4. The objective and rationale for the negotiation;
5. A statement that the recommended bidder would cover all personnel and logistical costs arising from their participation in the negotiations, followed by an invitation for the bidder to propose other options if they are unwilling to bear such costs (i.e., teleconference, or appointing their authorized local representative to attend the negotiation in their behalf, etc.);
6. A statement of impartiality or conflict of interest from the supplier;
7. A request to the bidder to provide the following information:

The confirmation of attendance at the specified time and venue, or any other proposed alternative means of participating; and

The number of personnel attending the negotiations and their respective positions in the organization they represent.

1. The notification of negotiations may be done by any means – courier, fax or email – provided that BU will be able to have proof of such transmission.

1. The number of persons involved in the negotiation should be kept at a minimum on both sides. If possible, they should be of equal numbers and level of authority (e.g. if there is a high level manager representing the bidder, a national officer or professional staff of comparable level in the BU should also be present).

**Possible Results of Negotiations**

1. Negotiations may require a series of meetings and internal consultations within the two organizations involved but these should not be allowed to result in unnecessary delays. A time frame for the pre-award negotiation should be agreed to and maintained for effective results.

1. If the validity of the offer is approaching expiration and no agreement has been reached from an ongoing negotiation, the BU may request the bidder, as well as all other responsive bidders, to extend the validity of their offers, to a reasonable period of time when the BU can expect a conclusion of the negotiation including a contingency period.

1. In the event that the subjects under negotiations remain unresolved after a reasonable mutual attempt to cooperate, the negotiations may be called off with a report back to the Procurement Review Committee or the Procurement Authority on the failure of the negotiations and request if necessary, approval to negotiate with the next ranked bidder. The BU should notify the bidder of this decision in writing, after a recommendation from the Procurement Review Committee or the Procurement Authority. Thereafter, the BU may initiate negotiations with the second-ranked bidder, if any, or declare a failure of the selection process.

**Documentation of the Negotiation Process**

1. In order to maintain transparency and adhere to principles of fair competition, all negotiations should be fully documented. At the minimum, the following information should be considered in documenting a negotiation process and must be kept in the files of the BU:
2. A justification for conducting the negotiation, including the objectives or the Negotiation Strategy cleared by the Procurement Authority, if the negotiation is substantial in nature;
3. The recommendations and approval of the Procurement Review Committee to conduct the negotiation, if required, depending on the contract value;
4. Minutes of the negotiations, indicating date, time and participants from both parties;
5. Written exchanges between the parties negotiating and other written communications that form part of the negotiation;
6. Final agreement between the parties;
7. The Procurement Review Committee or Procurement Authority’s recommendation for the result of the negotiation, if required, depending on the contract value; and
8. All minutes of the negotiations, exchanged letters and final agreements shall form an integral part of, and annexed to the contract that will be signed by the parties.
9. Any clarifications or support required on the application of this policy should be raised with the Procurement Services Unit (PSU). PSU will provide hands on training and support to Business Units on the conduct of pre-award negotiations.

1. The recommended offeror can only request negotiations on certain aspects of the contract upon the award of the contract, while this policy addresses pre-award negotiations. BUs shall ensure that such negotiations are in the interest of UNDP and for the success of the contract. [↑](#footnote-ref-1)
2. *Fair market value is the price at which a good or service can be sold on the open* ***market****, between an informed and unpressured buyer and seller.* [↑](#footnote-ref-2)