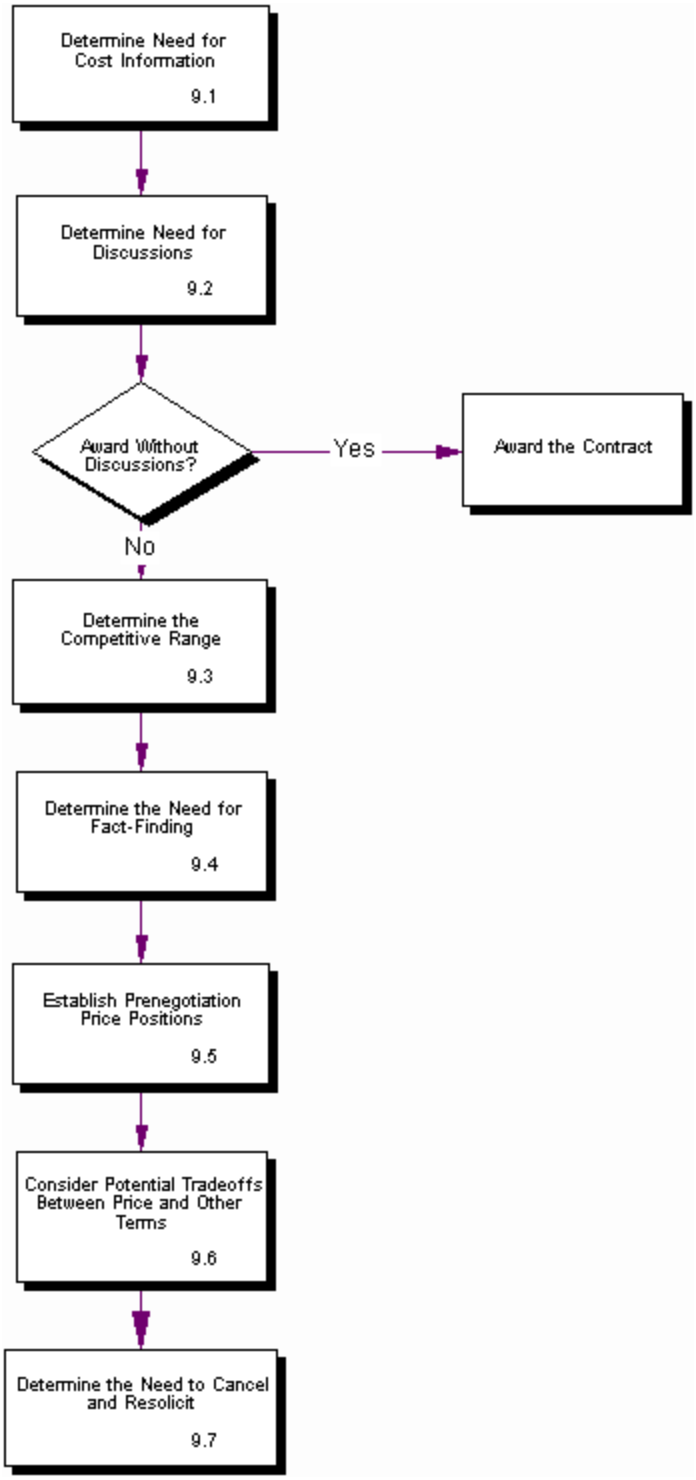
Ch 9 - Price-Related Decisions in Negotiations


- 9.0 - Introduction
- 9.1 - Determine The Need For Cost Information
- 9.2 - Determine The Need For Discussions
- 9.3 - Determine The Competitive Range
- 9.4 - Determine The Need For Prenegotiation Exchanges
- 9.5 - Establish Pre-Negotiation Price Positions
  - 9.5.1 - Analyze Risk
  - 9.5.2 - Develop Negotiation Positions
- 9.6 - Consider Potential Trade-Offs Between Price And Other Terms
- 9.7 - Determine The Need To Cancel And Resolicit


---

## 9.0 Introduction

*Price-Related Decision Process*. The figure below depicts the process involved in making price-related decisions in negotiation.




## 9.1 Determine The Need For Cost Information

*Situations Where Additional Information Might Be Necessary* (FAR 15.402, 15.403-3, and 15.403-4).

After you receive a proposal and perform your initial evaluation, you may determine that you need additional information on offeror costs before you can make a final decision on price reasonableness. You can require an offeror to provide information on proposed costs prior to contract award. However, bear in mind that the offeror will need additional time to produce the information and that you will need additional time to analyze the information-which will probably delay award. Hence, requesting cost information should be a last resort when one of the following situations exists:

- You cannot except the offeror from the requirement for cost or pricing data.

**Example 1: Offeror request for exception denied.** Suppose you are using negotiation procedures and received only one offer. That offer exceeded the cost or pricing data threshold. The offeror requested an exception from the requirements for cost or pricing data, but you determined that the offer did not qualify for the exception requested or any other exception. In such situations, you must require submission of cost or pricing data.

**Example 2: Single offer over the cost or pricing data threshold.** Suppose you expected adequate price competition, but received only one offer. That offer exceeded the cost or pricing data threshold. After further market research, you determined that you were wrong to expect price competition, because only one firm makes and sells an item that meets Government requirements. If you determine that no other exception applies, you must require submission of cost or pricing data. However, if any exception does apply, you must not require cost or pricing data.

- Price analysis alone is not sufficient to establish the reasonableness of proposed prices.

**Example 1: Competition cost realism.** Suppose you are using negotiation procedures for an acquisition with an estimated price in excess of the cost or pricing data threshold. You received two proposals but you are not convinced that the price of the apparent successful offer is fair and reasonable. Price comparisons between the competitive

offers are not very useful because the two offerors submitted such different technical proposals in response to the contract performance requirements. After comparing the price of the apparent successful offer with historical data and commercial prices, you are not convinced that it is reasonable. In such situations, you can require the offeror(s) to submit information other than cost or pricing data to support your pricing decision.

**Example 2: Single offer below the cost or pricing data threshold.** Suppose that you did not require the offeror to submit cost or pricing data because the estimated acquisition price did not exceed the cost or pricing data threshold. Now the offeror has submitted a proposal with a price that (while below the threshold) appears unreasonable, based on comparison with commercial prices and the item price history. In such situations, you could require the offeror to submit cost information other than cost or pricing data. Alternatively, you might require cost or pricing data if the proposal exceeds the simplified acquisition threshold and the requirement is authorized by the head of the contracting activity.

**Example 3: Single offer in simplified acquisition.** Suppose that you are using simplified acquisition procedures and the only offeror submitted a proposal with a price that appears unreasonable, based on comparison with commercial prices and the item price history. In such situations, you could require the offeror to submit cost information other than cost or pricing data. You could not require cost or pricing data because the anticipated acquisition price is less than the simplified acquisition threshold.

*Requiring Cost or Pricing Data* (FAR 15.403, and FAR Table 15-2). You have already learned that you:

- MUST NOT REQUIRE cost or pricing data when an exception applies.
- MUST REQUIRE an offeror to submit cost or pricing data for non-competitive contract actions over the cost or pricing data threshold, when no exception applies.
- MAY REQUIRE an offeror to submit cost or pricing data for acquisitions below the cost or pricing data threshold but over the simplified acquisition threshold, when no exception applies and you have approval from the head of the contracting activity.

When you require cost or pricing data, the data should meet the general requirements of FAR Table 15-2. Depending on the situation, the contracting officer may require data submission in:

- The format prescribed by Table 15-2;
- Another format prescribed by the contracting officer; or
- A format selected by the offeror.

*Requiring Information Other Than Cost or Pricing Data* (FAR 15.403-3 and 15.403-5(b)).

For noncompetitive acquisitions where the price is not set by law or regulation, minimum price information other than cost or pricing data must include appropriate information on the prices at which the same or similar items have been sold that is adequate to support price analysis. Requirements for cost information should be limited to specific areas of concern (e.g., the cost of high-cost material items). However, if necessary, the contracting officer may require cost information other than cost or pricing data to support the complete price offered.

Permit offerors to submit information other than cost or pricing data in a format selected by the offeror, unless the contracting officer decides that a specific format is essential.

---

**9.2 Determine The Need For Discussions**

*When Not to Conduct Discussions with Offerors* (FAR 15.209(a)(1) and 52.215-1(f)(4)). The standard FAR instructions to offerors for competitive acquisitions notify offerors that the Government intends to evaluate proposals and award a contract without discussions. As the contracting officer, you must determine the need for negotiations. **Do not conduct discussions with offerors unless they are necessary to identify the proposal that offers the best value to the Government based on the offer evaluation criteria.** For example, do not conduct discussions to squeeze lower prices from offerors when initial offers appear fair and reasonable.

If offerors know that award is likely to occur without negotiations, they will be encouraged to submit better offers initially. If they know that you will always negotiate, they may wait until your request for a final proposal revision (FPR) to submit a truly competitive price. Many offerors actually distrust the security of the competitive negotiation process and fear that their price will leak to competitors.

*When to Conduct Discussions with Offerors* (FAR 15.215-1 and 52.215-1 Alt 1). If the solicitation instructions to offerors notified offerors that the Government intends to evaluate proposals and award a contract after conducting discussions with offerors in the competitive range, you must conduct discussions.

If the solicitation instructions to offerors notified offerors that the Government intends to evaluate proposals and award a contract without discussions, you can conduct discussions if the contracting officer determines that discussions are necessary and documents the rationale for that decision in the contract file. Generally, the contracting officer should only consider such a determination when there is a question about which proposal truly offers the best value to the Government. For example, negotiations might be necessary to resolve concerns about the cost realism of a proposal that appears substantially under priced.

*Clarifications without Discussions* (FAR 15.306(a) and 14.407-2(a)). Clarifications are limited exchanges, between the Government and offerors, that may occur when award without discussions is contemplated.

When award will be made without conducting discussions, you may give offerors an opportunity to clarify:

- Certain proposal aspects (e.g., the relevance of an offeror's past performance information and adverse past performance information to which the offeror has not previously had an opportunity to respond); or
- Apparent minor or clerical errors. Examples of minor or clerical errors include, but are not limited to:
    - Obvious misplacement of a decimal point;
    - Obviously incorrect discounts (e.g., 1 percent, 20 days, 5 percent, 30 days);

- Obvious reversal of the price f.o.b. destination and price f.o.b. origin; or
- Obvious mistake in designation of the unit.

Carefully document any proposal aspects or apparent errors requiring clarification and the actions taken to clarify the proposal. If any clarification would prejudice the interest of another offeror, you should conduct discussions with all offerors in the competitive range.

---

**9.3 Determine The Competitive Range**

*Competitive Range* (FAR 15.306(c)). Once you make the decision to negotiate, you must determine which firms will participate in discussions.

Identify firms to be included in the competitive range by evaluating each offer against the evaluation criteria enumerated in the solicitation.

- Establish a competitive range comprised of all the most highly rated proposals, unless the competitive range is further limited for purposes of efficiency.
- If the solicitation provides that the competitive range can be limited for purposes of efficiency, the contracting officer may determine that the number of most highly rated proposals that might otherwise be included in the competitive range exceeds the number at which an efficient competition can be conducted. Then the contracting officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals.

*Steps for Determining the Competitive Range* (FAR 15.306(c)). When you determine the competitive range, you should follow these steps:

1. **Evaluate All Proposals.** Evaluate all proposals considering all award criteria (price and technical) established in the solicitation.

2. **Identify Evaluation Score Groupings.** Identify the grouping, or arrangement, of evaluation scores for all proposals. This may be done by arranging the proposals

from highest to lowest score and then looking for breaks in the scores such that natural groupings of similar scores may be identified.

3. **Identify the Most Highly Rated Proposals.** Look for breaks in the evaluation ratings that separate the most highly rated proposals from the others. Identify the most highly rated proposals for possible inclusion in the competitive range. If all proposals are tightly grouped, you could include all proposals as highly rated. However, you must exclude proposals that are not highly rated.

4. **Determine Whether To Limit The Competitive Range.** When permitted by the solicitation, the contracting officer may determine to limit the number of most highly rated proposals that might otherwise be included in the competitive range to support more efficient competition. This determination should depend on the number of offerors initially included in the competitive range and the issues involved in the competitive discussions. For example, it may be possible to efficiently conduct discussions with 20 offerors if the issues are relatively simple. When complex issues are involved, efficient competition may require limiting the competitive range to five firms or less. The number of firms actually included should not be set arbitrarily (e.g., to five), but should be set after an evaluation of the proposal ratings and the complexity of the issues involved in the discussions.
5. **Notify Unsuccessful Offerors.** You must notify an unsuccessful offeror in writing as soon as practical after determining that the proposal is no longer eligible for award.

*Consider Price Reasonableness* (FAR 15.305(a) and 15.306(c)). As you evaluate proposals to establish the competitive range, consider price reasonableness based on your should-pay price estimate(s). However, remember that price may only be one element in the proposal evaluation criteria.

*Consider Cost Realism* (FAR 15.404-1(d)). You must consider cost realism in evaluating proposal for any cost-reimbursement contract. For these contracts, your analysis should center on developing an estimate of most probable

cost. Remember that, for these contracts, final price will depend on final cost. An unrealistically low proposal could result in a unreasonably high final contract price.

You may consider cost realism in evaluating proposals for fixed-price contracts, particularly fixed-price incentive contracts. For these contracts, your analysis should center on evaluating the performance risk associated with an unrealistically low price. Proposed prices must not be adjusted, because the final contract price is either firm or limited on price, contract performance risk can increase substantially.

*Evaluation Practices to Avoid*. When determining the competitive range, you **should not**:

- Establish arbitrary limits on the competitive range based on comparisons with the proposal with the most favorable evaluation. For example, do not arbitrarily determine that all proposals with prices within 20 percent of the most favorably evaluated proposal will be included in the competitive range and all others excluded.
- Establish arbitrary limits on the competitive range based on the Independent Government Estimate or a preset evaluation score.
- Include any proposal in the competitive range if it is not among the most highly rated.

*Example of Proper Exclusion from Competitive Range* (Cadd Mgmt. Sys., Inc., CGEN B-239116, July 24, 1990).

In the matter of Cadd Management Systems, Inc., the CGEN found that Cadd had been properly excluded from the competitive range. Cadd protested the exclusion from the competitive range of its proposal under an RFP issued by the Department of Interior for engineering and drafting services at the Grand Coulee Dam. Cadd's proposal was excluded from the competitive range because Cadd's proposed price was so much higher than the prices of other proposals that received similar technical scores. The Department of Interior did not consider Cadd to have a reasonable chance of receiving an award. Cadd contended that in determining its price it relied on information not revealed to other offerors as to the true scope of the work, and thus Cadd was the only offeror whose price accurately reflected the

solicitation requirements. The CGEN found that the facts did not support the Cadd contention.

---

## 9.4 Determine The Need For Prenegotiation Exchanges

*Prenegotiation Exchanges* (FAR 15.306). Prenegotiation exchanges include any dialogue between the Government and the contractor after proposal receipt and prior to contract negotiation. The Government objective is to identify and obtain available contractor information needed to complete proposal analysis. In addition, most types of prenegotiation exchanges also provide the contractor an opportunity to seek clarification of the Government's stated contract requirements.

- **Competitive Negotiations.** In competitive negotiations, there may be several different types of exchanges, each with its own unique rules:
  - Clarifications with the intent to award without discussions;
  - Communications with contractors before establishment of the competitive range; and
  - Exchanges after establishment of the competitive range but before negotiations.
- **Noncompetitive Negotiations.** In noncompetitive negotiations, exchanges after receipt of proposals and prior to negotiations are normally referred to as fact-finding.

*Information Already Available*. As you determine the need for a prenegotiation exchange, consider the information already available, including:

- The solicitation, unilateral contract modification, or any other document that instigated the contractor's proposal;
- The proposal and all information submitted by the contractor to support the proposal;
- Information from your market research concerning the product, the market, and any relevant acquisition history;
- Any relevant field pricing or audit analyses;
- In-house technical analyses; and
- Your initial analysis of the proposed price and, where appropriate, specific elements of cost.

*Clarifications* (FAR 15.306(a)). Clarifications are limited exchanges, between the Government and contractors, that may occur when the Government contemplates a competitive contract award without discussions. Remember that award may only be made without discussions when the solicitation states that the Government intends to evaluate proposals and make award without discussions.

Consider giving one or more contractors the opportunity to clarify certain aspects of proposals that may have an effect on the award decision. For example, a request for clarification might give the contractor an opportunity to:

- Clarify the relevance of a contractor's past performance information;
- Respond to adverse past performance information if the contractor has not previously had an opportunity to respond; or
- Resolve minor or clerical errors, such as:
    - Obvious misplacement of a decimal point in the proposed price;
    - Obviously incorrect prompt payment discount;
    - Obvious reversal of price f.o.b. destination and f.o.b. origin; or
    - Obvious error in designation of the product unit.

*Communications* (FAR 15.306(b)). Communications are exchanges, between the Government and contractors, after receipt of proposals, leading to establishment of the competitive range. Communications with a contractor are only authorized when the contractor is not clearly in or clearly out of the competitive range. Specifically, communications:

- Must be held with contractors whose past performance information is the determining factor preventing them from being placed within the competitive range. Such communications must address adverse past performance information to which the contractor has not had a prior opportunity to respond.
- May be held with other contractors whose exclusion from, or inclusion in, the competitive range is uncertain. They may be used to:
    - Enhance Government understanding of the proposal;
    - Allow reasonable interpretation of the proposal; or
    - Facilitate the Government's evaluation process.

- Must not be held with any contractor not in one of the situations described above.

The purpose of communications is to address issues that must be explored to determine whether a proposal should be placed in the competitive range.

- Use communications to address any adverse past performance information to which the contractor has not previously had an opportunity to comment.
- You may use communications to address:
  - Ambiguities in the proposal or other concerns (e.g., perceived deficiencies, weaknesses, errors, omissions, or mistakes); and
  - Information relating to relevant past performance.
- You must not use communications to permit the contractor to:
  - Cure proposal deficiencies or material omissions;
  - Materially alter the technical or cost elements of the proposal; and/or
  - Otherwise revise the proposal.

*Exchanges After Establishment of the Competitive Range But Before Negotiations*. You should normally not need to conduct any exchanges after establishment of the competitive range but before negotiations. Proposals included in the competitive range should be adequate for negotiation. However, there may be situations when you need additional information to prepare reasonable negotiation objectives.

The purpose of such exchanges is to obtain additional information for proposal analysis and to eliminate misunderstandings or erroneous assumptions that could impede objective development. Never use this type of exchange to give a contractor an opportunity to modify its proposal.

*Fact-Finding* (FAR 15.406-1). In a noncompetitive procurement, fact-finding may be necessary when information available is not adequate for proposal evaluation. It will most often be needed when:

- The proposal submitted by the contractor appears to be incomplete, inconsistent, ambiguous, or otherwise questionable; and

- Information available from market analysis and other sources does not provide enough additional information to complete the analysis.

The purpose of fact-finding is to obtain a clear understanding of the contractor's proposal, Government requirements, and any alternatives proposed by the contractor. Typically, fact-finding centers on:

- Analyzing the actual cost of performing similar tasks. This analysis should include such issues as whether:
  - Cost or pricing data are accurate, complete, and current;
  - Historical costs are reasonable; or
  - Historical information was properly considered in estimate development.
- Analyzing the assumptions and judgments related to contract cost or performance, such as:
  - The reasonableness of using initial production lot direct labor hours and improvement curve analysis to estimate follow-on contract labor hours;
  - Projected labor-rate increases; or
  - Anticipated design, production, or delivery schedule problems.

---

**9.5 Establish Pre-Negotiation Price Positions**

This section covers the following topics:


- 9.5.1 - Analyze Risk
- 9.5.2 - Develop Negotiation Positions


*Prenegotiation Objectives* (FAR 15.406-1(a)). Prenegotiation objectives establish the Government's initial negotiation position and assist in determining whether a price is fair and reasonable. They should be based on the results of proposal analysis, taking into consideration all pertinent information including:

- Field pricing assistance;
- Audit reports;
- Technical analyses;
- Fact-finding results;
- Independent Government Estimates; and

- Price histories.

In addition to your price objective, your prenegotiation positions should also consider the range of reasonable prices around that objective. Many contracting officers fail in negotiations, because they believe that there is only one price that is reasonable for a particular contract requirement. Instead of negotiating, they attempt to force the offeror to accept that one reasonable price.

**9.5.1 Analyze Risk**

*Risk in Pricing*. As you begin to develop your price negotiation positions, you must analyze the risk involved. The acquisition may be the 99th acquisition of a standard commercial item or it may be the first acquisition of complex state-of-the-art equipment manufactured to precise Government specifications.

Acquisition of the standard commercial item may involve little pricing risk. You have price histories, commercial item price comparisons, and competition. All will likely lead you to the same should-pay price or very similar should-pay prices.

The state-of-the-art item will likely have a much higher level of pricing risk. You may have only the Independent Government Estimate. Commercial items may permit only very general comparisons. These different price estimates may lead you to a wide range of prices that appear reasonable.

*Risk Assessment and Should-Pay Prices*. You must begin to estimate should-pay prices when you begin acquisition planning, and you should continue to refine your estimate as information is collected throughout the acquisition process. Use judgment in evaluating the reliability of each estimate when developing the total estimate of the price the Government should pay.

*Judgment in Risk Assessment*. It is likely that, given the same data, buyers and sellers will develop different judgments on which price is most reasonable. These judgments will be based on different perspectives and different assessments of the risk involved. Sellers are concerned about being able to complete contracts, cover costs, and make a profit. Buyers are concerned about

contract completion, budgets limitations, fairness to all offerors, and the public perception of their actions.

---

### 9.5.2 Develop Negotiation Positions

*Price Positions in Noncompetitive Negotiations*. In noncompetitive negotiations, you should define the range of reasonable prices using three pricing positions. These positions should be based on your should-pay estimates developed during the acquisition process. As you prepare these positions, remember that:

- **The minimum price position** should be your starting place in negotiations and your first offer. Never offer a price that cannot be supported by reasoned analysis.
- **The objective (or target) price position** should be the price that you think is most reasonable, based on your analysis of the reliability of different price estimates. It should be the price that you think the Government should pay.
- **The maximum price position** should be the highest price that you can reasonably accept, given the information you have at the beginning of negotiations. The maximum price may change during negotiations if additional information is presented by the offeror that changes the situation.

Both parties to a negotiation expect movement by the other party. If you offer one price throughout the negotiation, you may appear inflexible and that appearance could jeopardize agreement. Different positions also provide you with an opportunity to collect information needed to understand the offeror's perspective on a reasonable price, and to sell the reasonableness of your negotiation positions.

*Price Positions in Competitive Discussions* (FAR 15.306(d)). Before entering into competitive discussions, develop separate minimum, objective, and maximum positions for each proposal. Use these positions in identifying the strengths, weaknesses, deficiencies, and uncertainties in the offeror's proposal.

As you prepare these positions, remember that they will be used to advise the offeror of deficiencies in its proposal so that the offeror is given an opportunity to improve its proposal.

- Include your reasons (if any) for believing that the offeror's pricing is deficient based on comparisons with historical prices, commercial prices, parametric estimates, rough yardstick estimates, or the Independent Government Estimate.
- Be prepared to point out any indicators that the proposed price is too high or too low.

Remember that you will not be able to engage in offers and counteroffers during discussions. The offeror must determine how to modify its proposal in order to increase the value offered.

---

**9.6 Consider Potential Trade-Offs Between Price And Other Terms**

*Introduction* (FAR 15.206). The price positions described in the last section should be based on the requirements stated in the original solicitation, unless Government requirements changed after proposals were received. If requirements have changed, all offerors must be notified of the change.

*Requirement Changes* (FAR 15.206). **In noncompetitive negotiations**, all elements of the contract are subject to negotiated change during the negotiation process. In preparing for such negotiations, you should identify any changes in terms and conditions that you are willing to trade for certain related changes in price. The potential requirements changes could be either additions or deletions. The potential price changes should correspond with the value to the Government of the change in technical requirements. A technical requirements increase should result in a higher price objective, while technical requirements decrease should result in a lower price objective. A change in requirements that is neither an increase or decrease in overall technical requirements should result in no change to the price objective.

**In competitive discussions**, you must not change minimum contract requirements unless all offerors remaining in the competitive range have an opportunity to revise their proposal based on the change. If the proposed change is so substantial that additional sources would likely have submitted offers had the amendment been known, the contracting officer must cancel the solicitation.

You must obtain approval from appropriate Government technical personnel before suggesting or agreeing to any change in technical requirements. As you and the appropriate Government technical personnel agree on requirements changes that you would be willing to consider, develop an estimate of the related objective price change.

*Format for Analyzing Potential Tradeoffs*. The following chart provides a format for analyzing potential tradeoffs during negotiations. A data page containing the type of information described below will greatly speed negotiations and enable you to concentrate on the important issues involved.

| **Type Of Change In Requirements** | **Related Objective Increase** | **Related Objective Decrease** |
|---|---|---|
| Technical Requirements: | | |
| Inspection and Acceptance Terms: | | |
| Delivery or Performance Terms: | | |
| Contract Type: | | |
| Socioeconomic Terms: | | |
| Payment Terms: | | |

| | | |
|---|---|---|
| Government Furnished Property: | | |
| Warranties: | | |
| Patents and Rights in Data: | | |
| Other Terms and Conditions: | | |

---

**9.7 Determine The Need To Cancel And Resolicit**

*Authority to Reject All Proposals* (FAR 15.303(a) and 15.305(b)). The source selection authority may reject all proposals received in response to a solicitation, if doing so is in the best interests of the Government. The source selection authority is the contracting officer unless the agency head appoints another individual for a particular acquisition or group of acquisitions.

*Examples of Reasons to Reject All Proposals* (G.K.S., Inc., CGEN B-235208, August 9, 1989).

Consider canceling and resoliciting anytime that you expect such action will increase competition or reduce cost to the Government.

Common price-related reasons for canceling a solicitation include the following:

- All otherwise acceptable proposals have unreasonable prices.
- Proposals were not independently priced.
- A cost comparison shows that in-house performance by the Government is more economical.

Pricing concerns may also lead the contracting officer to cancel a solicitation based on the potential for increased competition or cost savings. Such action in the best interest of the Government is supported by the

Comptroller General (CGEN) decision in the protest by G.K.S., Inc. In that case:

- The Air Force canceled a solicitation and resolicited when it learned of the possibility of increased competition and cost savings because of a newly approved source.
- G.K.S., argued that the Air Force should not have canceled the solicitation because the new solicitation was not substantially different from the original. G.K.S. argued that an agency cannot cancel an RFP solely for the purpose of allowing another party to have an opportunity to participate in a resolicitation with identical requirements. Further, G.K.S. alleged that there was a fair and reasonable price available under the original RFP since its proposed price was less than prices paid by the Government in the previous 3 years and was 30 percent less than the Government's estimated unit price. G.K.S. also claimed that there was com

petition under the original RFP because three sources of supply were identified in the RFP and two of the identified sources submitted offers.

  - The CGEN found that, a procuring agency may cancel a negotiated procurement based on the potential for increased competition or cost savings.
    - Once the Air Force learned of the possibility of increased competition and cost savings because of a newly approved source, it could properly cancel the RFP and resolicit.
    - While the Air Force may not have been required to cancel, the CGEN found that the Air Force did act reasonably under the circumstances in canceling the RFP