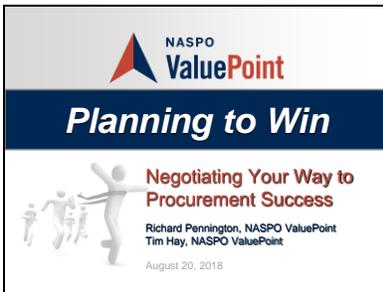


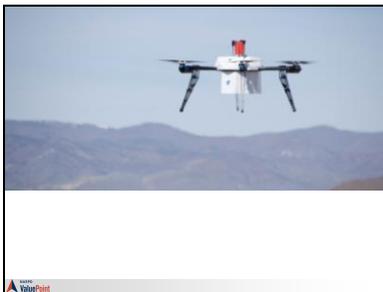
## Planning to Win: Negotiating Your Way to Procurement Success

Tim Hay & Richard Pennington

August 20, 2018



My colleague, Tim Hay, and I did a mock negotiation interspersed with comments about a negotiation model. The idea was to introduce a negotiation model and demonstrate that RFPs are negotiations also when oral presentations and discussions are used.



We used a fictitious RFP for drones-as-a-serve. Companies offer these services to law enforcement personnel, fire fighters, and other public entities who use drones. As-a-service eliminates the overhead associated with a government maintaining their own fleet.



In the first negotiation vignette, we illustrated a common introduction approach that sets the stage. In this fictitious oral presentation, the RFP competitors had already been short-listed, i.e. the competitive range established. The demonstration had been completed and the parties were meeting to discuss the exceptions taken to the RFP by the company.

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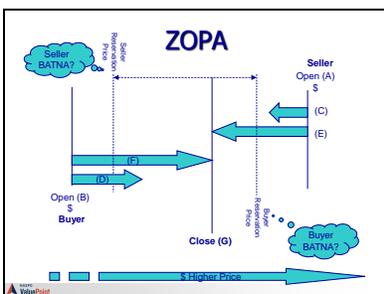
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Levers of Influence and Persuasion	
Reciprocity	• Obligation to return favors performed for us
Similarity (Liking)	• Wanting to say yes to those we like
Authority	• Following the advice of experts
Consistency	• Desire to act consistent with values and commitments
Social Proof	• Looking to others to guide behavior
Scarcity	• The less available the resource, the more we want it

Robert Cialdini is largely credited with publicly introducing the science of influence and persuasion. “Small talk” to begin a negotiation is an effective way to leverage “liking” as a constructive way to promote agreement. This slide summarizes other levers of persuasion and influence.

Range of “Negotiations”
<ul style="list-style-type: none"> <li>• Small purchases</li> <li>• Negotiations of sole source/emergency procurements</li> <li>• Contract administration: change orders and dispute resolution</li> </ul>
<ul style="list-style-type: none"> <li>• Requests for proposals and other competitive negotiations</li> <li>• Debriefing of disappointed bidders</li> </ul>

We all negotiate. While this session was about negotiation in the context of an RFP, procurement professionals have a wide range of opportunities to use negotiations.



This slide shows the classic “dance” of negotiations. An opening. Often counteroffers. Eventually an offer that is accepted. The Zone of Possible Agreement is framed by the reservation prices or resistance points each party has, informed by the Best Alternative to Negotiated Agreement (BATNA). In an RFP, the oral presentation/discussions are the mid-point of the process at C and D. The proposal revision and award are at E and F.

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**Key RFP Terms**

- Broad indemnification
- No Limitation of liability provisions
- Oral presentation possibility
- Atch E – exceptions permitted



Tim described the key RFP terms that were involved in this drones-as-a-service RFP and negotiation of liability allocation terms.

Exceptions

In this case, the RFP invited the offerors to identify exceptions to the RFP terms and conditions.

**Exception: Indemnification**

~~Seller shall defend, indemnify, and hold harmless the Buyer, its employees and agents, against any and all third party claims, damages, liability and court costs, including reasonable costs, expenses, and attorney fees, arising out of performance of this contract.~~



The offeror struck the indemnification clause. The offeror was concerned that in operational law enforcement or firefighting environments, it doesn't seem fair to shift all liability to the contractor.

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## Exception: Limitation of Liability

Seller shall not be liable for any costs, expenses, or damages arising under or related to this contract that exceed the amount paid under the contract.

Moreover, the supplier wants to try to align potential financial risk with the revenue on the contract.

Audience: What role do interests play here?

The audience was engaged to identify the interests, of both the government and the supplier, at play in this type of negotiation.

## Negotiation: Interests and Issues

I  
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S  
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E  
S

**Your Interests**

**Their Interests**

- Wants, needs, concerns, hopes, fears – personal and business
- Internal stakeholders?
- Whose side is time on?
- Technical understanding: ask Why?



Be Soft on People: Hard on Issues

Understanding both yours and the other party's interests for each issue is important. Taken from Fisher, Ury, and Patton's *Getting to Yes*, win-win negotiation is largely interest-based. They counsel, "Be hard on the issues, not the people."

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In this stage of the negotiation, I was trying to better understand Tim’s reluctance to negotiate anything about indemnification or the limitation of liability clause. This is the point sometimes where emotions might get heated, as they did here when I pointed out that other governments had agreed to them.

**Emotion: Diffusing It**

- Appreciation: "Good point; thanks" / "I see your point"
- Affiliation: "We met at World Congress"
- Autonomy/Status: "Ms. Smith, it's a pleasure . . . I've heard so much about you"

*Don't React: Go to the balcony - Ury*

The best way to avoid emotional errors in negotiations is to use appreciation, affiliation, and preserve autonomy/recognize status. When emotions do get triggered, William Ury in *Getting Past No* counsels, “don’t react—go to the balcony.”

**Some Errors and “Tricks”**

Error/Trick	Response or Tactic
Stonewalling	Try silence yourself; continue to problem solve/question
Negotiation walkout	Leave the door open
Emotion/personal attack	Silence, pause, “go to the balcony”, take a break
Logrolling/reopener	Re-open your previous concessions; revisit ground rules
Authority play	Clarify authority, break, and get them to the table

This presentation didn’t focus on negotiation “tricks” than can cause errors. But attacks and emotional outbursts are an example. In RFPs, sometimes offerors may raise post-award objections to terms and conditions, a form of “logrolling.” The common response is to remind offerors of the ground rules, that exceptions not brought up consistent with RFP instructions are not considered part of the offer, that the offeror risks having its offer rejected.

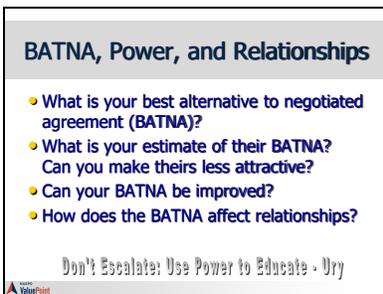
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The Best Alternative to Negotiated Agreement represents the plan that will be followed if agreement cannot be reached. In an RFP, the government's BATNA is "no award." The offeror's BATNA may be to withdraw the offer if exceptions cannot be acceptably negotiated.



Part of planning is assessing your own BATNA, as well as the estimated BATNA of the other side.

Sometimes during negotiation, one can learn more about the other side's BATNA. BATNA provides power, but as Ury counsels, don't escalate—use power to education. I used an inelegant deployment of my BATNA: threat of bid protest. It wasn't very effective!



During this portion of the session, Tim and I explored possible options for language revisions that might have been acceptable to both parties if proposal revisions were permitted.

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### Indemnification

Seller shall defend, indemnify, and hold harmless the Buyer, its employees and agents, against any and all third party claims, damages, liability and court costs, including reasonable costs, expenses, and attorney fees, arising out of performance of this contract . . . to the extent caused by Seller, its employees, agents, subcontractors or assignees. Seller's indemnity obligation for intellectual property infringement shall not extend to any combination of the product by Buyer with any other product, system or method unless the combination was provided or specified by Seller.



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Limiting the indemnification to the contractor's fault is one means of tailoring the indemnification provision. When technology is involved, as in drones, intellectual property indemnification may be appropriate and required. This revision does both.

### Limitation of Liability

Seller shall not be liable for any costs, expenses, or damages arising under or related to this contract that exceed the amount paid under the contract, two times the contract value, except this provision shall not apply to claims for bodily injury (including death), damage to tangible property, intellectual property infringement, or claims by the buyer for recoupment of progress payments for supplies or services not finally accepted.

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Use care tying limitation of liability to the amount paid under a contract. In early stages the amount can be zero (\$0). These revisions use the contract value and exclude insurable risk (bodily injury and damage to tangible property) as well as intellectual property claims.

### Options and Objectives

- Yours and Anticipate Theirs
  - What do you aspire to? Aim high!
  - What will you be content with?
  - What can you live with?
- Create concrete options; but stay flexible
- If stuck, look for shared interests



**Don't Argue: Step to their Side - Ury**

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Identification of tangible options requires planning. The attendees were provided a [set of planning checklists and documents](#) that included interest analysis and possible options when negotiating liability allocation terms and conditions.

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**Communications in Negotiations**

- What do you need to listen for/look for?
- Inform, discover, persuade, and motivate
- Ask questions and clarify
- Anticipate the hard questions
- List what you need to ask!
- Ethics and integrity



Don't Reject: Reframe - William Ury

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Communications should be planned and practiced, especially communications designed to persuade. Use questions to learn about interests of the other side, not just the positions. Reframe struck positions to get to the interests and identify possible options.

How is an RFP a negotiation?

The audience was asked to reflect and provide their ideas about how an RFP is a negotiation. Interestingly, not all agencies use this kind of information exchange during RFPs. Are they missing an opportunity?

**Competitive Solicitations**

- Boilerplate often frames the ZOPA
- Offerors erroneously may think they always get to submit a BAFO
- Give offerors equal opportunity for revisions
- Don't . . .
  - Auction one offeror against the other
  - Disclose offerors' approaches/prices to another
  - Technically "level", i.e. unfairly assist one over another through discussions

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Some concluding thoughts on RFPs as negotiations.

I'm a big fan of using BAFOs. In my experience, offerors often reduce prices.

The final three bullets are common prohibitions in RFP negotiations to preserve fairness to offerors.

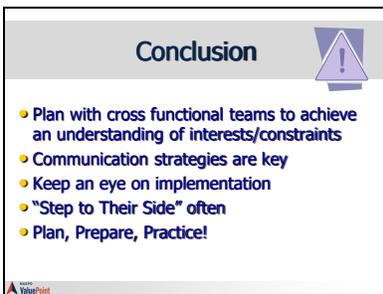
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This is a model based on *Getting to Yes*. The mnemonic is a little fun; Tim and I really are win-win negotiators! But this is a decent checklist for working through the negotiation planning, the most important phase of successful negotiations. [Planning checklists summarizing the considerations are available here.](#)



Planning, especially the communication, is key. Use questions effectively to "step to their side" often.

In an RFP, the implementation is the award.

If you don't ask for proposal revisions, you won't get them, e.g. price revisions.

