

Chapter VII

Negotiating a Contract

189. This chapter outlines procedures for contract negotiations with consulting firms for loan projects and delegated TA grants, for which the EA is responsible, and for TA grants, where ADB, normally COSO, is responsible. The chapter focuses on contract negotiations for loan projects. In instances where practices between EA-led negotiations and ADB-led negotiations differ significantly or substantially, the differences are indicated in the text or in footnotes.

190. The steps normally followed during negotiations between the borrower and a consulting firm are as follows:

- The CSC of the borrower³⁴ issues a letter of invitation to negotiate.
- A negotiating team is selected.
- Prenegotiation preparations are made.
- Negotiations are initiated, with a confirmation of authority to negotiate.
- Personnel, technical, or financial issues arising from the consulting firm's proposal are resolved.
- A preliminary agreement is reached on the type of contract to be used.
- The standard draft contract is reviewed jointly in detail.
- The appendixes of the draft contract are filled out.
- The special conditions of the draft contract are agreed upon and filled in.
- The draft contract is submitted to higher authorities for approval and to ADB for review (in the case of EA-led negotiations).
- The contract is signed and, in the case of EA-led negotiations, submitted to ADB.

The key aspects of these steps are described in this chapter.

³⁴ In the case of negotiations led by ADB, the letter of invitation is issued by COSO.

A. Issuing a Letter of Invitation to Negotiate

191. A letter of invitation to negotiate is issued after
- under QCBS** – a first-ranked firm has been selected after technical and financial evaluation;
 - under QBS** – a first-ranked firm has been selected after technical evaluation;
 - under FBS** – a first-ranked firm has been selected after technical evaluation and the financial proposals have been verified as correctly presented within budget;
 - under LCS** – the firm scoring 750 points or higher but with the lowest cost has been selected after technical evaluation and review of the financial proposals; or
 - under CQS and SSS** – the proposal of the invited firm has been reviewed and is considered acceptable from both the technical and financial points of view.

In some cases of negotiations for loan-funded consulting services, prior approval of ADB is required before negotiations can proceed. This is mentioned in the procurement plan.

192. The consulting firm should be invited to negotiate at the earliest possible opportunity, while the proposal is still within the validity period shown in the data sheet. This is to avoid complications and ambiguities if the validity period has expired. If it is not possible to negotiate within the proposal validity period and the negotiations will take place within a reasonable period from expiry, the firm should be requested to extend the validity of its technical and financial proposals until negotiations can take place.

193. The invitation letter
- informs the firm that it has been first-ranked;
 - invites the firm to send an authorized representative to negotiate the proposal and finalize a contract on behalf of the firm (bringing a letter of authority to do so);
 - proposes a schedule and agenda;
 - asks the consultant to confirm the availability of team members nominated in its technical proposal; and
 - summarizes any issues identified during evaluation that require clarification, any deficiencies that need to be corrected, any team members that the borrower would like to see replaced (and why), and any other corrective action to be taken.

194. It is important that the firm be forewarned in the invitation letter of any substantial issues that may be discussed so that its

representative can attend the negotiations fully briefed and with all required information at hand. Most loan-funded consulting services assignments are negotiated face-to-face, which entails a visit of a representative of the consulting firm to the country concerned. The cost of travel for negotiations is borne by the firm. For consulting services funded by TA and of a small size, ADB may decide, at times, to negotiate by facsimile rather than face-to-face.

B. Selecting the Negotiating Team

195. The borrower's negotiating team should consist of persons knowledgeable about the project, the role of the consultancy in it, the procurement plan, the content of the consultant's proposal, and the comments and suggestions of the CSC on it. It should thus contain at least one member of the CSC and one representative of the borrower's EA. Team members should be familiar with the standards, practices, and norms of funding international and national consultants in their country. If possible, at least one member of the team should have had prior experience in negotiating proposals with international and national consultants for multilateral-funded projects. For QBS, CQS, and SSS, the team should contain members who are familiar with consultancy rates and salaries on an international scale and within their country. A senior member of the team, with appropriate authority, should be appointed chief negotiator. In the case of ADB-led negotiations for TA-funded consultancies, the negotiating team consists of COSO staff supplemented by a representative from the user division. This representative is normally involved only in the technical aspects of negotiations and not the financial aspects. In the case of EA-led negotiations, ADB may be invited to send a staff member as an observer. In the case of ADB-led negotiations, a representative of the EA is usually invited to attend as an observer.

C. Preparing for Negotiations

196. Prior to negotiations, steps should be taken to ensure that the negotiating team is fully briefed on the task facing it as well as the specific conditions and circumstances that apply. Four key activities should be undertaken:

- review of relevant documentation,
- review of standard draft contracts,
- identification of and agreement on key issues, and
- preliminary preparation of the special conditions section of the standard contract.

1. Review of Relevant Documentation

197. Team members should review relevant documentation such as the RRP, TOR, consultant's proposal, and the minutes of the CSC

to ensure that they are fully familiar with the background and what is to be negotiated.

2. Review of Standard Draft Contracts³⁵

198. The team should be requested to review in detail the standard draft contracts (time-based and lump-sum) utilized by ADB. For loan-funded consulting assignments, prior translation of the contracts into the language of the country may be valuable in ensuring full understanding of the contracts if English is not commonly used as a working language. Contracts for loan-funded assignments consist of three sections: general conditions, special conditions, and appendixes.³⁶ The general conditions set out the framework of the agreement and cannot be changed. They are the same for all contracts. If these are not adhered to, ADB will not agree to use loan funds to finance the consulting services. All team members should understand this and realize that there is no point wasting time and energy trying to negotiate points that are nonnegotiable.

199. The special conditions set out the circumstances under which the general conditions will be implemented under the circumstances specifically prevailing for the consulting services assignment. They are negotiable and provide specificity for the general conditions. They are cross-referenced in the text of the general conditions.

200. The appendixes are also negotiable to a certain extent, i.e., as long as changes will not result in a change of scope of the assignment. They describe the scope of the consulting services; the personnel; the reporting requirements; the cost estimates; and the facilities, equipment, and services to be provided by the borrower to the consulting firm.

3. Identification of and Agreement on Key Issues

201. The team should meet at least once prior to the negotiations to determine its approach to the negotiations to be undertaken. Unanimity and consistency should be sought on

- the need to replace any of the team members including any ranked below average or noncomplying in the evaluation of the technical proposal;

³⁵ This step is not so critical for ADB-led negotiations for TA-funded assignments, since COSO staff are already familiar with the standard TA contract.

³⁶ Standard contracts for loan-funded consulting services are available on the ADB website at <http://www.adb.org/Consulting/all-methods/Loans/Section6-TBContract-Loan-6Jul07.doc> for time-based contracts and <http://www.adb.org/Consulting/all-methods/Loans/Section6-LSContract-Loan-6Jul07.doc> for lump-sum contracts. The standard ADB TA contract has a slightly different format consisting of the contract itself first, then appendixes, and then general conditions at the end. The contract document is the equivalent of the special conditions in the contracts for loan-funded assignments. An example can be found on the ADB website at <http://www.adb.org/Consulting/all-methods/TAs/Section6-Contract-TA-17Aug07.pdf>.

- ❑ any deficiencies noted in the methodology or approach;
- ❑ any deficiencies or inconsistencies noted in the scheduling of the consultancy as a whole or of individual inputs;
- ❑ any changes required to the support requirements to be provided either by the consulting firm or by the borrower;
- ❑ the position to be taken vis-à-vis the reimbursement of duties and taxes (which should be consistent with the decision taken during the costing of the consultancy and when preparing the procurement plan);
- ❑ a position on any comments on the TOR raised by the firm in its proposal or covering letter; and
- ❑ any deficiencies or mistakes noted in the firm's financial proposal.

4. Preliminary Preparation of Special Conditions Section of Standard Contract

202. During the same meeting (preceding paragraph) or a subsequent meeting, the negotiating team should prepare a preliminary draft of Chapter III – Special Conditions of the standard contract. This will provide a basis for discussion once the negotiations themselves are under way.

D. Initiating Negotiations

203. As negotiations are opened, negotiators on both sides (the EA or ADB and the firm) should keep in mind that the object of the negotiation is to turn the firm's proposal into a contract that can be implemented to the mutual benefit of both parties and, critically, to the benefit of the overall project. Negotiations are not a debate within which to score points, but a means of achieving a mutually agreeable conclusion. It may be helpful if the chief negotiator makes this point. Minutes of negotiations should be kept (normally by the EA or ADB representative), and important points may be signed by both parties as negotiations proceed. A template for the minutes of contract negotiations is available on the ADB website under Documents on Consulting Services (www.adb.org/Consulting/QCBS-Loan-CN-Minutes.doc).

204. At times (as set out in the procurement plan or decided upon later), ADB may delegate a staff member to assist the EA during negotiations. The ADB representative's role is primarily as an advisor in terms of policy and procedural matters and should be considered essentially neutral.

205. Negotiations are normally initiated with a formal presentation by each side. The chief negotiator of the EA will usually indicate why

the firm has been chosen to negotiate, and the chief negotiator of the consulting firm will normally reply, responding to some of the initial points raised and indicating that the firm is prepared to negotiate.

206. After these opening remarks, the representatives of both sides will normally indicate their authority to negotiate and their authority to sign a draft contract. Usually, at least on the part of the firm's representative, written authorization to do so is presented. Negotiations may then proceed along various lines, depending on the preference of the negotiators and the agreed-upon agenda. The steps outlined in subsequent sections of this chapter are a logical sequence that should cover all necessary issues and normally lead to a mutually satisfactory agreement.

E. Discussing Issues Arising from the Proposal

207. The negotiators of both the EA and the consulting firm may wish to raise issues arising from the proposal. These normally relate to

- personnel;
- the work plan; methodology; scheduling of personnel inputs; and the scheduling of outputs such as reports, designs, seminars, and workshops;
- out-of-pocket expenditures;
- counterpart support;
- provisional sums;
- miscellaneous items such as provision for inflation and contingencies and a clarification of contractual arrangements; and
- finalization of financial arrangements.

1. Personnel

208. The most important issues—and the ones that need to be addressed at the beginning of negotiations—generally have to do with personnel. The firm will have been asked to confirm the availability of its proposed personnel in the letter of invitation, but a number of issues often need to be resolved. Despite its original confirmation, the firm may need to replace personnel who, for one reason or another, are not available. If negotiations are held within the proposal's validity period shown in the data sheet, then it is normal to allow a replacement only under strict circumstances, for example, if the originally proposed team member has resigned from the firm, has been certified ill, has suffered an accident, or has died. If the proposal validity period has expired, then the firm may propose a replacement with a greater degree of flexibility. Proposed replacement team members must be of equal qualifications or better.

Under QCBS, FBS, and LCS, the remuneration rate for any replaced team member will be the same as indicated for the replaced team member in the original proposal.

209. In some cases, the EA or, during negotiations for TA-funded assignments, ADB may also request a change in personnel. This may occur if a particular team member is not considered suitably qualified for the services to be rendered or has been evaluated as below average or noncomplying, or because of history with the agency or country concerned. In the case of ADB-led negotiations for TA-funded assignments, it may also be because the expert was rated “unsatisfactory” during a previous assignment; is ineligible;³⁷ or, as an ex-ADB staff member being recruited for a first ADB-funded assignment, has been rejected by ADB’s Budget, Personnel and Management Systems Department. This request should have been communicated to the firm in the invitation letter. As with a replacement requested by the firm, for QCBS, FBS, and LCS, the remuneration rate for a replacement will be the same as for the expert replaced. Depending on the particular circumstances, an excessive number of replacements requested either by the firm, or by the EA, or by ADB may be the basis for suspension of negotiations. If this happens during negotiations for a loan-funded consultancy and if no resolution can be found, then ADB should be contacted and a request made by the EA to proceed with negotiations with the second-ranked firm.

210. At times, the consulting firm may wish to include additional personnel above and beyond those listed in the RFP and the proposal, or to eliminate a particular position and use the resulting savings for another expert. This may be because an expertise gap or an excessive focus on one type of activity has been identified. Such requests may be valid, but would normally be better accommodated through a contract variation once the contract has been signed and the need for a change in the staffing has been verified during the inception period.

211. Under current practices, negotiations on remuneration may take place only under QBS, CQS, and SSS. These require special procedures. They may be complex and time consuming, especially for QBS. The outcome is often uncertain, and this is one reason QCBS is now the preferred mode for consultant selection. For reference, in case these procedures are to be followed, they are spelled out in the RFP.

212. A major topic for clarification at this point during negotiations for loan-funded assignments will be the question of duties and taxes.

³⁷ There are various grounds for ineligibility including close family ties with ADB personnel, being a national of a country that is not an ADB member country, or being currently employed by the EA that the TA is supposed to be assisting.

This issue should have been clarified while preparing the consulting services package, and the RFP should indicate the expected responsibilities of the consultant and its staff and of the EA; but it is not always properly handled. The standard contract includes three possible scenarios for duties and taxes. For nonnational consulting firms and their staff, they are as follows:

- The consultant is exempted from any such levies.
- The consultant will be reimbursed by the borrower for any such levies it might have to pay, or the borrower will pay such levies on behalf of the consultant and the personnel.
- The consultants will have to pay levies of this kind without reimbursement by the borrower.

The firm is normally expected to have informed itself of the prevailing taxation legislation in the country and to have made appropriate arrangements to deal with the taxation issues of its nonnational staff.

213. During the discussions on personnel, parameters should also be established for dealing with allowances for long-term international experts. These will cover the circumstances under which their families may accompany them, any allowances that may be paid, and what provisions may be made for the education of accompanying children. Working practices and procedures may also be discussed at this point, depending on the nature of the work and the degree of integration with the EA's counterpart team and office facilities. In addition, the level of support to be provided to ensure visas and permits for international experts and their families should be confirmed. Also, the issue of salary adjustments for long-term consultants may be raised. Adjustments are normally allowed for experts who will be in the field longer than 18 months, and they are normally applied at the end of the first year.

2. Work Plan, Methodology, Scheduling, and Specific TOR

214. Once the personnel lineup has been confirmed, the next items to address are the work plan, methodology, scheduling, and specific TOR. In particular, the consulting firm may need to justify any deviations in its proposal from the work plan and methodology requested in the RFP, or at least to clarify why the particular proposed work plan was chosen. Similarly, it may be necessary to justify a particular timetable for fielding various team members, the production of reports, the holding of workshops and seminars, etc.

215. The EA's negotiating team will have had the benefit of reviewing other proposals and may be able to make constructive amendments to the methodology, work plan, and scheduling of the firm's proposal

on that basis. Conversely, the firm may also have some constructive suggestions about the work plan or the timing of inputs that it was not able to make in the proposal itself to conform with the proposal's requirements. Under an FTP, there is room to comment on the TOR, and such comments may be taken into account at this point. It is normally possible to reach a mutually agreeable conclusion on these items if both sides maintain a nonconfrontational attitude.

3. Out-of-Pocket Expenditures

216. A further item of discussion will be out-of-pocket expenditures. For QBS, CQS, and SSS, detailed negotiations may be required to establish rates for such items as airfares, per diems, equipment, transport, and other out-of-pocket expenditures. Under QCBS, FBS, and LCS contracts, the cost for these items will have already been established. The main items for discussion will thus be

- minor adjustments to take into account changes in the personnel schedule or the work plan (for which the unit rates outlined in the proposal will need to be followed), and
- any errors or discrepancies identified in the original proposal that need to be corrected.

4. Counterpart Support

217. During negotiations on counterpart support, the EA or the EA's representative at ADB-led negotiations will be expected to confirm the availability of any support listed in the RFP and may, after negotiations with the firm, agree to provide additional support, normally in kind or through the provision of counterpart personnel. If it turns out that the counterpart support outlined in the RFP will not, in reality, be forthcoming, then it may be necessary to provide additional funding, generally under out-of-pocket expenditures, to procure this support from other sources.

5. Provisional Sums and Contingencies

218. Provisional sums are those that are nonnegotiable at the time of submission of the proposal and include fixed costs for items such as seminars, workshops, the recruitment of NGOs, and particular types of equipment that it is considered should not be subject to price variations. In addition, the need for allowances for inflation and unforeseen expenditures will need to be covered. To cover these items, contingencies will have been included in the proposal as a nonnegotiable fixed amount in the same way as provisional sums. In addition, under QCBS these items are more easily dealt with, since it can be assumed that an allowance for inflation has already been built into the remuneration and per diem items of the financial proposal. For QBS, CQS, and SSS, these items will

need to be dealt with separately. During negotiations, it may be possible to define the cost of the items covered by the provisional sums and the contingencies more precisely. As a result, it may be possible to reallocate some of the amount originally reserved to items such as increased person-months or additional out-of-pocket expenditures.

6. Miscellaneous Items

219. In addition to the above issues, a number of other items in the proposal may be brought up during negotiations. These may include the need to clarify contractual or associational relationships among the partner firms of a joint venture or consulting consortium, or the need to clarify relationships between an international firm and its local partner.

7. Finalization of Financial Arrangements and Cost

220. Once all of the above issues have been satisfactorily resolved, then the financial aspects of the contract can be finalized. In the case of QCBS, FBS, and LCS, this normally requires only a few adjustments to the original financial proposal. For QBS, CQS, and SSS, the formal financial proposal (submitted prior to negotiations) will need to be reviewed in full in the light of the quantitative and unit cost agreements reached during negotiations.

F. Preliminary Agreement on Type of Contract Document

221. ADB normally uses two types of contracts, time-based and lump-sum, for which there are four types of standard contract documents:³⁸

- time-based contract documents for contract amounts over \$200,000;
- time-based contract documents for contract amounts \$200,000 or less;
- lump-sum contract documents for amounts over \$200,000; and
- lump-sum contract documents for amounts \$200,000 or less.

These documents consist of a general conditions section, which is fixed and not negotiable, and a special conditions section, which

³⁸ Besides time-based and lump-sum contracts, three other types of contract are possible: retainer and/or contingency fee contracts, indefinite delivery contracts, and performance-based contracts. These are not used as often as time-based and lump-sum contracts, and there are no formal standard contract documents for them. For TA-funded assignments, ADB uses the same contract document for both time-based and lump-sum contracts.

includes items negotiated between the EA and the firm.³⁹ Both parties should understand what can be negotiated and what cannot, since much time and effort can be saved if this is fully comprehended. Given that one of the deciding criteria is cost (i.e., over or below \$200,000), the only real decision to be made on the document to use is whether the contract will be time-based or a lump-sum.

222. Under time-based contracts, fees are paid and expenses reimbursed based on actual expenditure by the firm during implementation. Billings are usually on a monthly basis. The firm is paid for remuneration based on time sheets submitted by the experts, and is reimbursed for out-of-pocket expenditures based on receipts submitted for out-of-pocket items. Time-based contracts are recommended when the scope of the services may need to be adjusted during implementation or when the duration and quantity of services depend on variables that are beyond the control of the consultant. In time-based contracts, the consultant provides services on a timed basis according to quality specifications, and the consultant's remuneration is based on

- agreed-upon unit rates for consultant staff multiplied by the actual time spent by the staff in executing the assignment, and
- reimbursable expenses using actual expenses and/or agreed-upon unit prices.

This type of contract requires the client (i.e., the EA or ADB) to closely supervise the consultant and to be involved in the daily execution of the assignment.

223. Under lump-sum contracts, payments are made to the firm as a percentage of the total contract at specific agreed-upon times or upon completion of certain stages of the work. This may entail a certain percentage on submission of the inception report, a further payment on submission of the interim report, another on submission of a draft final report, and a final payment upon acceptance of the final report by the borrower. Such contracts are practical when the output is clearly defined and there is little room for dispute as to whether the work has been satisfactorily completed or not. Lump-sum contracts are easier to supervise than time-based contracts, since the former do not require such a high degree of oversight and accounting. They may be considered appropriate for any type of selection system but may be more appropriate for QCBS, FBS, LCS, and CQS.

³⁹ As previously noted, above standard contract for TA-funded assignments is somewhat different, with the main contract document itself constituting the special conditions section.

224. The decision on the type of contract to use should be a mutual one between the EA or ADB and the firm. It will often depend on how well the issues surrounding the proposal have been resolved and how precisely the inputs and expenditures of the proposal have been clarified. If there are some gray areas about the inputs but the outputs are well defined, it may be better to use a lump-sum contract. On the other hand, if the inputs (or at least unit rates) are clearly agreed upon but the outputs are somewhat uncertain, then a time-based contract may be preferable.

225. In either case, the decision taken at this point should be only preliminary. During the final part of negotiations, it may be found expedient to change from one type of contract to the other.

G. Joint Examination of Standard Contract

226. Once a type of contract has been agreed upon, the negotiators of both parties should take time to go paragraph by paragraph through the general conditions of the standard contract. This exercise will help confirm that the type of contract chosen is appropriate; will help identify parts of the special conditions that need to be agreed upon during the closing stages of negotiations; and may help identify gaps or shortcomings in the personnel, technical, and financial arrangements that still need to be resolved. This joint exercise should lead to a closer mutual understanding of the basis and mechanics of the agreement to implement the consulting services.

H. Finalizing Appendixes A to I of the Contract for Loan-Funded Assignments

227. The appendixes in the standard loan-funded contract are as follows:⁴⁰

- Appendix A** – Description of Services
- Appendix B** – Reporting Requirements
- Appendix C** – Personnel Schedule
- Appendix D** – Cost Estimates in Foreign Currency
- Appendix E** – Cost Estimates in Local Currency
- Appendix F** – Summary of Cost Estimates
- Appendix G** – Services, Facilities, and Equipment to be Provided by the Client
- Appendix H** – Standard Form of Advance Payment Security
- Appendix I** – Standard Dispute Notification Form

⁴⁰ In the standard contract for ADB TA-funded consulting services, the appendixes are somewhat different. They are: A – Terms of Reference, B – Personnel Schedule, C – Cost Estimates and Payment Schedule, and D – Specific Assurances of the Government.

228. Completing the appendixes should be straightforward at this point in the negotiations. The description of services should come directly from the final agreed-upon TOR. The reporting requirements will have been mutually agreed upon when deciding on the type of contract. The personnel schedule will have been finalized when resolving issues arising from the proposal. The cost estimates in foreign currency and local currency will have been agreed upon when finalizing the financial proposal (normally, international costs such as the remuneration of international consultants and international airfares will be in international currency, while local costs such as the remuneration of national consultants and local out-of-pocket expenses will be in local currency). In addition, services, facilities, and equipment to be provided by the client will have been agreed upon during discussion of the technical proposal. In the case of ADB-led negotiations, a similar exercise can also be easily undertaken to finalize the slightly different appendixes in the standard contract document for TA-funded consulting services.

I. Agreeing on Special Conditions

229. The appendixes and the special conditions (Chapter III of the contract document) are the main items of the contract to be negotiated. They distinguish a negotiated contract from the standard contract and provide precision to the agreements reached. In agreeing to and filling out the special conditions during negotiations for loan-funded consulting services, particular attention should be paid to the following:

- the section on duties and taxes (Section 1.10 in the time-based contract and Section 1.8 in the lump-sum contract⁴¹);
- the section on effectiveness of the contract (Section 2.1 of both contracts); this may entail various requirements that need to be fulfilled for the contract to become effective such as approval of the contract by ADB, the EA's approval of the consultant's proposals for appointment of specified key staff members, effectiveness of the ADB loan, and receipt by the consultant of advance payment and by the EA of advance payment security;
- the need to account for inflation if the contract is longer than 18 months (Section 6.2[a] in the time-based contract);
- the billing schedule for time-based contracts (Section 6.4[a] of the time-based contract);
- the schedule of payments for lump-sum contracts (Section 6.5 in lump-sum contracts);

⁴¹ These references are to contracts over \$200,000.

- ❑ the interest rate for delayed payments (Section 6.4 [c] of time-based contracts and Section 6.6 of lump-sum contracts); and
- ❑ the mechanism for settling disputes (Section 8 of both contracts).

J. Submitting the Draft Contract to Higher Authorities for Approval and to ADB for Review

230. At this point, for loan-funded consulting services, the contract will normally have to be approved by the higher authorities of the borrower. If required by the procurement plan, the draft contract will also need to be sent to ADB for review.⁴² The sequence of steps to be taken is normally as follows:

- ❑ Both parties initial the contract.
- ❑ The draft contract is sent to department or ministry authorities for review and formal acceptance.
- ❑ A draft is sent to ADB for review after approval of the borrower's authorities.
- ❑ ADB approves the draft and advises the borrower EA. If changes are required, these need to be communicated back to the negotiating team for further revision prior to this step.
- ❑ The consultant's representative and the EA's representative formally sign the contract.

231. This is a rather delicate phase in the negotiation process and needs to be carefully monitored. To avoid undue delays with internal approval, the borrower's authorities should be kept fully informed of the progress of negotiations during the negotiation period, and it may be worthwhile, if possible, to include a representative of the approving agency on the negotiating team. This may be the ministry or a legal division of the government. On the part of ADB, efforts should be made to keep internal review procedures as expeditious as possible.

K. Submitting the Signed Contract for Loan-Funded Consulting Services to ADB

232. Once signed, a contract for loan-funded consulting services is again submitted to ADB for further review. At this point, ADB checks to ensure that it is substantially the same as the draft contract sent earlier. In some cases it may not be, and further negotiations between ADB and the EA and between the EA and the consulting

⁴² By contrast, for TA-funded consulting assignments, the contract can be signed at this point by ADB's representative and the firm's representative, and copies sent to the user division. The minutes of negotiations are signed by ADB's representative, the firm's representative, and the EA's observer.

firm may be required if ADB funding is to be released to finance or partly finance the contract.

233. Once a contract has been signed, a number of additional documents (besides the final contract itself) need to be submitted to ADB:

- the names of the short-listed consultants who submitted proposals;
- the scores of their technical proposals;
- the prices of the financial proposals (for QCBS, FBS, and LCS);
- the overall ranking (for QCBS);
- the name of the consultant selected; and
- the amount of the contract.

This information is used for statistical purposes and for publishing on the ADB website for public information.

L. Failure of Negotiations

234. Should the negotiations be unsuccessful at any point, they may be terminated. If this should happen, the second-ranked firm will be invited to negotiate. In the case of recruitment by the EA under loan financing, prior ADB approval of these steps is required.

Self-Study Questionnaire – Chapter VII

1. **Q.** When is an invitation to negotiate a contract normally sent to a consulting firm?
 - A. When:
 - under QCBS – a first-ranked firm has been selected after technical and financial evaluation;
 - under QBS – a first-ranked firm has been selected after technical evaluation;
 - under FBS – a first-ranked firm has been selected after technical evaluation and the financial proposals have been verified as correctly presented within budget;
 - under LCS – the firm scoring 750 points or higher and with the lowest cost has been selected after technical evaluation and review of the financial proposals; or
 - under CQS and SSS – the proposal of the firm invited to submit a proposal has been reviewed and is considered acceptable from both technical and financial points of view.

2. **Q.** What should the invitation letter contain?
 - A. confirmation that the firm has been ranked first;
 - an invitation to send an authorized representative to negotiate the proposal and finalize a contract on behalf of the firm (bringing a letter of authority to do so);
 - a proposed schedule and agenda;
 - a request to confirm the availability of team members nominated in its technical proposal; and
 - a summary of any issues identified during evaluation that require clarification, any deficiencies that need to be corrected, any team members that the borrower would like to see replaced (and why), and any other corrective action to be taken.

3. **Q.** What are the four main activities in preparing for negotiations?
 - A. review of relevant documentation,
 - review of standard draft contracts,
 - identification of and agreement on key issues, and
 - preliminary preparation of the special conditions section of the standard contract.

4. **Q.** Which parts of the standard contract are negotiable and which are nonnegotiable?
 - A. The special conditions and the appendixes are negotiable. The general conditions are nonnegotiable.

5. **Q.** Why is it important for all members of the negotiating team to know this?
A. So that time is not wasted trying to negotiate nonnegotiable items.
6. **Q.** What is the main purpose of negotiations?
A. To turn the firm's proposal into a contract that can be implemented to the mutual benefit of both parties and, critically, to the benefit of the overall project.
7. **Q.** What do representatives of both parties need to formally undertake negotiations?
A. Written authority to negotiate on the part of the firm and the government.
8. **Q.** If negotiations take place within the proposal validity period, what are the circumstances within which the firm can request the replacement of a team member?
A. The originally proposed team member has resigned from the firm, has been certified ill, has suffered an accident, or has died.
9. **Q.** Is it possible for the EA or ADB to ask for the replacement of a team member?
A. Yes, as long as there is a sound reason, for example, when a candidate has been rated below average or noncomplying during the evaluation, when a candidate has been rated unsatisfactory on a previous assignment, or a candidate is ineligible.
10. **Q.** If a team member is replaced, is there any limit on his/her rate of remuneration?
A. Under QCBS, FBS, and LCS, the rate of remuneration will be the same as the originally proposed team member.
11. **Q.** What major issue is it important to clarify when discussing personnel for loan-funded consulting services?
A. The arrangements to be made for duties and taxes. These should be in accord with the formulation reached when the consulting services package was first prepared and with the data sheet that was sent to the consultants as part of the RFP.
12. **Q.** What are specific issues in discussing the work plan, methodology, and scheduling?
A. The timetable for fielding of various team members; the production of reports; and the holding of workshops, seminars, etc.
13. **Q.** Why is it generally easy to negotiate out-of-pocket expenditures under QCBS, FBS, and LCS?
A. These have already been proposed by the firm in its financial proposal, and only minor adjustments are necessary.
14. **Q.** Why is it important for the EA to confirm its counterpart support?
A. If it turns out that the counterpart support outlined in the RFP will not, in reality, be forthcoming, then additional funding may need to be provided, generally under out-of-pocket expenditures, to procure this support from other sources.

15. **Q.** What are the five types of contract that ADB uses?
- A. time-based,
 lump-sum,
 retainer and/or contingency fee,
 indefinite delivery, and
 performance-based
16. **Q.** Which are the most commonly used?
- A. Time-based and lump-sum contracts.
17. **Q.** Under what circumstances might a lump-sum contract be preferable, and under what circumstances might a time-based contract be preferable?
- A. If the inputs have some gray areas but the outputs are well defined, it may be better to use a lump-sum contract. On the other hand, if the inputs (or at least unit rates) are clearly agreed upon but the outputs are somewhat uncertain, then a time-based contract may be preferable.
18. **Q.** If a proper negotiating agenda and schedule are followed, why should it be easy to complete the appendixes to the standard contract for loan-funded consulting services?
- A. Appendix A, the description of services, should come directly from the final agreed-upon TOR.
 Appendix B, the reporting requirements, will have been mutually agreed upon when deciding on the type of contract.
 Appendix C, the personnel schedule, will have been finalized when resolving issues arising from the proposal.
 Appendixes D, E, and F, the cost estimates in foreign currency and local currency, will have been agreed upon when finalizing the financial proposal.
 Appendix G, services, facilities, and equipment to be provided by the client, will have been agreed upon during discussion of the technical proposal.
 Appendixes H and I are standard forms.
19. **Q.** Why is there often a delay after a draft contract for loan-funded consulting services has been agreed upon?
- A. The draft must often be sent for approval by higher authorities of the borrower and by ADB if the procurement plan so requires. Revisions may be required that entail further negotiations.

20. **Q.** Why does ADB carefully scrutinize the signed contract after it has been submitted by the EA?
- A.** To ensure that the signed contract is substantially the same as the draft contract.
21. **Q.** What information is normally submitted to ADB along with a copy of the signed contract?
- A.** the names of the short-listed consultants who submitted proposals,
 the scores of their technical proposals,
 the prices of the financial proposals (for QCBS, FBS, and LCS),
 the overall ranking (for QCBS),
 the name of the consultant selected, and
 the amount of the contract.
22. **Q.** Can an ADB representative assist with the contract negotiations?
- A.** Yes, but only as an observer.

