If you do this business for any length of time, sooner or later you will have to negotiate with somebody.

If you are a contractor, you may have to negotiate with a government contracting officer. If you are a subcontractor, you may have to negotiate with the prime contractor's buyer. If you are a government contracting officer, you may have to negotiate with a contractor.

If you want to do government contracting, you had better get used to the idea that you will have to sit down across the table from somebody (or perhaps some *bodies*) and try to reach an agreement about something. (The act of negotiating obviously is not confined to the government contracting environment; but that's where we practice so that's what we're going to talk about.) Negotiations are endemic to the contracting environment.

Yet in our experience many upon many individuals not only lack knowledge and skills in the "art" of negotiating—but they are also deathly afraid of it.

In our experience, far too many people who are otherwise skilled buyers or contracting officers are afraid of negotiating. They are afraid of sitting across the table from the "other side" and entering into a give-and-take exchange of information and positions, with the aim of identifying and eliminating differences in those positions.

Which is too bad—because if you will not or cannot negotiate, then you are very much handicapped. Rather than being an active agent, you become the victim of a process that you are powerless to influence. And make no mistake: you are powerless because you have chosen to give up your power.

We see the impact most often with respect to contract close-out. Time and time again, we hear that subcontracts or Purchase Orders or even prime contracts cannot be closed "because we are waiting for final rates." *Bullshit*. You do not need final indirect rates to negotiate a final price; you need the willingness to actually negotiate a final price. You need the willingness to understand the risks and mitigate them. You need the willingness to reach price agreement, understanding that a year (or many years) from now, you might learn that you didn't negotiate

the lowest price after all. You need the willingness to risk being wrong.

And most people are afraid of being wrong.

If you are in the government world, you are probably afraid of that peer review, or that IG review. If you are in the corporate world, you are probably afraid that your next promotion will be denied because of your "mistake". All of which is also pretty much bullshit, because of things like MSPB and HR—and the fact that boldness should be rewarded rather than criticized.

Back to "final rates" for a minute: it is absolutely important for readers to understand that the regulatory requirement for (audited and negotiated and agreed-upon) final billing rates (per the contract clause 52.216-7) is a lot more narrow than many people think it is. First of all, with respect to subcontracts, we've already devoted **an entire article** to the topic. Establishing final billing rates is a matter completely between the prime contractor and its subcontractor(s); the government plays no official role. Thus, when anybody tells you they cannot close out a subcontract because they are waiting for "final rates," feel free to find people with more knowledge and expertise—and courage—because you have the wrong people in that function.

Second, with respect to prime contracts, the regulations provide for "quick closeout" procedures at FAR 42.708. The regulations establish which contracts are eligible for quick closeouts, and then make it mandatory that the cognizant contracting officer actually use those procedures for qualifying contracts. The CO does not have a choice: quick closeout procedures must be used for qualifying contracts. ("The contracting officer responsible for contract closeout *shall* negotiate the settlement of direct and indirect costs for a specific contract, task order, or delivery order to be closed, in advance of the determination of final indirect rates set forth in 42.705, if – ….") (Emphasis added.)

The Defense Contract Management Agency (DCMA) has taken a more permissive position. DCMA Memorandum #13-288 (9/18/2013) "authorizes Administrative Contracting Officers (ACOs) to close specific contracts prior to the establishment of indirect cost rates regardless of dollar value or the percent of unsettled direct costs and indirect costs allocable to the contract [provided that] the contractor has submitted the final certified indirect cost rate proposal for the contract under consideration that has been audited by the [DCAA] of the ACO received a Low-Risk Adequacy Memorandum from DCAA."

The point is, in many circumstances you do not need to wait for “final rates” and anybody who tells you otherwise is mistaken. All you have to do is negotiate final rates with respect to the contract or subcontract is question, and then those rates become final and the price is established only for that contract.

But what about if DCAA comes along later and determines that the contractor or subcontractor had included unallowable costs in those final rates?

Doesn’t matter. The contract is closed. There is no impact. In fact, we would argue that DCAA should not even count the closed contract in its audit universe.

We should note that DCMA has closeout instructions and there are many resources on the internet to help negotiators structure a final rate negotiation that takes place in advance of receipt of final billing rates. In our experience, though, people don’t look for those resources because they have already decided that they have to wait for “final rates.”

Other common areas in which people seem to be reluctant to negotiate include establishing final costs for a firm-price-incentive or cost-reimbursement-incentive contract. Again, they want to wait for “final rates” to determine final contract costs for purposes of calculating the incentive shares—but that is *absolutely contrary* to the contract clause(s), which mandate final price negotiation “promptly”. (See 52.216-16(d).) Failure to follow the requirements by waiting for “final rates” could mean that the parties may be in breach of contract requirements.

And that’s just a couple of the many opportunities for negotiation. There are many more we could have discussed, including termination settlements, requests for equitable adjustment, etc. Our point remains: if you are unwilling to negotiate, you have missed significant opportunities to accelerate cash flow and reduce downstream administrative costs.

But one more thing: you may also have missed an opportunity to avoid a dispute.

Often, negotiations can resolve issues without resorting to the formal disputes process. If you can resolve issues without a formal dispute that means that you may not have to hire an attorney, thus avoiding significant fees that are likely to be unallowable.

You may have to give something up, but the upside is avoidance of a potentially protracted and costly process. In our experience it's usually worth giving something in order to avoid litigation.

Here's a final story:

Several years ago we were involved in an intense dispute involving huge DCAA disallowances on multiple years' rates, Contracting Officer Final Decisions, demand for payment, notices of appeal, and actual litigation at the Armed Services Board of Contract Appeals (ASBCA). As we've written before, if the government's disallowance is big enough, and the contractor disagrees, then the contractor *will* lawyer-up. The contractor literally *cannot afford to agree*. These disallowances were cumulatively worth nearly one billion dollars: the contractor could (and did) hire quite a few very expensive attorneys to pursue its appeal. There were litigation experts; there were deposition experts; there were contract cost experts. With that kind of money at stake, the contractor was willing to spend more than the GDP of many states.

Meanwhile I put together a very small team and tried to negotiate some of the issues with the DCMA contracting officer in parallel with the ASBCA litigation. Our strategy was simple: rather than focus on the dollars, we would focus on the issues. We would try to come to an agreement on issues and then apply the agreement to the years in dispute. (Note that we knew the dollars associated with each issue; but we wanted to separate the dollars from the issues because we expected the government folks wouldn't have the same understanding of how costs flowed to contracts in our very complex indirect cost allocation model.)

(We were helped by a government realization that the DCAA audit reports underlying the COFDs were seriously flawed. We were also helped by a government realization that nobody wanted to actually try the case, because it was either (a) embarrassing, or (b) too complex.)

Our strategy was to tackle the small issues first, and *we gave in on almost every one of them*. When we didn't give in, we "split the baby" and agreed to a 50/50 position on cost allowability.

We gave the government negotiators a string of victories—all of them virtually worthless at the contract cost level. Then when we got to the big issues, we stood firm and reminded the other side how many concessions we had already made, and asked them to now make some concessions of their own. And they did!

Long story short: for one year we started with (if memory serves) $249 million in cost disallowances. (*Yes, million with an "M".*) By the time we were done, we had agreed on $489 thousand, none of which was deemed to be expressly unallowable. When that $489,000 was run through the cost allocation model, the impact on contract costs was less than $300,000.

We considered that a very good negotiation outcome—and the agreed-upon positions were applied to the other years in dispute, with similar results. Our agreement was contingent on a global settlement agreement being executed between the parties. It was eventually executed and the ASBCA appeals were dismissed with prejudice.

Had we not been willing to negotiate, or had we been afraid of being criticized over the fact that we could not get the disallowances down to a perfect zero, then we would have missed a significant opportunity to resolve matters without spending a small fortune on outside attorneys. The government would have missed a significant opportunity to close out years and contracts and eliminate a whole slew of ULOs.

Negotiation worked, as it often does.

Why not bolster your negotiation skills?