

# TEXAS WORKFORCE COMMISSION

## Procurement & Contract Management Handbook



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# CHAPTER 1 - INTRODUCTION

## Overview

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Texas Workforce Commission (TWC) is required to establish clear levels of purchasing accountability and staff responsibilities related to purchasing and to document contracting policies and practices consistent with the Texas Comptroller of Public Accounts (Comptroller) Texas.

Procurement and Contract Management Guide (Guide).<sup>1</sup> The TWC Procurement and Contract Management Handbook (Handbook) documents TWC's global guiding principles for procurement and contracting functions.

As the designated centralized unit with primary responsibility for TWC procurement and contract management, the Procurement and Contract Services Department (PCSD) responsible for establishing consistent agency policies and efficient practices that align with the Guide and [2 Code of Federal Regulations § 200, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards](#) (Uniform Guidance) which requires TWC to expend and account for federal grant funds in accordance with state laws and procedures.

Within TWC, many of the procurement planning functions are performed by individuals within the TWC business units. In addition, some TWC business units outside the have certified contract developers and managers who participate in many of the purchasing or contracting functions. This Handbook is designed as a general overview of procurement, consisting of purchasing and contracting, for all TWC employees who participate in the procurement and contract management processes.

PCSD establishes agency policies and processes for contract functions, and partners with TWC business units to plan procurements, develop solicitation documents, evaluate proposals, conduct negotiations, award contracts, execute contracts, manage, and monitor contracts, support grant administration, and maintain agency procurement, contract, and grant award records in accordance with the agency records retention policy and state law.

TWC business unit policies and procedures exist outside of this Handbook. TWC business units are expected to develop or adapt internal procedures or guidelines to harmonize with this Handbook. See Appendix 1 for a list of suggested business unit procedures.

The contents of this Handbook (including associated processes, forms, and templates) are subject to change. The contents are not intended in any way to grant any entitlement or right to any individual or entity. The contents do not constitute a basis for contesting any bid, offer or proposal made, granted, or awarded by the TWC.

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<sup>1</sup> Tex. Gov't Code § 2261.256.

## How to use this Handbook

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This Handbook is to be used in conjunction with the Guide. Although this Handbook serves as a reference for Texas procurement laws and TWC policy and procedures, it is not an exhaustive compilation that may pertain to a particular transaction. It also is not a substitute for legal advice. TWC staff should coordinate legal questions with the TWC Office of General Counsel (OGC). Technical purchasing and contracting questions should be coordinated with the PCSD Director.

### Procurement and purchasing terminology

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When using this Handbook, care should be taken to gain an understanding of the referenced terms. Every attempt has been made to use the terms in the same context as they are used in the underlying statutory authority; even then a word may have different meanings depending on the statutory context. This Handbook is intended to follow the rules of statutory construction. In the event of a conflict, the underlying law controls.

Notably, as in the Guide, great effort is made to distinguish between procurement and purchasing as follows:

Procurement refers to all aspects of the sourcing activities, including drafting and issuing the solicitation, evaluation of responses, selection of successful respondents, the negotiation of contracts and grant awards, and the actual purchasing of goods or services.

Purchasing refers to the mechanical or administrative process of how goods and services are ordered.

Purchasing can usually be described as the transactional function of the procurement process, whereas procurement is, essentially, the overarching or umbrella activity within which purchasing can be found.

A glossary of procurement terms and a list of selected acronyms and abbreviations are available in the Appendices to the Guide.

### Applicability to Vocational Rehabilitation Services

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The Handbook contains specific guidelines for procurement, purchasing and contract management for the TWC Vocational Rehabilitation Services (VRS) program. State and federal laws authorize TWC to enter into contracts on behalf of vocational rehabilitation customers and administrative contracts on behalf of VR staff.

## Grant Awards

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The award of grants to other entities for the purpose of carrying out a public purpose, in contrast to the procurement of goods or services, must follow TWC's Grant Handbook and Procedures, the Uniform Grant Management Standards (UGMS) published by the Texas Comptroller's Statewide Procurement Division under Chapter 783 of the Texas Government Code, as well as underlying state and federal law.

## Version Control

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The Handbook was first published as Version 1.0 in September 2018. When modifications are made, the date of revision on the cover page of the Handbook will be updated and the superseded version will be archived by PCSD for reference.

## Accessibility

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TWC and PCSD are committed to making TWC Electronic and Information Resources (EIR), including all forms, documents, webpages, and software, comply with state, federal and TWC EIR Accessibility requirements so that TWC information is accessible to everyone, including people with visual, hearing, mobility, cognitive and other disabilities. If there is an accessibility issue with the TWC Handbook, please contact the PCSD Director.

## CHAPTER 2 - ETHICS and PROFESSIONAL STANDARDS

### Overview

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TWC procurement employees have a special responsibility as gatekeepers for the proper expenditure of Texas government financial resources. They are entrusted to uphold the highest ethical standards and be good stewards of public funds with every purchasing decision they make. Purchasing and contracting functions must be independent of bias, free of obligation or suspicion, and completely fair and impartial, thereby avoiding even the appearance of impropriety.

More information can be found in the TWC Ethics policy and the Guide.<sup>2</sup> In the event of questions or concerns, the employee should contact a supervisor, the Chief Ethics Officer, or the Ethics Advisor.

### TWC Ethics Policy

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All TWC employees, including TWC procurement employees, are required to read and acknowledge receipt of the TWC Ethics Policy and acknowledge an ongoing responsibility for compliance with it and statutory requirements. The TWC Ethics Policy contains special provisions pertaining to TWC purchasing, grants and contracts.

### Conflicts of Interest

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#### Overview

State law mandates that no state officer or employee shall have a direct or indirect interest in, or engage in, any business transaction or professional activity, or incur any obligation that conflicts with the proper discharge of that individual's duties for the state. A conflict of interest may exist or appear to exist when an individual engaged in purchasing or contracting functions has a real, apparent or potential financial interest or other beneficial interest in an entity selected for contract award or in the outcome of a transaction. Financial or other beneficial interest includes, but is not limited to the following:

- Employment with a grantee, contractor, vendor, or respondent;
- Pending employment with a grantee, contractor, vendor, or respondent;
- Paid consultation with a grantee, contractor, vendor, or respondent;
- Membership on a grantee's, contractor's, vendor's or respondent's board of directors, officer, or partner of the respondent, or its parent or subsidiary organization; and/or
- Ownership of stock, partnership or other beneficial interest in a grantee's, contractor's, vendor's or respondent's organization.

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<sup>2</sup> <http://intra.twc.state.tx.us/intranet/gc/docs/ethics-policy-twc.docx>

## Non-Disclosure and Conflict of Interest Certification Statement

PCSD staff involved in procurement and grant solicitation activities must sign an Annual Non-Disclosure and Conflict of Interest Certification.<sup>3</sup> The Statement is retained by the PCSD Director. A copy of the form is located on the Business Operations PCS SharePoint site. PCSD encourages other business units with staff who regularly develop solicitations to also have those staff sign and submit Annual Non-Disclosure and Conflict of Interest Certifications to the PCSD Director. TWC staff involved in procurement and grant solicitation activities who do not submit annual certifications will be required to submit a certification for each procurement or solicitation in which they are involved.

## Conflict of Interest Disclosure Statement

TWC staff involved in TWC procurement or contract activities shall disclose any known potential conflict of interest with respect to any contract with a private vendor or bid for the purchase of goods or services from a private vendor.<sup>4</sup> This disclosure requirement applies only to a contract for the purchase of goods or services solicited through a purchase order if the amount of the purchase order exceeds \$25,000. The Statement is retained in the Procurement file. A copy of the form is located on the Business Operations PCS SharePoint site.

TWC attorneys acting in their capacity as legal counsel to TWC and therefore covered by the attorney-client privilege are not required to sign non-disclosure statements when participating in the review and development of TWC procurement documents. To the extent a TWC attorney is participating in a procurement as an end-user or customer, the TWC attorney must sign the Non-Disclosure and Conflict of Interest Certification.

## Disclosure Statement for Purchasing Personnel

Prior to awarding a major contract, defined as a contract with a value of at least \$1 million, for the purchase of goods or services to business entity, TWC staff working on the contract must disclose, on the form prescribed by the State Auditor's Office, any relationship about which the purchasing personnel is aware and submit the completed disclosure statement to the Executive Director or his designee.<sup>5</sup> This requirement does not apply to any attorney who is licensed to practice law in Texas and has not been disciplined by the State Bar of Texas.<sup>6</sup>

This Statement is retained in the Procurement file. A copy of the form is located on the Business Operations SharePoint site.

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<sup>3</sup> Tex. Gov't Code § 2155.003.

<sup>4</sup> Tex. Gov't Code § 2261.252(a).

<sup>5</sup> Tex. Gov't Code § 2262.004.

<sup>6</sup> Tex. Gov't Code § 2262.004.

## Employment Restrictions

A former TWC state officer or employee, who during the period of state service or Texas Workforce Commission Procurement and Contract Handbook (10/2021) employment, participated on behalf of TWC in a procurement or contract negotiation involving a person or business entity, is restricted from accepting employment from that person or business entity before the second anniversary of the date the contract was signed, or the procurement was terminated or withdrawn.<sup>7</sup>

TWC is prohibited from entering into a contract for consulting or professional services or into an employment contract with any individual who has previously been employed by TWC within the last twelve (12) months. The term “employment contract” includes a personal services contract regardless of whether performance of such a contract involves the traditional relationship of employer and employee.<sup>8</sup>

## Reporting Conflicts

TWC staff involved in procurement decision making are required to report any real, apparent, or potential conflicts of interest that may come to their attention during any phase of the procurement or contract administration life cycle. Reports regarding potential conflicts of interest should be made to the supervisor through the proper chain of command and include all pertinent information regarding the incident.

TWC contractors are required to disclose conflicts of interests and notify TWC, in writing, of any potential conflict of interest that could adversely affect the TWC by creating the appearance of a conflict of interest. More information can be found in the TWC Ethics Policy. In the event of questions, the TWC employee should contact a supervisor, the Chief Ethics Officer, or the Ethics Advisor.

## TWC Nepotism Policy

In addition to the TWC Ethics Policy, all TWC employees are required to be familiar and comply with the [TWC’s Nepotism policy](#) found in the TWC Personnel Manual.

## Suspected Fraud, Waste, or Abuse

The TWC has developed and utilizes a purchasing accountability and risk analysis procedure that includes an assessment of the risk of fraud, abuse, or waste in the contracting process, contract provisions, and payment and reimbursement rates and methods for the different types of goods and services for which the agency contracts.

Reports of fraud, waste and abuse are reported in accordance with state statute and the [TWC’s Reporting Fraud, Theft, Waste and Program Abuse policy](#) found in the TWC Personnel Manual.

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<sup>7</sup> Tex. Gov’t Code § 572.069.

<sup>8</sup> Tex. Gov’t Code § 2252.901.

## CHAPTER 3 - CONFIDENTIALITY and RELEASE of INFORMATION

TWC staff must take all reasonable steps to protect the confidentiality and non-disclosure of information throughout the procurement. No information should be shared with any potential vendor that will provide a competitive advantage over other vendors.

Some vendors may be unwilling to provide the TWC with information regarding their organization operations and may request that information not be revealed to their competitors. Certain laws apply during the procurement process and following the procurement process, as well as opportunities for a vendor to request and maintain confidentiality of information. Information contained in an offer is generally considered confidential until the TWC publishes or sends written notice of an award.

Questions regarding the release of procurement information, whether during the procurement process or following, must be referred to the TWC OGC Open Records Section. Determinations related to the release of public information requests are issued by the TWC OGC Open Records Section.

During the solicitation and assessment process and prior to announcement of an award, TWC staff must ensure vendor responses are maintained in a confidential manner. TWC staff may not refer to the content of another offer, give information about offers, or state whether there are other offers.

All individual client information is considered confidential. In addition, the TWC may receive information considered to be personally identifiable information (PII) that must be protected and maintained as confidential. Each TWC staff member bears a responsibility under agency policy for maintaining PII in a secure manner. Each TWC business unit that may create or receive a procurement or contract document containing PII must ensure proper procedures are in place to ensure confidentiality.

## CHAPTER 4 - ROLES and RESPONSIBILITIES

### Overview

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Contracting roles and responsibilities involve a broad range of functions and activities across multiple business units within TWC providing numerous opportunities for overlap and duplication of efforts. Each TWC business unit must establish an internal organizational structure that assigns accountability for contract management activities and develop and maintain internal, written policy, processes, and procedures in accordance with this Handbook.<sup>9</sup>

### TWC Business Unit Roles and Responsibilities

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#### Business Unit and End-User

The business unit starts the procurement process when it identifies a need for goods and services. Responsibilities include the following:

- conducts a needs assessment and cost estimate TWC Form 1300 and submits to [PCSD Customer Service Portal](#);
- completes the necessary procurement forms (such as a purchase requisition);
- obtains the required management approvals for proceeding with the procurement;
- verifies the availability of funds for the procurement;
- collaborates with necessary staff for the procurement, including developing the statement of work, developing evaluation criteria, and identifying deliverables;
- provides input for development of the Acquisition Plan;
- provides input on the solicitation and associated documents;
- designates a business unit representative to serve as point of contact for business unit questions during the procurement
- designates a qualified business unit staff member to serve as Contract Manager if the business unit will manage an awarded contract, which may include:
  - manages all aspects of the contract;
  - requests amendments or renewals;
  - verifies that payment is timely and appropriate;
  - performs contract monitoring;
  - periodically performs risk assessments of the contract throughout the contract life;
  - completes contract/vendor performance evaluations and submits them to PCSD;
  - immediately notifies PCSD and OGC of performance issues; and
  - monitors corrective action plans;
- attends procurement-related training as necessary; and
- provides information to the contract manager, PCSD, Contract Oversight and Support (COS), or others, as necessary.

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<sup>9</sup> See Appendix XX for a list of suggested internal processes for TWC divisions.



## Statement of Work

The TWC Business Unit's completed needs assessment and cost estimate TWC Form 1300 provides information useful for development of the Statement of Work (SOW). Contract success is usually connected to the quality of the SOW that includes the following:

- detailed description of the goods and service requirements to be performed, including deliverables, milestones and tasks
- outlined requirements for the vendors to have their work accepted and approved for payment

TWC Business Units responsible for developing the SOW include the following:

- end-users obtain details for the project from Subject Matter Experts (SME)
- end-user submits an initial draft SOW to the Purchaser
- Purchaser works closely with the end-user to refine their needs
  - Purchaser is the solicitation process expert
  - Purchaser critically reviews the SOW to ensure full and open competition

TWC Business Units collaborate to develop the following key elements of the SOW:

- scope of work
- project objectives and background
- requirements and tasks
- milestones and deliverables
- period of performance
- deliverables schedule and payment terms
- miscellaneous or special requirements
- acceptance criteria

## Procurement and Contract Services Department (PCSD)- Business Operations Division

PCSD supports TWC business units and staff through all aspects of the Procurement Cycle as follows:

- defines and implements rules, policies and procedures that relate to contracting and purchasing, review and oversight of the procurement and contract process throughout the contract life cycle, and the review and approval process of all contracts;
- facilitates and provides technical assistance on state procurement law and options for TWC contracting;
- reviews and comments on TWC rules that include any part of the Procurement or Grants cycle;
- provides training to PCSD and TWC staff regarding TWC procurement;
- designates a certified Purchaser or Contract Developer to manage the procurement process through to contract execution.
- identifies the appropriate procurement method in accordance with state and federal laws and regulations;

- bases awards on best-value principles, on best business practices, and on providing value to the State of Texas;
- processes contract amendments and change requests;
- requests business unit to provide vendor performance evaluations and enters evaluations into CPA portal;
- manages required contract reporting;
- in consultation with the OGC and Finance, continuously updates and maintains templates as necessary to maintain compliance with changes in governing legislation and regulations;
- maintains a written code of standards governing the performance of its employees engaged in the Procurement Cycle;
- maintains the contract records in Enterprise Contract and Procurement System (ECPS), which is the official TWC repository for all contracts; and
- report, posts and provide the required contract and purchasing notifications.

## Finance

Finance supports TWC business units and staff throughout the Procurement Cycle as follows:

- provides support regarding fiscal accountability and payment requirements;
- identifies funding source and funding availability;
- approves and processes invoice payment;
- establishes contractors in the TWC financial system;
- provides expenditure reporting to oversight agencies; and
- assists in contract closeouts.

## Office of General Counsel

- OGC provides legal support to TWC business units and staff as follows:
  - provides legal assistance on procurement laws and regulations;
- assists in the development of solicitation, contract and amendment documents;
- reviews solicitation documents or contracts with an initial or amended value of
- \$100,000 or greater, and others, if determined to be high risk;
- provides legal support for contract negotiations;
- provides legal assistance for vendor performance concerns, including initiating remedies and defending disputes;
- assists in the development, review and approval of subsequent contract documents such as amendments, work orders and task orders; and
- manages the Vocational Rehabilitation (VR) appeals and request for reconsideration process and maintains the related records.

## Contract Oversight and Support (COS)

COS participates in the Procurement Cycle for VR contracts as follows:

- coordinates preparation of VR contract risk assessment for statewide on-site monitoring;
- conducts monitoring of VR contractor performance;
- financial and recordkeeping requirements of VR contracts;
- oversees VR contractor remedial action review; and
- maintains VR contract monitoring review and remedial action review files.

## Procurement Team

For certain procurements, a procurement team may be established that will include a PCSD Purchaser or Contract Developer, a representative from the business unit that has identified the procurement need and any other staff from other TWC business units, as needed.<sup>10</sup>

The establishment of a procurement team does not replace or limit procurement requirements, policies and procedures. For example, although Finance might not have a representative on the procurement team, it is still necessary and imperative that standard processes that require involvement or review by Finance continue to be used (such as questions regarding availability of funds, funding authority and other questions that would be directed to Finance).

Procurement team responsibilities may include:

- procurement planning;
- developing solicitation specifications and related documents;
- serving on the evaluation committee; and
- fulfilling other responsibilities related to the procurement.

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<sup>10</sup> The terms Purchaser, Contract Developer and Contract Manager are used throughout this Handbook as those terms are used by the Comptroller in the State of Texas Procurement and Contract Management Guide and not the functional or classification titles used at TWC. TWC strictly adheres to the certification requirements for the functions performed by each. See Professional Certification and Training section of this Handbook.

## CHAPTER 5 - VENDOR COMMUNICATION

Communication between TWC public procurement professionals and vendors is imperative and encouraged. If used effectively, this communication can be a vital resource for TWC procurement staff. Steps must be taken, however, to maintain a fair opportunity to compete for all vendors and avoid any appearance of favoritism. TWC staff involved in a procurement must be mindful that one-on-one communications with vendors occurring prior to contract award are subject to enhanced scrutiny due to the importance of maintaining a level playing field among all eligible vendors during competitive procurements. If there is any doubt about appropriate communications with vendors, consult with a supervisor, the Chief Ethics Officer or the Ethics Advisor.

Fact Gathering. Texas law authorizes the exchange of information between a state agency and a vendor related to future solicitations.<sup>11</sup> Vendors are often experts in their respective fields and can offer insight on potential purchases, such as current trends, industry practices, and available products or solutions. Vendor input may be obtained through the issuance of a Request for Information (RFI), attendance at industry days, or directly contacting DIR approved vendors or industry leaders or vendors listed under the applicable code on the Comptroller Certified Master Bidders List (CMBL). The result of these interactions may lead to increased competition, a more detailed and up-to-date description of technical requirements or statement of work, and ultimately better value for the State. However, procurement specifications must never be tailored to benefit a particular vendor, as this limits competition. Care should be taken to avoid the appearance of favoritism toward certain vendors in the fact-gathering process and when possible, agencies should avoid consulting exclusively with the incumbents or a small number of vendors, which could give the appearance of favoritism.

Drafting the Solicitation. When all fact gathering is completed and the actual solicitation-drafting process has begun, vendor communication must cease to ensure the integrity of the procurement, except as permitted by the solicitation. If a vendor is compensated by TWC to assist in drafting specification or the scope of work for a solicitation, TWC may not accept a bid or award a contract to that vendor.<sup>12</sup>

During the Solicitation. To ensure a level playing field, any contact between vendors and end users or evaluators should be avoided during the solicitation posting period, and if a vendor fails to obey by the guidelines regarding vendor communication posted in the TWC solicitation, the vendor's proposal may be subject to disqualification. Guidelines in the solicitation could include designating specific agency points of contact throughout the solicitation and evaluation process. Evaluation and vendor selection should be based on response documents formally submitted by each vendor, not other communications. If one vendor is provided an opportunity to clarify its response, similarly situated vendors should receive the same opportunity.

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<sup>11</sup> Tex. Gov't Code § 2155.090(b).

<sup>12</sup> Tex. Gov't Code § 2155.004 and § 2155.090(b).

Special Caution regarding Current Contractors. Contract Managers who have regular interactions with current contracts may continue to work directly with their assigned contractor, even if those contracts might be pursuing a pending TWC procurement.

The Contract Manager must exercise caution to ensure that conversations with current contractors are limited to the current contract, and do not stray into a pending solicitation or possible future contract. Contract Managers should direct questions to their supervisor, the PCSD Director, the Chief Ethics Officer or the Ethics Advisor.

## CHAPTER 6 - PROFESSIONAL CERTIFICATION and TRAINING

### Overview

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Texas law requires that state agency “public procurement professionals” conducting purchasing, contract development, or contract management activities receive training and/or be certified and comply with continuing education requirements.<sup>13</sup> There are three (3) types of public procurement professionals:

- Purchaser
- Contract Developer
- Contract Manager

In order to retain their position, each TWC procurement professional must obtain and maintain their certification without lapse. Newly hired TWC procurement professionals must obtain their certification within the timeframe specified on their job posting.

### Purchaser and Contract Developer

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#### Purchasing

A TWC employee must complete the Basic Texas Purchaser Course to engage in purchasing functions on behalf of TWC if the employee has the job title of “purchaser”; performs purchasing activities as fifteen percent (15%) or more of their job activities; or makes a purchase in excess of \$5,000.<sup>14</sup>

Purchasing is defined as the receipt and processing of requisitions, development of specifications, development of statement of work, the issuance of purchase orders against existing statewide, cooperative or agency contracts, and the verification of the inspection of merchandise or receipt of services by the agency. The term does not include the development of solicitations and contract awards that must be posted to the Electronic State Business Daily (ESBD) found on the Texas SmartBuy website.<sup>15</sup>

#### Contract Development

A TWC purchaser, who is not already a Certified Texas Contract Developer (CTCD) or Certified Texas Procurement Manager (CTPM), must be certified as a CTCD (formerly CTPM) to engage in contract development functions on behalf of TWC if the employee develops, evaluates, negotiates, or awards a contract posted to Texas SmartBuy on behalf of a state agency.

Contract development applies to actions taken prior to contract execution, including the receipt and processing of requisitions, assessment of need, assessment of potential risks, development and review of specifications, development and review of scopes of work, identification and selection of procurement methods, identification and preparation of

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<sup>13</sup> Tex. Gov’t Code § 656.051 and § 656.052.

<sup>14</sup> 34 Tex. Admin. Code § 20.133(c)(1).

<sup>15</sup> Located at <http://www.txsmartbuy.com/>.

evaluation criteria, preparation and advertising of solicitation documents, tabulation of respondent bids, evaluation of respondent proposals, negotiation of proposals, and the preparation and completion of contract award documents. The term does not include invoice or audit functions.

Training and Certification Requirements				
Purchasing Authority	Course Title	Experience	Certification	Exam
Zero to \$25,000 (routine purchases)	Basic Texas Purchaser Course	None required	None	None required
Routine purchases and contract development	Texas Contract Developer Certification Training	None required	CTCD (formerly CTPM)	80% or greater

## Contract Manager

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A TWC employee must be certified as a Certified Texas Contract Manager to engage in contract management functions on behalf of the TWC if the employee has the job title of “contract manager” or “contract administration manager” or “contract technician”; performs contract management activities as fifty percent (50%) or more of their job activities; or manages any contract in excess of \$5,000,000.<sup>16</sup>

Contract Management applies to actions taken following contract execution, including the assessment of risk, verification of contractor performance, monitoring compliance with deliverable and reporting requirements, enforcement of contract terms, monitoring and reporting of vendor performance, and ensuring that contract performance and practices are consistent with applicable rules, laws and the State of Texas Procurement and Contract Management Guide.

Training and Certification Requirements			
Course Title	Experience	Certification	Exam
Texas Contract Manager Certification Training	None required	None	None required

## Documentation

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The PCSD Staff Services Officer ensures that each TWC staff member who is required to have training or certification provides evidence of training and certification. The Staff Services Officer maintains the documentation for each staff member required to be trained and certified, including initial and renewal certificates or documentation.

TWC business unit directors are responsible for ensuring that staff performing functions requiring certification or specialized training obtain the required certification and receive the specialized training. TWC staff receiving certification must report the certification to the PCSD Staff Services Officer, who retains a copy of the certification.

<sup>16</sup> 34 Tex. Admin. Code § 20.133(c)(3).

## CHAPTER 7 - PURCHASING and CONTRACTING STRATEGIES

### Overview

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The Texas Legislature has indicated that its intent is that all agencies establish effective processes and controls to manage contracts and ensure the cost-effective use of state appropriations for contracted goods and services.

### Procurement and Contract Checklist

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Purchasers and Contract Managers collaborate to ensure compliance with state law regarding maintaining contract records by identifying the location of all documents on the Procurement and Contract Checklist (TWC Form 1400) that are required to support the lifecycle of all contracts from solicitation through contract closure.

### Contract Management and Oversight<sup>17</sup>

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TWC manages its contracts consistent with state statutes, the General Appropriations Act, the State of Texas Procurement and Contract Management Guide, this Handbook, and ensures proper oversight of contract processes. TWC strives to:

1. Provide adequate time for applicable external reviews by the Quality Assurance Team (QAT) and Contract Advisory Team when establishing procurement timelines;
2. Follow recommendations made by the Contract Advisory Team or adequately explain any deviations from the recommendations and why the deviation is necessary;
3. Ensure proper justification for proprietary purchases and that contracts are established and approved by the Statewide Procurement Division of the Office of the Comptroller;
4. Ensure that contract award decisions are determined based on best value criteria established in solicitation documents to ensure fair and open competition;
5. Ensure that staff involved in contract management or administration duties are adequately trained to perform those duties;
6. Periodically review internal contracting practices and manuals to ensure that they are current and up to date with current regulations and best practices;
7. Ensure that provisions related to service level and pricing mechanisms in existing contracts are correctly enforced;
8. Enforce damage provisions for vendor non-performance and collect monetary refunds for improper payments to vendors;
9. Ensure dollar values of performance bonds and insurance are consistent with risk of nonperformance; and

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<sup>17</sup> General Appropriations Act, House Bill 1, 86th R.S., Article IX, Section 17.10 (effective September 1, 2019).



10. Ensure that vendor performance is reported to the Vendor Performance Tracking System (VPTS) and that VPTS data is used in selecting vendors for contract awards.

### Competitive Bids and Cost-Benefit Analysis Requirement

In addition, TWC may not use funds appropriated elsewhere in the General Appropriations Act to pay for a contract for goods or services unless it:

1. Seeks competitive bids before renewing or extending a contract that has been in effect more than five fiscal years as of August 31, 2019 and is valued at the lesser of \$10,000,000 or 10 percent of the agency's All Funds budget for the 2018-19 biennium. The following contracts are exempt from these requirements:
  - a. Texas SmartBuy, term, and cooperative contracts administered by the Comptroller or Department of Information Resources;
  - b. grants;
  - c. interagency contracts;
  - d. contracts that relate to a construction project as defined by §2166.001, Government Code;
  - e. contracts that relate to highway construction or highway engineering;
  - f. contracts that relate to developing information resource applications or information resource technologies; and
  - g. contracts not required by law to be competitively bid.
2. Conducts a cost-benefit analysis to compare canceling or continuing any contract related to a major information resource project subject to Quality Assurance Team (QAT) monitoring that is more than 50 percent over budget or over schedule.<sup>18</sup> QAT must reapprove the cost-benefit analysis for the project to continue.

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<sup>18</sup> The QAT is a statutorily created interagency working group that provides on-going oversight to reduce project overruns and failures of major information resources projects (MIRPs). Tex. Gov't Code § 2054.158.

## CHAPTER 8 - THE PROCUREMENT CYCLE

Common characteristics exist between all public procurements. Following each of the processes outlined below ensures that the procurement is conducted in a transparent and efficient manner.

The Procurement Cycle, summarized below, identifies the five (5) phases performed for every procurement.

### PHASE 1 – PROCUREMENT PLANNING

Define the business need and establish the procurement objectives.

### PHASE 2 – PROCUREMENT METHOD DETERMINATION

Identify the appropriate Procurement Method and, if applicable, issue a solicitation;

### PHASE 3 – VENDOR SELECTION

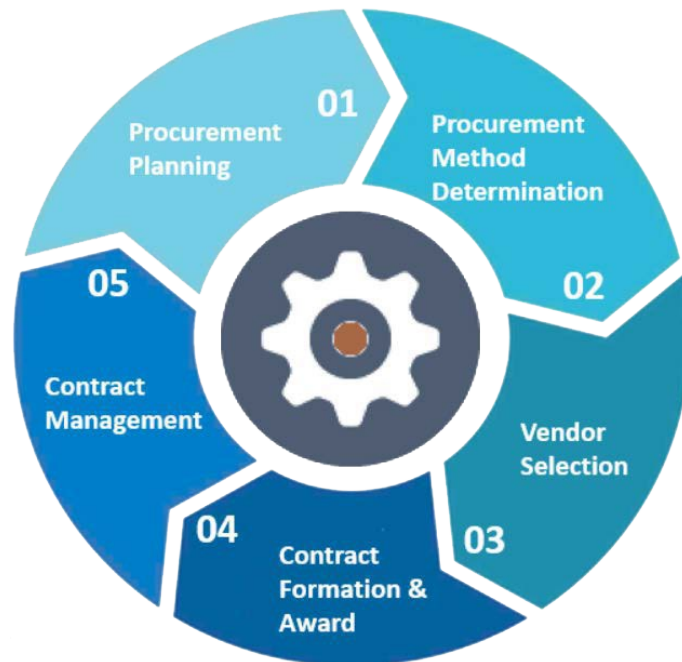
Fairly and objectively select the vendor that provides best value to the State;

### PHASE 4 – CONTRACT FORMATION AND AWARD

Ensure that the awarded contract complies with applicable procurement law and contains provisions that achieve the procurement objectives; and

### PHASE 5 – CONTRACT MANAGEMENT

Administer and enforce the terms of the contract.



## CHAPTER 9 - PROCUREMENT PLANNING

### Overview

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The procurement process begins with the Procurement Planning phase. The information gathered and provided by the TWC requestor during the procurement planning phase assists the PCSD Contract Developer/Purchaser in determining the appropriate procurement method.<sup>19</sup> Procurement planning consists of a needs assessment, cost estimate, and Acquisition Plan. These forms are instrumental in identifying the appropriate procurement method and ensuring TWC addresses identified needs at the best value to the State.

One of two (2) forms is required to initiate the procurement process: the purchase requisition (PR) or Needs Assessment and Cost Estimate form. The Needs Assessment and Cost Estimate help determine the necessity, nature, scope and cost of the acquisition.

Purchase Requisition (PR). The most common procurement planning document is the PR. The PR is all that is needed for a majority of TWC routine procurements, such as routine office supplies, conference registration, certain publications, and other purchases that do not require a contract. The requestor obtains the required management approvals and submits the PR through TWC's Workforce Reporting & Procurement System (WRAPs).

Needs Assessment and Cost Estimate Form. The Needs Assessment and Cost Estimate is a decision-making tool designed to aid TWC in planning its contracts, evaluation of new and current goods and services contracts and making sound financial decisions about purchases. It should provide a clear definition of the contracting objectives. The Needs Assessment and Cost Estimate Form is required whether it is a new contract or contract renewal. The requestor obtains the required management approvals and submits the Needs Assessment and Cost Estimate to [PCSD Customer Service Portal](#).

The Needs Assessment and Cost Estimate is required when a procurement:

1. will result in a contract between TWC and the contracting party, with a clearly defined contract term; or
2. a procurement, contract or agreement that exceeds \$50,000 is subject to reporting to the Legislative Budget Board (LBB).<sup>20</sup>

The Contract Developer, using the Needs Assessment and Cost Estimate Form or the PR will determine the procurement strategy or approach for obtaining the goods or services. The Contract Developer works with the requestor throughout the procurement process.

The Needs Assessment and Cost Estimate Form is available on the Business Operations SharePoint site.

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<sup>19</sup> See Procurement Method Determination in the next section of this Handbook for a listing of the various methods to be considered. A step-by-step determination checklist is provided. The Handbook does not cover all of the legal requirements to be considered for each procurement method determination.

<sup>20</sup> Tex. Gov't Code §§ 2166.2551, 2254.006 and 2254.0301(a).

Acquisition Plan: For relatively simple and routine procurements (Work Quest, formerly, Texas Industries for the Blind and Handicapped (TIBH) and Texas Correctional Industries (TCI) programs, Texas SmartBuy, or informal bidding), the Acquisition Plan is documented as TWC procedure. For TWC procurements that may result in a major contract of \$1 million or more, a Contract Developer will develop a unique Acquisition Plan in consultation with the requesting TWC business unit.<sup>21</sup> The Acquisition Plan may also be developed for other unique procurements as determined by PCSD. Factors considered in determining which procurements require an individual Acquisition Plan include the following: procurement type (e.g., furniture, software maintenance, consulting services), contract complexity, dollar value, and whether the procurement is part of a larger organizational project.

Supporting documentation. Supporting documentation should be provided with the PR, the Needs Assessment and Cost Estimate Form or, if applicable, the Acquisition Plan.

All completed forms and supporting documents must be retained in the official procurement or contract files.

In the event of any questions on which form to utilize or for assistance, the requestor should submit the inquiry to [PCSD Customer Service Portal](#).

## **Needs Assessment and Cost Estimate Form**

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### **Needs Assessment Overview**

The success of the procurement is often dependent upon how well the business requirements are developed during the Procurement Planning phase. The TWC business unit or end user may collaborate or consult with other TWC staff in order to complete the Needs Assessment and Cost Estimate Form.

#### ***Needs Assessment Factors***

Once the need is identified, a variety of factors must be considered in determining how best to meet and document that need.

- What is the specific description of the goods or services to be provided, or what are the expectations in terms of goals, outputs, and measurable outcomes?
- Where are the goods or services needed (delivery location within a town, county, region, and address)?
- What is the time period (beginning and ending dates) during which the goods or services are needed?
- How much or what quantities of the goods or services are needed and how much might those goods or services cost? How much of what is needed is already available under existing contracts?
- How much funding is available to meet the need and what might be an appropriate basis for payment?

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<sup>21</sup> “Major contract” has been defined in statute as a contract with a value of at least \$1 million. Tex. Gov’t Code 2262.001(4).

- Is this an administrative or program service or goods need?
- Does the TWC have the legal authority to acquire and or pay for this good or service?
- Are there any prerequisite actions that must be taken, approvals that must be sought, or conditions that must be met?

### ***Conducting the Needs Assessment***

As part of the needs assessment, the TWC staff person may conduct market research, poll agencies that may have conducted similar purchases; study historical spending, use benchmarking, and/or, working with PCSD staff, issue a Request for Information (RFI) to the vendor community.

Note: When conducting the needs assessment, TWC staff and PCSD staff must be mindful that the TWC may not accept a response or award a contract to a vendor that received compensation from the TWC to participate in the preparation of the specifications or solicitation on which the proposal or contract is based. A respondent or contract participant, however, may provide free technical assistance to an agency.

Market Research. Market research is routinely used to obtain information relating to the size of the potential vendor pool, pricing, applicable industry standards, market trends, and determine if the item or service to be purchased is readily available in the commercial marketplace.

Market research may include online research, review of industry periodicals and information obtained from professional organizations, attendance at trade shows, discussions with other customers, and consultations with industry representatives.

Historical Spending Analysis. Historical spending analysis is a tool used to optimize an agency's buying power. Studying purchasing data may reveal opportunities for cost savings, which may be available by consolidating purchases or diversity, and areas for improvement of administrative efficiencies.<sup>22</sup> For instance, a study of a particular spending pattern may reveal that the TWC is missing a volume discount opportunity when it makes multiple single purchases rather than consolidating the individual purchases together as a bulk purchase.

Benchmarking. Benchmarking is used to compare a particular item, service, or process with other entities or an established industry standard. The objective of benchmarking is to obtain a "measure" that can then be used to identify opportunities for improvement. For example, for a product that the TWC is using under an expiring contract, benchmarking for the subsequent procurement would include an analysis of the product capabilities currently available in the market and the associated price per standard unit. This practice helps to ensure that the TWC is not procuring an outmoded replacement product for the same or similar price as a product with far more advanced capabilities.

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<sup>22</sup> See General Appropriations Act, Senate Bill 1, 85th R.S. at Article IX, Section 17.10(a)(9)-(10) (directing agencies to consolidate purchasing requests and delivery intervals and, while ensuring maximum use of competitive sourcing, consolidate contracts for similar services into the fewest vendors possible to reduce duplication of effort).

Request for Information (RFI). TWC staff should coordinate the RFI process with PCSD. An RFI is a formal research method used to gather information directly from the industry about a particular type of product or service. It is important to note that an RFI is not a procurement method.

TWC may use information received from RFI responses to develop specifications for a solicitation. Responses to RFIs, therefore, are public information. TWC staff must be mindful to not to provide any information during the RFI process that would give a vendor an advantage in a later procurement or could be construed as preliminary negotiations.

**Best Practice**

*It is best practice for RFI activities to conclude prior to formal solicitation specific drafting.*

### Cost Estimate Overview

Prior to initiating a procurement, the TWC staff person initiating the procurement may need to prepare a cost estimate, unless an exemption applies. Exemptions for preparing cost estimates include:

- the cumulative payments for an awarded contract are expected to be less than \$14,000;
- The requirements will be met through an interagency contract;
- The contract is sole source; and
- The contract is mandated by statute

An initial determination regarding the funding source is also required. Funding for a procurement is dependent upon available federal and/or state appropriations and items procured or contracts awarded under applicable federal and state laws and regulations, which govern the use of funds.

Information gathered for the cost estimate is used to complete the Needs Assessment and Cost Estimate Form. It will also be used to complete the Acquisition Plan, should one be required.

A cost estimate may be developed from a vendor’s advertised price list, developed through online research, or may be prepared using standardized estimation methods and based on historical spend. The cost estimate must be developed in good faith as it will be used not only in the selection of the appropriate procurement method, but also for compliance with statutory requirements.

TWC staff should consult with their assigned budget analyst for assistance in determining funding availability. PCSD staff is available to answer questions regarding procurement cost estimate development.

### ***Threshold Values***

Governmental entities must use competitive bidding, whether formal or informal, if the purchase:

- exceeds \$10,000 and
- is made under a written contract.<sup>23</sup>

Governmental entities must solicit bids or proposals from each eligible vendor on the master bidders list that serves the agency's geographic region for a purchase or other acquisition that will cost more than \$25,000.<sup>24</sup>

Governmental entities must submit a request for pricing to at least six vendors included on the list in the category that the contract relates or to all vendors on the schedule if the category has fewer than six vendors for a contract with a value of more than \$1 million but not more than \$10 million.<sup>25</sup>

Governmental entities must notify interested parties at least two months before the date the agency issues the solicitation for a procurement that exceeds \$20 million.<sup>26</sup>

Governmental entities agency may not enter into a contract to purchase a commodity item if the value of the contract exceeds \$10 million.<sup>27</sup>

### ***Informal Budget Quotes***

When preparing a cost estimate, several vendors may be contacted to obtain pricing information by means of an “informal budget quote.” The TWC staff must clearly explain to all contacted vendors that the price estimate is sought for informational purposes only and that the agency’s request for an estimate is not a formal solicitation. When obtaining price estimates from vendors, care must be taken to avoid giving a vendor any competitive advantage in a future procurement initiative.

### ***Funding Source***

As part of the procurement planning activities, the funding source that will be used to pay the vendor should be identified early in the process. Sources of funding include: General Revenue, General Revenue-Dedicated accounts, Federal Funds, and Other Funds.

Identifying the funding source will assist in ensuring that the procurement complies with any laws, special regulations, restrictions or limitations applicable to the source of funding.

Information regarding funds and accounts may be found in the Texas Comptroller Manual of Accounts posted on the CPA website.<sup>28</sup> In addition, if grant funds are to be used, the use of

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<sup>23</sup> Tex. Gov’t Code § 2155.132.

<sup>24</sup> Tex. Gov’t Code § 2155.264.

<sup>25</sup> Tex. Gov’t Code § 2157.068.

<sup>26</sup> Tex. Gov’t Code § 2262.051.

<sup>27</sup> Tex. Gov’t Code § 2157.068.

<sup>28</sup> Located on the CPA website at <https://fmcpa.cpa.state.tx.us/fiscalmoa/index.jsp>.

the grant funds must also comply with any applicable grant requirements or special conditions imposed by the underlying grant award that will fund the procurement.

### ***Allowable Use of Appropriated Funds***

Steps must be taken to ensure that the procurement is not prohibited by law, including the General Appropriations Act. For example, appropriated funds may not be used for the following goods and services unless the procurement falls within a statutorily authorized exemption:

- alcoholic beverages;<sup>29</sup>
- an audit of the financial records or accounts of the agency;<sup>30</sup>
- postage or a post office box from an entity other than the U.S. postal service;<sup>31</sup>
- membership in or dues for professional organizations;<sup>32</sup>
- live or artificial indoor plants;<sup>33</sup>
- private facilities for meetings, conferences or exams<sup>34</sup>; and
- generally informational, promotional or educational periodicals and publications issued by TWC intended for use by the general public and not essential for achievement of a statutory objective of TWC.<sup>35</sup>

Additionally, there may be certain restrictions based on the funding sources. For example, TWC may not use any appropriated funds for the purchase of program-related customer services unless certain requirements are met.<sup>36</sup> Although many of these requirements are imposed on a resulting contract, the end-user should be aware of them during the planning phase in order to make a determination as to whether to proceed with the procurement.

TWC purchasing and contracts staff should seek guidance from the Purchasing Director, who may consult with OGC, to determine if an exception exists when there is a need to purchase a generally prohibited item.

## **Acquisition Plan**

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Purchasing will determine whether an Acquisition Plan is needed and will work with the end user. The Acquisition Plan will be required for “major contracts” and may be required for other contracts to ensure that the procurement is solicited, negotiated, executed, and managed in a way that delivers best value to the State. Accordingly, the Acquisition Plan tracks all of the procurement activities that take place throughout the Procurement Cycle. The Acquisition Plan identifies the procurement team (including the Contract Developer, Contract Manager, and end user), the team’s roles and responsibilities, the schedule of events, as well as the

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<sup>29</sup> Tex. Gov’t Code § 2113.0012 and § 2113.101.

<sup>30</sup> Tex. Gov’t Code § 2113.102 (see exceptions).

<sup>31</sup> Tex. Gov’t Code § 2113.103 (see exceptions).

<sup>32</sup> Tex. Gov’t Code § 2113.104 (requiring prior review and approval).

<sup>33</sup> Tex. Gov’t Code § 2113.105.

<sup>34</sup> Tex. Gov’t Code § 2113.106.

<sup>35</sup> Tex. Gov’t Code § 2113.107 (multiple exceptions).

<sup>36</sup> General Appropriations Act, Art. VII, Rider 17, page VII-39.



activities necessary to ensure that the contract requirements are satisfied, the goods and services are delivered in a timely manner, and the financial interests of the agency are protected.

To aid in the development of an Acquisition Plan, a procurement value threshold chart is available on the Comptroller's website.<sup>37</sup> Also, the TWC procurement file checklist or contract file checklist must be used to document compliance with applicable procurement laws, rules, and agency practices.<sup>38</sup> Prior to contract award, the Acquisition Plan should be updated to address significant changes to the overall procurement effort, including changes to any identified assumptions that may impact the procurement scope or constraints to the procurement process.

After contract award, the Acquisition Plan is used during the transition from Contract Developer to Contract Manager. A well-drafted Acquisition Plan will assist the Contract Manager in managing the contract throughout its term.

## Initial Risk Assessment

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When planning a solicitation the Contract Developer and/or Contract Manager and assigned business unit staff should conduct a preliminary risk assessment to:

- define risks associated with the potential contract; and
- determine the level, type, and amount of the following required to plan and implement the contract:
  - management;
  - oversight; and
  - resources.

When a new procurement is conducted and there is a history of contracting for the same or similar goods or services, the risks that apply to the new procurement may be similar to those that applied to the procurement for which there is a history.

The Contract Manager and assigned business unit staff evaluate the risk level associated with the contract that will be awarded. The risk level varies by:

- contract type;
- contract dollar value;
- source of funds;
- payment method;
- contract term;
- complexity of services and goods to be procured;
- degree of expected competition;
- historical performance of contractor; and
- other attributes that are identified by program, purchasing, or management staff.

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<sup>37</sup> <https://comptroller.texas.gov/purchasing/docs/procurement-requirements.pdf>

<sup>38</sup> Tex. Gov't Code § 2262.053.

High profile contracts, such as contracts to address new legislative mandates or to achieve new program initiatives are considered high risk and may require:

- additional time;
- additional staff; or
- more experienced staff to procure, manage, and monitor the contract.

Contract risk is also assessed after the contract is awarded and prior to renewal. The Contract Manager must consider the risk level when evaluating and determining the appropriate initial term and possible renewal periods for a contract.

## CHAPTER 10 - PROCUREMENT METHOD DETERMINATION

### Overview

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The second step of the procurement process is to determine which procurement method would best achieve the identified TWC business requirements and procurement objectives and provide the best value to the State. The procurement methods available to TWC are:

- Statewide Procurement Division (SPD) of the Comptroller of Public Accounts(CPA) procurement methods
  - See Procurement Method - Non-Delegated Purchases, below;
  - Procurement Method - Delegated Purchases, below
- Department of Information Resources (DIR) designated procurement methods;
  - See Procurement Method - Information Technology, below
- Statutorily excluded or exempted
  - See Procurement Method – Other, below

The various procurement methods are further described in the Guide and underlying statutes. PCSD staff are familiar with the various requirements and are available to assist TWC staff or answer questions. The procurement methods are summarized here to provide an overview to TWC staff of the various procurement methods.

### Delegated Purchases

The SPD has the authority to regulate state agency purchasing. SPD has retained authority over some purchases but has delegated purchasing authority for other purchases.

SPD purchases or may delegate authority to purchase:

- Goods that cost more than \$50,000 and are not on state contract;<sup>39</sup> and
- Services valued at more than \$100,000 and are not on state contract. SPD has delegated to state agencies the authority to purchase:
  - one-time purchases of goods, including goods for resale that do not exceed \$50,000;<sup>40</sup>
  - emergency purchases;
  - purchases of perishable goods;
  - purchases of services, including services for resale, the estimated cost of which does not exceed \$100,000;
  - purchases of publications directly from the publisher;
  - fuel, oil, and grease purchases; and
  - distributor purchases.

TWC procurements are made through the PCSD. PCSD functions as the contact between the SPD, the vendor, and other TWC staff for all TWC purchases, delegated and non-delegated.

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<sup>39</sup> Tx Govt Code 2155.132(b)

<sup>40</sup> Tx Govt Code 2155.132(a)

## Exempt Purchases

State agencies also have delegated authority to make exempt purchases.<sup>41</sup> These are purchases of certain commodities and services that are exempt by specific statute from CPA purchasing authority, exempt from competitive bidding, or may be required by statute to be purchased through another specific purchasing method. If not exempt by the General Appropriations Act, Texas Government Code Chapter 2151, or other statute, the purchase must be competitively bid or the purchase should satisfy the requirements of a proprietary purchase justification that is retained within the procurement file. Exempt purchases are subject to the Comptroller's post-payment audit process to verify whether the purchases are exempt and that the TWC used the correct document types and Comptroller Object Codes.

Questions regarding exempt purchases should be directed to the PCSD Director, who may consult with OGC.

## Federal Funds Procurements

TWC is appropriated a large sum of funds by the Texas Legislature. Many of these funds are federal funds for the various grant programs. Grant solicitations and the resulting agreements or contracts with subrecipients are covered by Part 200 of Title of the Code of Federal Regulations and the TWC Grant Management Handbook. However, to the extent goods or services are purchased through a transaction or contract with a vendor,<sup>42</sup> TWC is required to use its own documented procurement procedures that reflect applicable State laws and regulations, provided the procurements conform to the underlying Federal law for that program and standards identified in Part 200.<sup>43</sup>

## Best Value to the State

Texas law mandates that contract awards may only be made to responsive vendors providing best value to the State. The best value standard may vary depending on the procurement method.<sup>44</sup> TWC procurement staff ensures that the appropriate best value standard is used as the basis for the contract award.

TWC must first receive approval from the comptroller before including factors other than price in a solicitation to procure goods or services with a value that exceeds \$100,000.<sup>45</sup> The relevant factors other than price to consider in determining which bid offers the best value include the following:<sup>46</sup>

- Installation costs;
- Life cycle costs;

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<sup>41</sup> <https://comptroller.texas.gov/purchasing/docs/96-1809.pdf>, Appendix 31.

<sup>42</sup> This determination is made prior to procurement through the use of TWC's Form 1307 Subrecipient or Vendor Determination. This determination is made based on 2 CFR § 200.330.

<sup>43</sup> 2 CFR §200.317 and § 200.318. See 2 CFR Part 200 in general regarding the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards.

<sup>44</sup> Best value standards include, but are not limited to, the following: Tex. Gov't Code § 2155.074, 2156.007, 2157.003, 2254.003, and 2254.027.

<sup>45</sup> Tex. Gov't Code § 2155.074.

<sup>46</sup> Tex. Gov't Code § 2155.074.

- The quality and reliability of the goods and services;
- The delivery terms;
- Indicators of probable vendor performance under the contract such as past vendor performance, the vendor’s financial resources and ability to perform, the vendor’s experience or demonstrated capability and responsibility, and the vendor’s ability to provide reliable maintenance agreements and support;
- The cost of any employee training associated with a purchase;
- The effect of a purchase on agency productivity;
- The vendor’s anticipated economic impact to the state or subdivision of the state, including potential tax revenue and employment;
- The impact of a purchase on the agency’s administrative resources; and
- Other factors relevant to determining the best value for the state in the context of a particular purchase.

## Identifying the Proper Procurement Method

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### Overview

The importance of selecting the proper procurement method cannot be overstated. If the incorrect procurement method is selected, the purchase will not result in best value to the State and will most likely be more expensive and less efficient than if the correct method was used. In the worst case, it may result in a void contract that must be re-solicited.

Note: Only TWC purchasing staff have the authority to make a procurement method decision. There are numerous delegated and non-delegated procurement types available. PCSD will advise TWC staff on the appropriate procurement processes based on contract types, funding and current business circumstances.

When identifying the appropriate procurement method, including relevant exclusions and exemptions, TWC purchasing staff need to know the following for each purchase:

- what goods or services are required,
- cost estimate,
- the end user, and
- cost center purchasing entity.

The purchase process begins when a PR for a commodity or services is submitted in WRAPS with any necessary background information or the Needs Assessment and Cost Estimate is submitted to [PCSD Customer Service Portal](#). The PR is routed through the system for required approvals. TWC staff or the enduser is responsible for obtaining the required signature on the Questionnaire. TWC purchasing staff will determine the appropriate procurement method.

### Procurement Method Determination Process

The process for selecting the appropriate Procurement Method is outlined below. TWC purchasing staff will follow the applicable statutes, rules and procedures found in the Guide.

- Step 1: Is the purchase subject to a Declaration of Disaster by the Governor?
- If yes, follow acquisition procedures for the Texas Disaster Act of 1975.
    - If no, proceed to Step 2.
- Step 2: Can the purchase be completed using State or Federal surplus property?
- If yes, follow acquisition procedures for the State and Federal Surplus Property Programs, as applicable.
  - If no, proceed to Step 3.
- Step 3: Is the purchase for professional services, consulting services, or legal services?
- If yes, follow the acquisition procedures for Professional Services, Consulting Services, or Legal Services, as applicable.
  - If no, proceed to Step 4.
- Step 4: Can the purchase be completed using the TCI Program?
- If yes, follow the acquisition procedures for TCI Purchases.
  - If no, proceed to Step 5.
- Step 5: Can the purchase be completed using the State Use Program?
- If yes, follow the acquisition procedures for the State Use Program.
  - If no, proceed to Step 6.
- Step 6: Is the purchase for information technology (NIGP Class/Item with an \*)?
- If yes, follow the acquisition procedures for Information Technology Purchases.
  - If no, proceed to Step 7.
- Step 7: Can the purchase be completed by contracting with another state agency or local government?
- If yes, follow the acquisition procedures for Interagency Cooperation Contracts (IAC) or Interlocal Cooperation Contracts, as applicable.
  - If no, proceed to Step 8.
- Step 8: Can the purchase be completed using SPD Term Contracts?
- If yes, follow the acquisition procedures for Term Contracts.
  - If no, proceed to Step 9.
- Step 9: Is the purchase for printing services or equipment, or mail and messenger services?
- If yes, follow the acquisition procedures for Printing Services and In-House Copy Centers or Mail and Messenger Services, as applicable.
  - If no, proceed to Step 10.
- Step 10: Does the purchase involve used equipment or supplies?
- If yes, follow the acquisition procedures for Used Equipment.
  - If no, proceed to Step 11.
- Step 11: Can the purchase be completed using one of the following:
- SPD Delegated Purchases,
  - SPD TXMAS Contracts,
  - Contract Established by Another State Agency,
  - Federal Government Purchases, or
  - Interstate Compacts & Cooperative Agreements?
  - If yes, follow the applicable acquisition procedure.
  - If no, proceed to Step 12.

Step 12: Is the purchase for goods valued at over \$50,000 or services valued at over \$100,000?

- If yes, follow the acquisition procedures for SPD Administered Agency-Specific Procurements.
- If no, consult SPD or the TWC PCSD Director for the procurement method.

## Procurement Method –Non-Delegated Purchases

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### Overview

For procurements and procurement methods within SPD’s purview, the TWC is required to comply with SPD’s rules and procedures. SPD Non-Delegated Purchases include the following:

### Texas Correctional Industries (TCI) Purchases

The Prison Made Goods Act requires that TWC purchase goods made by and services offered by TCI. Competitive bidding requirements do not apply. TCI offers most goods through Texas SmartBuy.

Goods not available through Texas SmartBuy may be found in the TCI Catalog published on the TCI website. Only in certain circumstances may TWC decline to procure a good or service from TCI.

### The State Use Program (Work Quest)

TWC oversees the Purchasing from People with Disabilities Program, commonly referred to as the State Use Program. State agencies, including TWC, must purchase products and services offered through TIBH that meet the applicable specifications and that are available within the time specified. Competitive bidding is not required for purchases from Work Quest. Only in certain circumstances may a state agency decline to purchase products and services through the State UseProgram.

### Proprietary Purchases

Proprietary purchases preclude competition because an attribute of the purchase limits consideration to only one product or supplier. *Proprietary purchases, regardless of whether they are sole source or competitive, are subject to ESBG posting requirements as well as requirements applicable to SPD delegation, Contract Advisory Team (CAT) reviews, and QAT reviews.* TWC publishes proprietary purchase notices on ESBG for a minimum of 14 days.

The TWC Contract Developer/Purchaser must document the file with a Proprietary Purchase Justification, which must be signed by the TWC Deputy Executive Director.

For proprietary purchase solicitations, the Contract Developer/Purchaser ensures the required specific statements are included in the solicitation.

### Printing

The Contract Developer/Purchaser ensures procurements for printing comply with the Printing Services and In-House Copy Centers procedures. TWC is not required to follow the competitive bidding procedures when printing is performed at its print shop.

## Term Contracts

TWC is required to use Term Contracts, Texas SmartBuy and cooperative contracts whenever possible.<sup>47</sup> SPD establishes Term Contracts for the purchase or lease of goods and services used in large quantities by several agencies.<sup>48</sup> Best value is achieved by using SPD established Term Contracts; competitive bidding by TWC is not required for items purchased from Term Contracts. Except for Managed Term Contracts (discussed below), goods or services on Term Contracts must be ordered through Texas SmartBuy.

Managed Term Contracts are a type of Term Contract that requires manual processing and typically have different pricing structures or require a quote. These purchases cannot be made through TexasSmartBuy; TWC issues a PO directly to the awarded vendor.

## SPD-Administered Agency-Specific Procurements

For procurements not delegated to TWC, SPD will administer the procurement. The Contract Developer provides the solicitation information to SPD.

Used equipment. As a general rule, the Guide recommends that a state agency procure new equipment. However, in certain circumstances, used equipment may be purchased or traded.

Contract Established by Another State Agency. When a contract created by another state agency fulfills an unmet need of TWC and the terms of the contract are desirable, TWC may receive authorization from SPD to utilize the contract. Established purchasing procedures must be used for a procurement through the existing contract.<sup>49</sup>

Federal Government Purchases and Interstate Compacts and Cooperative Agreements. This procurement method is available to TWC in very limited circumstances and should be coordinated through SPD.<sup>50</sup>

## Procurement Method –Delegated Purchases

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### Overview

SPD is authorized by statute to delegate its purchasing functions to agencies.<sup>51</sup> A delegation of authority may be:

- provided by SPD rule for a pre-approved class of procurements, such as a particular procurement type (e.g., emergency purchases) or contract value(e.g., one-time purchases of goods that do not exceed \$50,000), or
- obtained on a case-by-case basis by the agency through the SPD Review and Delegation Process.

A delegated purchase is made by TWC under the authority of SPD and is subject to SPD's rules and procedures.

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<sup>47</sup> Tex. Gov't Code § 2155.074.

<sup>48</sup> 34 Tex. Admin. Code § 20.220.

<sup>49</sup> 34 Tex. Admin. Code § 20.236(c).

<sup>50</sup> Tex. Gov't Code § 2155.084(a)-(b), § 2156.181(a), and 34 Tex. Admin. Code § 20.237.

<sup>51</sup> Tex. Gov't Code § 2155.131.



If a state agency does not comply with procurement rules or laws under delegated purchasing authority, SPD may revoke the agency's purchasing authority and report the violations to the Governor, Lieutenant Governor, Speaker of the House of Representatives, and the LBB. Delegated purchases are, whenever possible, accomplished through competitive bidding.<sup>52</sup>

### Purchases Delegated by Rule

SPD has by rule delegated its purchasing authority to agencies for the following types of procurements:

- purchases of \$10,000 or less ("spot" purchases)<sup>53</sup>
- one-time purchases of goods that do not exceed \$50,000;
- purchases of services that do not exceed \$100,000;
- direct publications;
- purchases of perishable goods;
- distributor purchases;
- fuel, oil, and grease purchases;
- internal repair purchases; and
- emergency purchases.

Printing services must be competitively bid if the value is more than \$2,500.<sup>54</sup>

For procedures applicable to proprietary purchases, refer to Proprietary Purchases.

### Determining Contract Value

For SPD reporting, review, and delegation requirements, contract value is defined as "the estimated dollar amount that an agency may be obligated to pay pursuant to the contract and all executed and proposed amendments, extensions and renewals of the contract."<sup>55</sup> Contract value, therefore, is not limited to just the cost for the initial term, it is determined by the total value of the contract over a contract's term as well as any modifications, renewals, or extensions of the contract.<sup>56</sup>

EXAMPLE: A contract with a one-year initial term and three (3) optional one-year renewal periods, costing \$4 million annually, would have a contract value of \$16 million and would be subject to CAT review.

Oversight agencies may not use the same standard for determining contract value. For example, the value of a contract is calculated differently for IT commodity purchases under DIR contracts.

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<sup>52</sup> Tex. Gov't Code § 2155.0563; 34 Tex. Admin. Code § 20.206(c).

<sup>53</sup> Tex. Gov't Code § 2155.132.

<sup>54</sup> Beginning in 2017, SPD took over management of the State Print Shop Program (contract No. 966-M2)

<sup>55</sup> 34 Tex. Admin. Code § 20.25(b)(13).

<sup>56</sup> Tex. Gov't Code §§ 322.020(a), 2254.006, 2254.0301; 34 Tex. Admin. Code 20.25(b)(13).

## Competitive Bidding

Procurements for goods and services must, whenever possible, be accomplished through competitive bidding.<sup>57</sup> The Minimum Requirements for SPD Delegated Purchases chart, below, identifies whether competitive bidding is required. TWC may not divide a purchase into small lot purchases to match the delegation dollar thresholds in order to avoid the competitive bidding requirements.

MINIMUM REQUIREMENTS FOR SPD DELEGATED PURCHASES*								
Contract Value	Purchases of Goods**	Purchases of Services**	Direct Publication Purchases	Perishable Goods Purchases	Distributor Purchases	Fuel, Oil and Grease Purchases	Internal Repair	Emergency Purchases**
\$0.00 to \$10,000.00	Competitive Process Not Required PCEE	Competitive Process Not Required PCEE	Competitive Process Not Required PCKK	Competitive Process Not Required PCLL	Competitive Process Not Required PCCM	Competitive Process Not Required PCCP	Competitive Process Not Required PCEE	Competitive Process Not Required PCEE
\$10,000.01 to \$25,000.00	Informal Competitive Solicitation PCCF	Informal Competitive Solicitation PCCQ	Competitive Process Not Required PCKK	Informal Competitive Solicitation PCLL	Informal Competitive Solicitation PCCM	Informal Competitive Solicitation PCCP	Informal Competitive Solicitation PCCQ	Informal Competitive Solicitation PCCQ
\$25,000.01 to \$50,000.00	Formal Competitive Solicitation PCCS	Formal Competitive Solicitation PCCS	Formal Competitive Solicitation PCKK	Formal Competitive Solicitation PCLL	Formal Competitive Solicitation PCCM	Formal Competitive Solicitation PCCP	Formal Competitive Solicitation PCCS	Formal Competitive Solicitation When Possible PCCS
\$50,000.01 to \$100,000.00	Non-delegated PCCS	Formal Competitive Solicitation PCCS	Formal Competitive Solicitation PCKK	Formal Competitive Solicitation PCLL	Formal Competitive Solicitation PCCM	Formal Competitive Solicitation PCCP	Formal Competitive Solicitation PCCS	Formal Competitive Solicitation When Possible PCCS
Over \$100,000.00	Non-delegated PCCS	Non-delegated PCCS	Formal Competitive Solicitation PCKK	Formal Competitive Solicitation PCLL	Formal Competitive Solicitation PCCM	Formal Competitive Solicitation PCCP	Formal Competitive Solicitation PCCS	Formal Competitive Solicitation When Possible PCCS

Procurements made under SPD’s delegation authority are subject to ESDB posting requirements as well as requirements applicable to CAT and QAT reviews.

For a purchase made through competitive bidding, the solicitation is required to include factors other than price that TWC will consider in determining best value and proposal criteria TWC will use when considering the best value factors.<sup>58</sup>

<sup>57</sup> Tex. Gov’t Code § 2155.063; 34 Tex. Admin. Code § 20.206(c)

<sup>58</sup> Tex. Gov’t Code § 2155.075(a).

## **Competitive Bidding – IFBs and Informal Bidding**

### **Overview**

As mentioned above, procurements for goods and services must, whenever possible, be accomplished through competitive bidding. Competitive bidding may be accomplished either by an Invitation for Bids (IFB) or informal bidding.

Unlike the competitive sealed method or Request for Proposal (RFP) described below, negotiations are not permitted by the competitive bidding method. If there is only one (1) qualified bidder, then the Contract Developer may negotiate with the sole bidder, including price, provided the negotiation does not result in a material change to the advertised specifications.<sup>59</sup>

Proprietary procurements must follow the procedures set forth in Proprietary Purchases.

### **Best Value Standard-Competitive Bidding**

TWC is required to purchase goods and services that provide the best value for the State<sup>60</sup>. For a purchase made through competitive bidding, TWC must specify in the solicitation the factors other than price that will be considered in determining which bid offers the best value for the State.<sup>61</sup> In determining the best value for the state, the purchase price and whether the goods or services meet specifications are the most important considerations.<sup>62</sup> TWC may, however, consider other relevant factors.<sup>63</sup> If the cost is not the single largest criterion, TWC will default to a weight of 40% for the associated cost score, unless a written justification is provided and approved by the Director of Procurement and Contract Services. Justification will have to show that cost is still the most significant factor in determining best value.

## **Competitive Sealed Proposals/Request for Proposals (RFPs)**

### **Overview**

A Request for Proposals (RFP) is a written solicitation document for purchases acquired by means of the competitive sealed proposals procurement method. Generally, an RFP is recommended when factors other than price are to be considered, negotiations are desired, requirements cannot be described by detailed specifications included in a PO, or the respondent is expected to provide innovative ideas.

This solicitation type must be used when an IFB is not practicable or advantageous.<sup>64</sup> One of the key differences between an IFB and an RFP is that negotiations are allowed in an RFP and not allowed in an IFB.

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<sup>59</sup> 34 Tex. Admin. Code § 20.206(d)(5).

<sup>60</sup> Tex. Gov't Code § 2155.074(a).

<sup>61</sup> Tex. Gov't Code § 2155.075(a).

<sup>62</sup> Tex. Gov't Code § 2155.074(b).

<sup>63</sup> Tex. Gov't Code § 2155.074(b).

<sup>64</sup> Tex. Gov't Code §§ 2156.121(a), 2156.122, 2157.121(a); 34 Tex. Admin. Code § 20.208.

### ***Delegation***

TWC must follow the SPD Review and Delegation Process to submit delegation requests to SPD procurements of goods with a value of more than \$50,000 and services with a value of more than

\$100,000. For goods and services acquired under SPD’s purchasing authority, SPD shall determine whether to delegate to TWC sole oversight of the use of the competitive sealed proposal procurement method or retain oversight of the procurement.<sup>65</sup> For purchases made under SPD’s delegation authority, SPD delegates to TWC the assessment whether to use the competitive sealed proposals procurement method.

### ***Best Value Standard-Competitive Sealed Proposals***

TWC is required to purchase goods and services that provide the best value for the State.<sup>66</sup> For a purchase made through competitive sealed proposals, TWC must specify in the solicitation the known factors other than price that TWC will consider in determining which proposal offers the best value for the State.<sup>67</sup> TWC shall make a written award of a contract to the respondent whose proposal offers the best value for the State, considering price, past vendor performance, vendor experience or demonstrated capability, and any other evaluation factors in the RFP as relevant to TWC’s decision.<sup>68</sup>

## **Procurement Method – Other**

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### ***Procurement Method – Interlocal SPD Texas Multiple Award Schedule (TXMAS) Contracts***

The SPD establishes Texas Multiple Award Schedule (TXMAS) contracts that have been developed from contracts awarded by the federal government or other governmental entities. TWC may utilize these contracts without obtaining delegated authority to make purchases that exceed \$50,000 for goods and exceed \$100,000 for services. For purchases that exceed \$25,000, TWC is required to post the award notice on the ESBID.<sup>69</sup>

Under certain circumstances, TWC may negotiate a lower price for the goods or services offered on a TXMAS contract. A “best value” purchase is made by following the TXMAS purchasing procedures. TWC follows the SPD’s procedure whether the purchase is entered through the Texas SmartBuy online ordering system, offline or includes incidental, off-schedule items.

### ***Interagency Cooperation Contracts (IACs)***

An interagency contract is a written understanding between two (2) or more agencies as authorized by Chapter 771 of the Texas Government Code. Intergovernmental or inter-entity agreements are also encouraged in the federal Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards.<sup>70</sup>

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<sup>65</sup> Tex. Gov’t Code § 2156.121.

<sup>66</sup> Tex. Gov’t Code § 2155.074(a).

<sup>67</sup> Tex. Gov’t Code § 2155.075(b)(1).

<sup>68</sup> 34 Tex. Admin. Code § 20.208(e)(1).

<sup>69</sup> Tex. Gov’t Code § 2155.509.

<sup>70</sup> 2 CFR § 200.318(e): “To foster greater economy and efficiency, and in accordance with efforts to promote cost-effective use of shared services across the Federal Government, the non-Federal entity is encouraged to enter into state and local

TWC may agree or contract with another agency for the provision of necessary and authorized services (including technical services) and materials and equipment. Competitive bidding requirements do not apply to Interagency Contracts. Certain statutory requirements must be met when entering into an IAC.

IAC's should be for a fixed term to obligate TWC and other agency to review and assess whether the contract is needed and if any changes in contract scope or pricing will be required before entering into a subsequent agreement.

**Best Practice**

*Include a fixed term in an interagency contract.*

***Interlocal Cooperation Contracts (ILCs)***

An interlocal contract is a written understanding authorized by the Interlocal Cooperation Act, Chapter 791 of the Texas Government Code. Intergovernmental or inter-entity agreements are also encouraged in the federal Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards.<sup>71</sup>

The purpose of the Interlocal Cooperation Act is to increase the efficiency and effectiveness of local governments by authorizing them to contract, to the greatest possible extent, with one another and with agencies of the State.<sup>72</sup> Certain statutory requirements must be met when entering into an ILC.

***Texas Disaster Act of 1975***

If applicable, TWC may make purchases under a disaster declaration. Under Chapter 418 of the Texas Government Code, the Governor may by executive order or proclamation declare a state of disaster and suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of an agency if strict compliance with the provisions, orders, or rules would in any way prevent, hinder, or delay necessary action in coping with a disaster.<sup>73</sup>

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intergovernmental agreements or inter-entity agreements where appropriate for procurement or use of common or shared goods and services.”

<sup>71</sup> 2 CFR § 200.318(e): “To foster greater economy and efficiency, and in accordance with efforts to promote cost-effective use of shared services across the Federal Government, the non-Federal entity is encouraged to enter into state and local intergovernmental agreements or inter-entity agreements where appropriate for procurement or use of common or shared goods and services.”

<sup>72</sup> Tex. Gov’t Code § 791.001.

<sup>73</sup> Tex. Gov’t Code § 418.004(1). "Disaster" means the occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man-made cause, including fire, flood, earthquake, wind, storm, wave action, oil spill or other water contamination, volcanic activity, epidemic, air contamination, blight, drought, infestation, explosion, riot, hostile military or paramilitary action, extreme heat, cybersecurity event, other public calamity requiring emergency action, or energy emergency.

A purchase made under a disaster must clearly relate to the disaster, conform to the directives of the disaster declaration, and occur within the timeframe specified in the disaster Declaration. The procurement file contains a copy of the disaster declaration, documentation to support the purchase, receipt of goods or services, and approval of the payment.

### ***Professional Services***

TWC may procure professional services under Chapter 2254, Subchapter A, of the Texas Government Code.<sup>74</sup> There is no delegation of authority required from SPD to acquire professional services. The procurement of professional services is subject to ESBD posting requirements as well as requirements applicable to CAT reviews.

### ***Professional Services of Physicians, Optometrist, and Registered Nurses***

Multiple contracts may be awarded for Professional Services of Physicians, Optometrists, and Registered Nurses, and are not subject to competitive advertising and proposal evaluation requirements.<sup>75</sup>

Notwithstanding Texas Government Code § 2254.003, if TWC is not otherwise limiting the number of contracts to be awarded, TWC may make the selection and award on the basis of:

1. the provider's agreement to payment of a set fee, as a range or lump-sum amount; and
2. the provider's affirmation and TWC's verification that the provider has the necessary occupational licenses and experience.

### ***Consulting Services***

Acquisition of consulting services is delegated to TWC by statute and does not require a delegation of authority from SPD.<sup>76</sup> The procurement of consulting services is subject to ESBD posting requirements as well as requirements applicable to CAT reviews. There are numerous statutory requirements that must be fulfilled prior to entering into a consulting services contractor amendment or extension. Notifications must be provided to oversight entities or published and a finding by the Governor's office may be required.<sup>77</sup> Chapter 2254 of the Government Code and the Guide provide more information.

The Contract Developer/Purchaser must carefully review the statutory requirements and ensure strict adherence to them. A consulting services contract or renewal, amendment, or extension is void if TWC fails to follow particular requirements.

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<sup>74</sup> Tex. Gov't Code § 2254.003.

<sup>75</sup> Tex. Gov't Code § 2254.008.

<sup>76</sup> Tex. Gov't Code § 2254.023.

<sup>77</sup> A Consultant Finding of Fact Request form must be used to submit a request to the Governor's office. The form is available on the Governor's website here: [https://gov.texas.gov/uploads/files/organization/budget-policy/Consultant\\_Contract\\_Finding\\_of\\_Fact\\_Request\\_Form\\_1.docx](https://gov.texas.gov/uploads/files/organization/budget-policy/Consultant_Contract_Finding_of_Fact_Request_Form_1.docx)

### ***Legal Services***

The Office of Attorney General (OAG) provides legal services to state agencies, including TWC.<sup>78</sup> For any other contract for legal services between an attorney and TWC, TWC follows the OAG procedures. These contracts must be solicited, unless the OAG indicates otherwise.

If applicable, TWC will also seek the required finding from the LBB regarding the availability of appropriated funds available to pay the estimated amounts required under a contract providing only for the payment of hourly fees.<sup>79</sup>

### ***State and Federal Surplus Property Programs***

The Federal and State Surplus Property programs are administered by the Texas Facilities Commission (TFC). The programs have different laws, rules, and procedures.<sup>80</sup>

### ***Reverse Auction Procedure***

TWC may purchase goods or services using the reverse auction procedure. This procedure, which is not commonly used in Texas state agency procurement, may be conducted in only either of two (2) ways identified in statute.<sup>81</sup>

### ***Open Enrollment***

TWC staff may use open enrollment for the acquisition of goods or services when the eligibility of potential providers is a common set of criteria established by state or federal statute, regulation or TWC rules. Open enrollment procurement is conducted through an application process. In determining whether to use open enrollment as the procurement method, TWC considers whether the service quality and utilization of applicants is closely monitored and supported by state certification or licensure.

TWC may use open enrollment when it has established that the following conditions exist:

- Goods or services are readily available throughout the state;
- Similar good or services are available under equitable standards throughout the state;
- Recipients have the freedom to choose and obtain services through any provider qualified to perform the services;
- Goods or services are those for which providers can be required to meet defined, accepted standards (including state licensure and/or certification) before enrollment; and
- An equitable standard unit cost can be established for all contracts/grants for the same goods or services.

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<sup>78</sup> Tex. Gov't Code § 402.021, 402.0212(a).

<sup>79</sup> Tex. Gov't Code § 2254.103(e). (Note that a contingent fee contract for legal services is void if TWC fails to obtain the required LBB finding. Tex. Gov't Code § 2254.103(f).)

<sup>80</sup> Guide at <https://comptroller.texas.gov/purchasing/docs/96-1809.pdf> Appendix 10.

<sup>81</sup> Tex. Gov't Code §§ 2155.062(d)(2), 2155.085.

Open enrollment is currently required by state statute for some TWC funded services. TWC uses this method for programs including, but not limited to, the following workforce programs:

- Apprenticeship
- Self-sufficiency
- Skills Development

## Procurement Method - Information Technology

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### Overview

TWC is required to use contracts established by Department of Information Resources (DIR) to obtain Automated Information Systems (AIS) unless the procurement is subject to an exclusion or exemption.<sup>82</sup> AIS type products and services are associated with computers (automation) or telecommunications systems.<sup>83</sup>

### DIR Contracts

#### Overview

DIR has statewide procurement authority similar to SPD. However, DIRs authority is related to information technology. Much like SPD, DIR establishes and manages master contracts. DIR has established the following types of master contracts:

1. Cooperative Contracts for Information Technology (IT) commodity items,
2. Texas Multiple Award Schedule contracts for IT commodity items,
3. the Texas.gov contract,
4. Data Center Services contracts, and
5. Telecommunication Services contracts.

Note: The five (5) master contracts established by DIR are briefly summarized below. See the Guide for more information. The TWC Contract Developer/Purchaser may contact DIR for guidance on applicable procedures and best practices to be utilized in procuring IT commodity items under DIR contracts.

IT Commodity Items. IT commodity items are a subset of AIS. IT commodity items refer to commercial software, hardware, or technology services, other than telecommunications services, that are generally available to businesses or the public and for which DIR determines that a reasonable demand exists in two (2) or more agencies.<sup>84</sup> The term includes managed services, through which an agency transfers its personal computer equipment and service responsibilities to a private vendor to manage.

Determining Contract Value of IT Commodity Item Procurements. TWC must use its best judgment to determine the monetary value of the anticipated contract. Statute provides further guidance on this determination.<sup>85</sup>

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<sup>82</sup> Tex. Gov't Code § 2157.006.

<sup>83</sup> Further defined at Tex. Gov't Code § 2157.001(1) and the Guide.

<sup>84</sup> Tex. Gov't Code § 2157.068(a).

<sup>85</sup> 1 Tex. Admin. Code § 212.1(2)(B).



**DIR Cooperative Contracts Program**

**Overview**

TWC is required to use DIR contracts for particular information technology commodity items. DIR offers the following categories of contracts through DIR’s Cooperative Contracts Program:

- hardware,
- software,
- technology-based training,
- managed services,
- IT Staff Augmentation Contracts (ITSAC),<sup>86</sup> and Deliverables-Based IT Services (DBITS).

DIR establishes and maintains a catalog of active contracts on the DIR website that contain IT commodity items available for purchase by TWC. TWC may negotiate even deeper discounts based on individual purchase volumes by issuing pricing requests to multiple DIR vendors in order to drive price competition for the final purchase award.

Monetary thresholds and competitive requirements for purchasing an IT commodity item under a DIR contract are as follows:<sup>87</sup>

**Number of Quotations Required from DIR Contract Vendors**

<b>Contract Value</b>	<b>Required Number of Bids</b>
\$50,000 or less	Award the contract directly to the DIR vendor of choice
\$50,000.01 but less than \$1 million	Obtain bids from three (3) DIR vendors
\$1 million or more but less than \$10 million	Obtain bids from six (6) DIR vendors
Over \$5 million and up to \$10 million	<ul style="list-style-type: none"> <li>▪ Use of DIR contract is optional</li> <li>▪ Use of Request for Offers (RFO) is acceptable</li> <li>▪ No external review required from DIR or Comptroller’s Contract Advisory Team (CAT) for an RFO that does not exceed \$10 million</li> </ul>
More than \$10 million	Use of RFO is required
More than \$20 million	Potential vendors must be notified at least 2 months prior to posting the solicitation on the Electronic State Business Daily (ESBD)
Managed Services for Telecommunications are excluded from the required number of bids and include a separate review process.	

<sup>86</sup> See General Appropriations Act, Senate Bill 1, 85th R.S. at Article IX, Section 17.10(a)(3) (directing agencies to reduce staff augmentation contracts for nonessential functions; if an agency cannot fill a classified information technology position (class number 0210-0328), the agency may re-classify the position up to Salary Schedule Group 32 if it provides written notice to LBB, SAO, and CPA at least 30 calendar days prior to filling the position. The request shall be considered approved unless disapproved by the LBB.).

<sup>87</sup> Tex. Gov’t Code § 2157.068(e-4).

TWC may not enter into a contract to purchase a commodity item through the DIR Cooperative Contracts Program if the value of the contract exceeds \$10 million.<sup>88</sup>

The expanded definition of a Major Information Resources Project (MIRP) includes any information technology project designated for additional monitoring by State Auditor's Office if the development costs for the project exceeds \$5 million.<sup>89</sup>

- Purchases from DIR contracts may not exceed \$10 million including the initial terms and optional renewals
  - To use a DIR contract the initial term and all renewal options may not exceed \$10 million
- A contract with a value of more than \$5 million but not more than \$10 million the Purchaser may use an RFO
  - To purchase a commodity item between \$5 million - \$10 million a purchasing method designated by the comptroller under § 2157.006 (a)(2) is allowed

### ***DIR Review and Signature Approval of Certain DIR SOWs***

For purchases that will exceed \$50,000, TWC is required to prepare and submit to DIR certain DIR Statements of Work (DIR SOW). A contract for an IT commodity item is not valid and money may not be paid to the contractor under the terms of the DIR SOW unless DIR first signs the DIR SOW.<sup>90</sup> More information on the DIR SOW process and requirements is identified in DIR's rules.<sup>91</sup>

### ***Exemptions and Exclusions***

An exemption or waiver from the requirement to use a DIR contract to purchase an IT commodity item is available in very limited circumstances through DIR Exemption,<sup>92</sup> LBB Approval;<sup>93</sup> or DIR certification of unavailability.<sup>94</sup> TWC IT, in cooperation with PCSD, submits the exemption or waiver request on behalf of TWC.

### ***DIR Texas Multiple Award Schedule - (TXMAS) CONTRACTS***

TWC may utilize TXMAS contracts developed by DIR for the purchase of IT commodity items.<sup>95</sup> For orders that exceed \$25,000, TWC posts the award notice on the ESBD.<sup>96</sup> The monetary thresholds associated with the DIR Cooperative Contracts Program apply to procurements under DIR TXMAS contracts.

### ***Texas.Gov Services***

Texas.gov is the official e-government web portal for the State of Texas and allows citizens to access government services online. Texas.gov Services include payment processing,

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<sup>88</sup> Tex. Gov't Code § 2157.068(e-2).

<sup>89</sup> Tex. Gov't Code §2054.003(10).

<sup>90</sup> Tex. Gov't Code § 2157.0685.

<sup>91</sup> 1. Tex. Admin. Code Chapter 212.

<sup>92</sup> Tex. Gov't Code § 2157.0698(f); 1 Tex. Admin Code § 212.22.

<sup>93</sup> Tex. Gov't Code § 2157.068(f), 2157.068(g).

<sup>94</sup> Tex. Gov't Code § 2157.068(f).

<sup>95</sup> Tex. Gov't Code § 2155.502(e).

<sup>96</sup> Tex. Gov't Code § 2155.509.

custom application development, operational and infrastructure support, customer service, marketing, and analytic reporting. TWC is eligible to participate.

### ***DIR Data Center Services***

DIR provides consolidated data services to public entities, including TWC. The monetary threshold requirements and SOW review and signature process associated with the DIR Cooperative Contracts Program apply to all procurements made as a pass-through expense in the Data Center Services Program; however, these requirements do not apply to contracts procured through the Data Center Services Program that are signed by the contracted vendors.

### ***Telecommunication Services***

TWC is required to use the Capitol Complex Telephone System (CCTS) for landline services. TWC is also required to use the Texas Agency Network (TEX-AN) for telephone, internet, data, and video services. If a telecommunications service is offered by DIR, TWC must purchase the service through DIR or must request and be granted a waiver before procuring the service through an avenue other than DIR.<sup>97</sup>

### ***Other Information Technology Procurements***

The RFO procurement method is intended as the designated, primary purchasing method for procuring AIS other than under DIR's IT commodity program.<sup>98</sup> However, in certain circumstances, TWC may choose to use the RFO procurement method<sup>99</sup> or any other procurement method authorized by Title 10, Subtitle D of the Texas Government Code that will obtain the best value.<sup>100</sup> When using these other methods to procure AIS, TWC must follow the guidelines published by SPD.<sup>101</sup>

Note that state agencies are required to ensure that purchases for an automated information system or major information resources project (MIRP) are capable of being deployed and run-on cloud computing services, minus certain exemptions. If an agency utilizes an exemption, the agency must submit a report to the LBB and QAT at least 14 days prior to the initial solicitation.<sup>102</sup>

### ***Determining Best Value for Purchases of Automated Information Systems***

"Best value" for purposes of automated information systems means the lowest overall cost of an automated information system. In determining the lowest overall cost for a purchase or lease of an automated information system TWC will consider the following factors:

1. the purchase price;
2. the compatibility to facilitate the exchange of existing data;

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<sup>97</sup> Tex. Gov't Code § 2170.051.

<sup>98</sup> Tex. Gov't Code § 2157.006(a)(2); 34 Tex. Admin. Code § 20.391.

<sup>99</sup> TWC's use of an RFO does not require or involve delegation of authority or prior approval by SPD. Procurements using the RFO method are subject to ESBD posting requirements and applicable CAT and QAT review. TWC must consider the "best value" factors identified in Tex. Gov't Code § 2157.003.

<sup>100</sup> 34 Tex. Admin. Code §20.391.

<sup>101</sup> 34 Tex. Admin. Code §20.391.

<sup>102</sup> Tex. Gov't Code § 2157.007.

3. the capacity for expanding and upgrading to more advanced levels of technology;
4. quantitative reliability factors;
5. the level of training required to bring persons using the system to a stated level of proficiency;
6. the technical support requirements for the maintenance of data across a network platform and the management of the network's hardware and software;
7. the compliance with applicable department statewide standards validated by criteria adopted by the department by rule; and
8. applicable factors listed in Sections [2155.074](#) and [2155.075](#).

## Solicitation Process

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### Solicitation –IFB, RFP, RFO, RFQ, Open Enrollment

#### **Overview**

Depending on the procurement method selected, a solicitation may be required. If the selected procurement method does not require issuance of a solicitation (e.g., Term Contracts), then the Contract Developer will proceed to the Vendor Selection step of the Procurement Cycle. For purchases made using informal bidding, refer to Competitive Bidding (IFBs, Informal Bidding) for the applicable solicitation process.

There are certain advantages and disadvantages to every procurement method and it is necessary to consider them in the context of what is being procured. An IFB, for example, would not usually be an appropriate procurement method for procuring technical services, as the primary characteristics of an IFB are lowest price and meeting specifications with no opportunity for negotiation. Likewise, a Request for Qualifications (RFQ) would not be a suitable procurement method for procuring goods, as the essential feature of an RFQ is that price is not a factor until after vendor selection.

Open Enrollment may be used when goods or services, qualifications and costs are defined and multiple vendors are needed. When drafting the solicitation, the Contract Developer ensures that the solicitation aligns with the applicable procurement method.

#### **Request for Applications**

In contrast to the procurement methods identified in this Handbook, a Request for Applications (RFA) is not a sanctioned method for procuring goods and services from a vendor. TWC issues an RFA when it, as the grantor, is responsible for awarding grant funds to other entities such as otherstate agencies, local governments, non-profit organizations or private entities.

An RFA is used to invite grant applications, in which the grants are tied to designated funds and for a specific purpose. Refer to the TWC Competitive Grants Handbook and Procedures for further information.

## Solicitation – Preparation

### **Overview**

Once the Procurement Planning Process has occurred, the Procurement Method Determination conducted, and a determination made that a solicitation is required, the next step is to develop the solicitation. For some procurements, the solicitation development activities by the Contract Developer may be an administrative due diligence review of the requirements listed on the requisition for compliance with applicable procurement law and TWC best practice before initiating the purchase.

For other procurements, solicitation development involves a collaborative multi-departmental approach. It is common for there to be a kick-off meeting with the key stakeholders (such as the Contract Developer, end-user, subject-matter experts, Contract Manager, legal personnel, and information technology representatives, if applicable) to discuss the requirements for administering the contract from solicitation issuance to contract closeout. The number of stakeholders involved in the solicitation drafting activities may increase relative to the procurement complexity. PCSD will assign a Contract Developer to assist in solicitation development.

See the Solicitation Content and Style Guide for contents of a solicitation and drafting tips.

### **Procurement Lead Time**

The first step the Contract Developer conducts is development of the procurement lead time. Procurement lead time is the interval between a decision to purchase a product or service to when the contract is awarded. The SPD suggests a minimal lead time of 180 days from start to completion, allowing variances depending on the specific requirements and the complexity of the procurement.

Examples of tasks that may impact the lead-time include, but are not limited to, the following:

- The actual preparation of the solicitation document can affect lead-time. Coordination and collaboration between team members and with other TWC staff, as well as structured planning and thorough research can shorten this period. On the other hand, inadequate planning and research along with lack of communication among team members, each with subject matter expertise, may cause the preparation of the solicitation document to be prolonged.
- The time required for the Contract Developer to finalize the solicitation document can vary depending on how well the statement of work or specifications are written by the end users. The Contract Developer is responsible for ensuring the solicitation documents are complete, allow for competition, and follow all applicable statutes, rules, and procedures.
- A thirty (30)-day solicitation publication period is recommended for RFPs, while RFOs may necessitate a longer posting time. Posting times should be considered on a case-by-case basis, keeping the statutorily mandated minimum time periods in consideration. A particularly complex or unusual statement of work may result in many

- vendor questions, in which case, an extended solicitation period may be warranted. Evaluation of proposals may take more or less time, depending on the size of the evaluation committee and the complexity of the procurement. Likewise, the number of proposals to be evaluated impacts the evaluation time frame. The evaluation period could also be extended if there are presentations, discussions, or best and final offers.
- Contract negotiation and contract formation timeframes may vary depending on the complexity of the procurement and the skill set of TWC’s negotiation team. Personnel unavailability may also be a factor as delays may occur due to inclement weather events, national and local holidays, illness, scheduled vacations, and the like.
- The actual process of award may be extended if Commission approval is required. This timeframe may also differ significantly between a PO and a formal executed contract. Depending on the signature requirements of TWC and the contractor, the contract execution lead-time may need to be adjusted.
  - Purchaser must provide notice to potential vendors at least two (2) months **prior** to posting the solicitation for a contract valued in excess of \$20 million.<sup>103</sup>

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<sup>103</sup> Tex. Gov’t Code § 2262.051.

The chart below has been provided by the SPD as a guideline for documenting procurement leadtime in **simple** procurements with **minimal** vendor negotiation required.

Procurement Lead Time(Template)		
Task	Number of Days to Complete	Due Date
Decision Made to Procure	—	April 10th
Post Notice of Intent to Procure > \$20M	—	May 9th
Drafting Solicitation	45 days	May 25th
CAT Review ≥ \$5M QAT Review for MIRP contract ≥ \$10M SPD Delegation Review: Services > \$100K SPD Delegation Review: Goods > \$50K	30 days	June 24th
Finalize Solicitation for Issuance	15 days	July 9th
Solicitation Advertised	—	July 9th
Submission of Questions	4-5 days	July 13th
Release of Official Response to Questions	2-3 days	July 15th
Response Deadline	14 days	July 23rd
HSP Evaluation	3 days	July 26th
Evaluation of Responses	14 days	August 9th
Contract Negotiation (if allowed) and Contract Formation	10 days	August 19th
Contract Execution (all signatures obtained)	12 days	August 31st
Performance Begins	Contract Effective Date	September 1st

### ***Internal Calendar of Major Events***

The Contract Developer also develops an internal calendar of events for the procurement. The internal calendar of events differs from the procurement lead time calendar in that it also includes the internal dates of activities or events occurring pre- and post- solicitation.

The internal calendar of events may include routine activities such as standard interdepartmental workflow timelines and fiscal year end deadlines and procurement-specific events such as statutorily mandated project commencement dates and the onboarding of a successor contractor prior to cessation of services by the incumbent contractor.

### Best Practice

*As part of the solicitation planning process, it is best practice to develop a timeline to document projected dates. Complexities and delays may affect the timeline.*

The internal calendar of events must be included in the Acquisition Plan or may be included in another procurement monitoring tool. The Contract Developer uses the internal calendar as a gauge to keep the procurement on schedule. In developing the internal calendar of events, the Contract Developer allows sufficient time for oversight reviews, such as SPD Delegation, CAT review, and QAT review (if necessary), and meaningful evaluation and negotiations. The procurement value threshold chart assists in developing the internal calendar.<sup>104</sup>

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<sup>104</sup> <https://comptroller.texas.gov/purchasing/docs/procurement-requirements.pdf>



Below is an example of an internal calendar of events, beginning with pre-solicitation milestones, continuing to encompass the solicitation calendar of events, and ending with post-solicitation milestones.

Internal Calendar of Events		
TASK		DUE DATE
1	Budget (approval/questions)	
2	Kick Off Meeting (Contract Developer, Contract Manager, End User)	
3	Post Notice of Intent to Procure > \$20M	
4	Draft Solicitation	
5	Agency Approvals for Issuance	
6	CAT Review ≥ \$5M QAT Review for MIRP contract ≥ \$10M SPD Delegation Review: Services > \$100KSPD Delegation Review: Goods > \$50K	
7	Solicitation Issued	
8	Pre-Bid/Offer/Proposal Conference	
9	Due Date for Written Questions	
10	Date of Issuance of Agency's Written Answers	
11	Due Date for Responses	
12	Vendor Selection Evaluation Committee (RFP, RFO, RFQ) or Bid Tabulation (IFB)	
13	Negotiation (if permitted) and Contract Formation	
14	Contract Award	
15	Transition Meeting Between Contract Developer and Contract Manager	
16	Post Award Meeting with Contractor	
17	Project Start Date	
18	Project Completion	
19	Contract End Date	

### ***Solicitation Contents***

The solicitation must contain all information required for vendors to respond to the TWC's procurement opportunity. The content of a solicitation will vary depending on what is being procured, the complexity of the transaction, and the identified risks associated with the procurement. Care must be taken to identify all of TWC's requirements in the solicitation,

because TWC will not be able to hold a vendor accountable for performance of a requirement that is not specified in the solicitation or resulting contract and TWC may not add requirements to a contract that are outside the scope of the solicitation.

Contract Developers must not only ensure that the solicitation contains all of TWC's requirements but also that those requirements are presented in an organized manner. There is not a mandated statewide solicitation template. However, TWC has developed its own solicitation templates.

Solicitations, regardless of organizational structure, usually include the following components:

- Introduction
- Minimum Vendor Qualifications
- Statement of Work
- Payment and Pricing Terms
- Contract Term
- Terms and Conditions
- Response Submission Requirements
- Evaluation Criteria for Award
- Vendor Agreement Form

More information and detailed explanations are in the Solicitation Development Guide, as well as drafting and style tips.

## Solicitation – Reviews and Approvals

### ***CAT – Review of Solicitations with a Value of \$10 Million or More***

Prior to posting to Texas SmartBuy, TWC must submit solicitation documents for contracts that have a value of \$10 million<sup>105</sup> or greater to the Contract Advisory Team (CAT) for review regardless of procurement method.<sup>106</sup> The procurement cannot be artificially split into multiple solicitations to avoid the \$10 million threshold for CAT review.

Solicitation documents include the solicitation (e.g., IFB, RFP, RFO, RFA) as well as any other documents that supplement the solicitation (e.g., Proprietary Purchase Justification) or are incorporated by reference. Solicitation documents are not submitted until after the required internal agency approvals have been obtained.

Requests for CAT reviews are processed in the order received and may take up to thirty (30) days to complete. Even if the review period exceeds thirty (30) days, TWC does not have the authority to issue the solicitation until it receives approval from CAT.

Prior to posting or publishing the solicitation following CAT review, TWC must either:

- comply with CAT recommendation(s); or

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<sup>105</sup> Tex. Gov't Code § 2155.132

<sup>106</sup> Tex. Gov't Code § 2262.101(a)(1). Contract value means the estimated dollar amount that TWC may be obligated to pay over the life of the contract including all executed and proposed amendments, extensions and renewals. 34 Tex. Admin. Code § 20.25(b)(13).

- submit to CAT a written explanation regarding why the recommendation is not applicable to the procurement under review.

Substantial Changes to CAT Submission. If the initial solicitation documents submitted for CAT review change substantially, TWC is required to resubmit the solicitation documents for additional CAT review.

As a general guideline, grant agreements where the recipients eligible for award are governmental entities or non-profit business entities are not subject to a CAT review. CAT reviews state-funded grant solicitations when the recipients eligible for award are for-profit business entities because these contracts provide public funds to entities that could profit from the award. RFAs based solely on federal funding are not subject to CAT review.<sup>107</sup>

TWC's responses to the CAT recommendation are retained within the procurement file.

### ***Review of Major Information Resources Projects (MIRP)***

Procurements, regardless of the procurement method chosen by TWC, associated with a MIRP are subject to QAT oversight.<sup>108</sup>

TWC must notify QAT when it advertises any solicitation of a MIRP regardless of the solicitation method (e.g., RFP, IFB, RFO).<sup>109</sup> This notification is required to include the requisition number for each solicitation advertised. TWC is also required to provide a report to both QAT and the LBB if TWC chooses to utilize an exemption to the cloud computing compatibility requirements in Tex. Gov't Code § 2157.007.

Certain Texas Project Delivery Framework Documents must be filed with QAT before a MIRP can be initiated. After QAT approves the project to proceed and before TWC spends more than ten (10) percent of allocated funds or issues a solicitation for the project, it is required to file a Project Plan with the QAT; if the major information resources project involves a procurement, a DIR Acquisition Plan must also be filed.

The initial contract or a contract amendment for a MIRP valued over \$10 million is subject to QAT review. Information regarding the steps involved in initiating, monitoring, completing, and submitting deliverables to the QAT for a MIRP is available on the Project Delivery Framework page located on the DIR website.<sup>110</sup>

## **Solicitation – Advertisement**

### ***Overview***

The type of procurement method used dictates the required solicitation advertisement. Advertising requirements for goods and services are different from those of building construction or client service contracts.

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<sup>107</sup> This guideline is from the Texas Comptroller's Procurement and Contract Management Handbook

<sup>108</sup> Tex. Gov't Code § 2054.003(10).

<sup>109</sup> General Appropriations Act, Senate Bill 1, 85th R.S. at Article IX, Section 9.02(c)(2).

<sup>110</sup> Tex. Gov't Code § 2054.160.

The following chart identifies the advertising method for different procurement types.

Type of Procurement	Advertising Method	Statutory Reference
Goods and services, including AIS	Texas SmartBuy	Tex. Gov't Code Chapters 2155 and 2166
Professional and consulting services	Texas SmartBuy	Tex. Gov't Code Chapter 2254
Building construction	ESBD and newspaper	Tex. Gov't Code Chapter 2166

Solicitations are advertised to reach as many potential respondents as possible. When determining the appropriate solicitation posting period, the Contract Developer considers what timeframe affords interested eligible vendors the opportunity to submit quality proposals.

Publishing solicitations for time periods that are not commercially reasonable may have the effect of artificially limiting the vendor pool.

Computation of Time. In computing the period of days, the first day is excluded and the last day is included. In addition, if the last day of any period is a Saturday, Sunday, or legal holiday, the period must be extended to include the next day that is not a Saturday, Sunday or legal holiday.<sup>111</sup>

***Texas SmartBuy (Electronic State Business Daily (ESBD))***

Texas SmartBuy (formerly known as the Electronic State Business Daily (ESBD), managed by SPD, is the State’s online directory listing procurement opportunities. TWC is required to post procurements with a contract value of more than \$25,000 to the ESBD, regardless of the source of funds to be used for the contract.<sup>112</sup> The contract value for posting to the ESBD means “the estimated dollar amount that an agency may be obligated to pay during the life of the contract and all executed and proposed amendments, extensions and renewals.”<sup>113</sup>

<sup>111</sup> Tex. Gov't Code § 311.014(a)-(b).

<sup>112</sup> Tex. Gov't Code § 2155.083(a); 34 Tex. Admin. Code §§ 20.109, 20.214.

<sup>113</sup> 34 Tex. Admin. Code § 20.25(b)(13).

ESBD Posting Timelines <sup>1</sup>	
Contract value estimated to be greater than \$25,000	Minimum Posting Time for Advertisement
Entire solicitation package (including all parts, exhibits and attachments posted to the ESBD).	14 calendar days
<p>If not posting the entire solicitation package to the ESBD, then notice must be posted that includes all information necessary to make a successful bid, proposal, or other applicable expression of interest for the procurement contract, including at a minimum the following information:</p> <ul style="list-style-type: none"> <li>(1) a brief description of the goods or services to be procured and any applicable state product or service codes for the goods and services;</li> <li>(2) the last date on which bids, proposals, or other applicable expressions of interest will be accepted;</li> <li>(3) the estimated quantity of goods or services to be procured;</li> <li>(4) if applicable, the previous price paid by the agency for the same or similar goods or services;</li> <li>(5) the estimated date on which the goods or services to be procured will be needed; and</li> <li>(6) the name, business mailing address, and business telephone number of the agency employee a person may contact to inquire about all necessary information related to making a bid or proposal or other applicable expression of interest for the procurement contract.</li> </ul>	21 calendar days

**TABLE NOTES**

<sup>1</sup> [TEX. GOV'T CODE § 2155.083\(h\)-\(j\); 34 TEX. ADMIN. CODE § 20.215.](#)

While a fourteen (14)-day posting may satisfy the statutory minimum period for posting on the ESBD, TWC generally advertises a solicitation for thirty (30) days or longer.

For solicitations requiring delegated authority, a letter of delegation must be obtained from SPD prior to posting to the ESBD. The Contract Developer files proof of the ESBD posting and documentation from SPD authorizing the delegated purchasing authority in the procurement file. A contract award is void if the TWC violates the applicable statutorily required minimum time for posting on the ESBD.<sup>114</sup>

**Texas Register**

The Texas Register, maintained by the Secretary of State (SOS), records agency activities, including RFPs. The Texas Register is published every Friday and is available to the public online.

TWC may opt to publish in the Texas Register to notify a broader audience of a solicitation opportunity. The OGC submits the items to the Texas Register and provides a copy of the submission to the Contract Developer. A copy of the Texas Register notice must be placed in the procurement file. Texas Register postings may increase the timeline because of the Texas Register submission and publication schedule.

<sup>114</sup> Tex. Gov't Code § 2155.083(j); 34 Tex. Admin. Code § 20.215(e).

### ***Centralized Master Bidders List***

The Centralized Master Bidders List (CMBL), maintained by SPD, is an online directory of vendors registered to receive bidding opportunities from State of Texas purchasing entities. TWC uses the CMBL to find vendors for products and services. The CMBL may also be used to gather information for noncompetitive procurement processes and for vendor performance data.

TWC must use the CMBL to select bidders for competitive bids or proposals and to the fullest extent possible for purchases exempt from SPD's purchasing authority. For purchases between \$10,000 and \$25,000, TWC must solicit from a minimum of three (3) active vendors on the CMBL including two (2) current Texas-certified HUBs. For procurements exceeding \$25,000, TWC must use the CMBL to solicit from each eligible vendor on the list that serves the agency's geographic region.<sup>115</sup> A print-out from the CMBL is placed in the procurement file.

When TWC is required to use the CMBL, a copy of the solicitation is sent to all vendors on the CMBL bid list for the advertised commodity code(s). TWC may use announcements of solicitations. If TWC sends a separate announcement, a copy is retained in the procurement file.

Supplementing the CMBL. TWC may supplement the CMBL with State of Texas certified HUBs at any time if TWC determines that it may enhance competition or increase the number of HUBs that submit bids. In addition, TWC may solicit from vendors that are not on the CMBL by obtaining approval from the Executive Director or designee to add non-CMBL vendors to the final bid list to increase competition.<sup>116</sup> The non-CMBL vendors may be added to the final bid list for specific solicitations to increase competition where the requirement to solicit only CMBL vendors is not adequate.<sup>117</sup> Documentation regarding the additions to the CMBL bid list, including the written approval from the Executive Director or designee of the supplemented CMBL bid list, is maintained in the procurement file.

## **Solicitation – Agency Communications with Potential Respondents**

### ***Pre-Bid/Offer/Proposal Conferences***

TWC may hold a pre-bid/offer/proposal conference. A pre-bid/offer/proposal conference occurs after solicitation issuance and before the solicitation closing deadline. TWC should consider scheduling a conference if the information cannot be covered by a well-written solicitation. A conference provides a forum for potential respondents to pose questions about the solicitation in a face-to-face setting or by conference call or web conference. It also provides an opportunity for vendors to develop subcontracting relationships and TWC gauge industry interest in the procurement.

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<sup>115</sup> Tex. Gov't Code § 2155.264.

<sup>116</sup> Tex. Gov't Code § 2155.269; 34 Tex. Admin. Code § 20.107(h).

<sup>117</sup> Tex. Gov't Code § 2155.269; 34 Tex. Admin. Code § 20.107(h).

TWC may conduct pre-bid/offer/proposal conferences that are mandatory or non-mandatory for prospective respondents. Mandatory conference should be carefully considered as it may limit competition. Depending on the location of vendor candidates, out-of-town or out-of-state vendors may be discouraged from participating in the procurement because of the travel time and expense associated with the conference. Alternatively, eligible vendors that wish to participate in the procurement may be administratively eliminated from the vendor pool simply because their companies' representatives arrived late or were otherwise unable to attend. In either event, use of a mandatory conference may thwart the goal of encouraging competition among all eligible candidates in the vendor pool.

Conferences should be mandatory only if an on-site visit is required to have a full understanding of the procurement or if the solicitation is so complex that TWC staff believes attendance is critical for potential respondents to fully understand the procurement. Accordingly, mandatory pre-bid/offer/proposal conferences are required when TWC determines that disqualification is appropriate for any response from a vendor that did not receive certain information pertaining to the solicitation at a TWC-designated time and location.

If a pre-bid/offer/proposal conference is held, the solicitation must indicate the date, time, and location of the conference and whether respondents' attendance is mandatory or voluntary. If the conference is mandatory, the following statement must be included in the solicitation:

“Failure to attend the pre-bid/offer/proposal conference will result in disqualification of the response.”

A pre-bid/offer/proposal conference is not scheduled earlier than ten (10) days after the solicitation issuance to allow sufficient time for respondents to receive and review the solicitation prior to the conference. Conference attendees are documented on a sign-in sheet which is the official record used by the TWC to verify respondent attendance. For mandatory conferences, the sign-in sheet will be collected at the beginning of the conference.

The Contract Developer conducts the conference in coordination with the program staff using Pre-Bid/Offer/Proposal Conference Guidelines maintained by Purchasing and HUB Services.

Conference attendees should be advised that the verbal responses provided by TWC during the conference are not binding until confirmed by TWC in writing. Changes to the solicitation must be in writing and published through an addendum to the solicitation. ESBID posting requirements apply.

### ***Question and Answer Period***

TWC includes in its solicitations a formal process for potential respondents to submit questions to TWC to clarify their understanding of the solicitation. The solicitation specifies the due date when questions must be submitted as well as the anticipated release date of the TWC's answers.

Written questions submitted to TWC as directed in the solicitation are compiled verbatim (with any spelling and grammatical errors) into a Q&A document. Every question received, even similar questions submitted by different vendors, is accounted for in the Q&A document. The name of the entity submitting the question and identifying information is omitted. The Contract Developer may organize the questions (e.g., chronological by receipt, by topic).

Once the Q&A document is finalized, TWC publishes it with the solicitation documents on the ESBD, and any other site where TWC has published the solicitation. Any answer that results in a material change to the solicitation is identified in a solicitation addendum.

### ***Solicitation Addenda***

A written addendum identifying the addition or correction to a solicitation is issued by TWC in the same manner as the solicitation (e.g., Texas SmartBuy, Texas Register) if a change to the solicitation occurs before the response due date. For addenda other than just an extension to the response due date, the responses must include an acknowledgement of each addendum to the solicitation.

#### **Best Practice**

***For addenda other than just an extension to the response due date, the responses must include an acknowledgment of each addendum to the solicitation.***

A solicitation addendum is used to clarify an ambiguous provision, correct an error or oversight, extend the response due date, or alter a public opening date. Rather than using a Q&A document, a solicitation addendum may also be used to answer questions by respondents even though the answers do not result in a modification or change to the solicitation.

Depending on the timing of the addendum, the Contract Developer may determine that the response due date should be extended. If an addendum results in substantial changes to the original solicitation, the response due date is extended.

Addenda are numbered sequentially. Each addendum to the original solicitation must be posted to the ESBD no later than the next business day following its release to the public.<sup>118</sup>

### ***Communication with Agency Personnel***

The solicitation provides the TWC's designated point of contact and identifies the acceptable forms of communication to TWC. If a potential respondent contacts program staff or other non-purchasing personnel about the solicitation, staff must politely decline to discuss the procurement and forward the inquiry to the assigned Contract Developer. All communication with potential respondents must occur only through the designated point of contact or other

<sup>118</sup> 34 Tex. Admin. Code § 20.214(b)(3).



designated staff. To maintain a level playing field among all potential respondents, program staff or other non-purchasing personnel should not have contact with potential respondents outside of the pre-bid/offer/proposal conferences about the solicitation.

## Solicitation – Receipt and Control of Responses

### ***Receipt***

Responses must be received on or before the due date and time designated in the solicitation. The terms “response opening date” and “solicitation closing date” both describe the deadline for receipt of responses. A response will be considered timely only if it is received on or before the published due date and time and in conformance with the delivery instructions specified in the solicitation.

To ensure fairness to all respondents, no submitted responses are to be opened or reviewed before the due date and time as announced in the solicitation document.

Upon receipt by TWC, the sealed response is marked with a date and time stamp and initialed by the Contract Developer directly on the envelope, when possible, or on the express delivery label, and the response remains sealed and kept in a secure place to prevent misplacement, loss, or tampering, until after the published response due date and time. The marked receipt must be retained in the procurement file.

Delivery by Email, Fax, or Other Electronic System. If allowed by the solicitation, responses received by email, fax, or any other electronic system must be treated as sealed response documents and kept secure until after the response due date and time. A copy of the email received with the response documents attached must reflect the date and time of receipt. If multiple emails are sent by the respondent, a copy of each email must be included in the procurement file. The faxed documents must be accompanied by a fax receipt notice. If the faxed document(s) do not have a date/time stamp, one must be affixed manually immediately upon receipt and initialed.

Responses Opened in Error or to Confirm Identification. Despite instructions contained in the solicitation, a respondent will occasionally submit a sealed response without properly identifying the solicitation on the packet. TWC staff may open a sealed response solely for the purpose of identification so that the response can be properly marked as received. If TWC staff open a sealed packet for the purpose of identification or a response was inadvertently opened, the packet must be resealed, dated, and signed by the person who opened the packet. Packets inadvertently opened by TWC staff should be marked with “Opened in Error” or “Opened to Determine Content.”

### ***Late Responses***

If a response is received after the published date and time, it is considered a late response. Late responses will not be opened and the respondent will be notified that the response was rejected because it was not timely received. TWC will either return the unopened response to the respondent at the respondent’s expense or dispose of the response according to the arrangements specified in the solicitation.

### ***Withdrawal of Response***

A respondent may withdraw its response at any time prior to the closing date and time for the solicitation. The respondent's request to withdraw its response must be made in writing on company letterhead. The preferred practice is for the respondent to submit the withdrawal of response in person and provide appropriate identification (e.g., corporate identification card, photo identification card to match the authorized contact person listed in the response) so that TWC can verify that the withdrawal request is legitimate. If the respondent's request to withdraw the response is submitted by mail, email, or fax, then a determination is made by TWC as to whether additional documentation is necessary in order to comply with the request.

### ***Cancellation of Solicitation***

TWC may cancel a solicitation at any time. If a solicitation is cancelled, TWC provides notice of the cancellation in the same manner as the issuance of the solicitation.<sup>119</sup> Cancellation notices must meet certain statutory requirements.<sup>120</sup>

Unless other delivery or disposition arrangements are specified in the solicitation, all responses should be returned unopened with a notification letter from TWC of the solicitation cancellation.

### ***Public Bid Opening Option***

TWC has discretion whether to conduct a public bid opening on the closing date of the solicitation. If TWC elects to open responses received in public, the solicitation must clearly state the time and place of the public opening. A change to the public opening date and time must be published through an addendum to the solicitation. ESBD posting requirements apply. Entities on the CMBL mailing list and respondents must be properly notified.

TWC staff will not discuss whether a product or model meets the written specifications. Attendees must be advised to submit any concerns in writing to the appropriate PCSD staff.

The sealed responses may be opened and read in any order such as alphabetical by respondentname, in order of receipt, or by lot.

TWC PCSD facilitates and conducts a public bid opening. Each attendee must sign an attendance log including attendee's company name, attendee name and title. A copy of the log must be retained in the procurement file.

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<sup>119</sup> 34 Tex. Admin. Code § 20.214(b)(3).

<sup>120</sup> 34 Tex. Admin. Code § 20.219(c).

## CHAPTER 11 - VENDOR SELECTION

### Overview

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The third step of the procurement process is vendor selection. TWC conducts evaluations in a fair and impartial manner consistent with Texas law and in accordance with either the evaluation procedure published in the solicitation or, for informal bidding situations, by TWC procedure. The evaluation methods are informal evaluation, bid tabulation or evaluation committee, depending on the procurement method utilized.

Texas law requires that contract awards be made to responsive vendors providing the best value to the State. The best value standard varies depending on the procurement method.<sup>121</sup> The Contract Developer ensures that the appropriate evaluation method is used for the type of procurement and that the best value standard is used as the basis for the contract award.

Questions regarding the proper evaluation process should be directed to the PCSD Director or OGC.

### Evaluation Exemption: TCI Program, State Use Program, and Term Contract Purchases

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TWC purchases using the following procurement methods have been determined to be best value to the State by statute or SPD rule:

- the TCI Program,
- the State Use Program, and
- Term Contracts.

Accordingly, TWC does not conduct an evaluation process when selecting a vendor for these purchases.

### Informal Evaluation: Informal Bids Only

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Upon receipt of bids in the informal bid process, the Contract Developer/Purchaser may consult with the TWC staff to evaluate bids submitted, to determine the selection of a vendor and to document the decision. The Contract Developer/Purchaser makes the required pre-award compliance checks. The TWC purchaser follows requirements for purchase or contract reporting.

### Competitive Bid and Solicitation Responses

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#### Minimum Qualification Review

The Contract Developer is responsible for determining whether competitive bid or solicitation responses meet minimum qualifications or are responsive to the solicitation. Only responses that are responsive to the solicitation and meet minimum qualifications are evaluated.

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<sup>121</sup> Best value standards include, but are not limited to, the following: Sections 2155.074, 2156.007, 2157.003, 2254.003, and 2254.027 of the Texas Government Code.

Following opening and recording the responses, a minimum qualification review includes an examination of each response to verify that the minimum vendor qualifications are satisfied and all required forms and documents were submitted and signed, as required by the published solicitation. Consultation with the PCSD Director and Business Operations Division Director, who may in turn consult with OGC, may be necessary to determine whether a response is responsive to the solicitation requirements. TWC's Minimum Qualification Review Checklist documents the results of the minimum qualification review.

Unsigned Response. A response without a signature is not responsive to the solicitation and will be disqualified. Unsigned responses will not be evaluated; these responses will be kept with the procurement file and not be returned to the respondent.

"Responsive" Response. A response is "responsive" if it conforms in all material respects to the solicitation requirements (e.g., timely submission, signed response, completed forms, anything else identified in the solicitation). The Contract Developer makes an initial determination as to whether a response is responsive. The initial determination of responsiveness is subject to change during the course of the evaluation process. TWC reserves the right in the solicitation to waive minor technicalities if it is in the best interest of the state to do so.

Technical Assistance in Specification Preparation. A respondent or contract participant may provide free technical assistance to an agency.<sup>122</sup> However, TWC may not accept a response or award a contract to a vendor that received compensation from TWC to participate in the preparation of the specifications or solicitation on which the proposal or contract is based.<sup>123</sup>

In the event a single-response is received, the Contract Developer must investigate why TWC received only one (1) response by:

- reviewing the solicitation for any restrictive specifications, and
- contacting several potential respondents to inquire why they chose not to submit a response.

Depending on the determination, the Contract Developer will recommend (1) re-advertising the solicitation, (2) preparing a Proprietary Purchase Justification, or (3) tabulate the bid (only if objective criteria are used for informal bidding or an IFB) or direct the evaluation committee to evaluate the response.

## Vendor Compliance Verifications

### **Overview**

As part of the minimum qualification review, TWC conducts multiple compliance verifications. Many of these verifications apply to non-governmental entities only. Prior to award, the Contract Developer/Purchaser checks the divestment lists to determine if the

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<sup>122</sup> Tex. Gov't Code § 2155.004(e).

<sup>123</sup> Tex. Gov't Code § 2155.004(a).

potential awardee is in violation of this requirement.<sup>124</sup> The divestment lists are maintained by the Texas Safekeeping Trust Company and posted to the CPA website. If the potential awardee is on the list, TWC does not award a contract to that vendor. Some of these verifications must be performed again prior to contract signature.

### ***Vendor Performance Tracking System Check***

Contractor performance information is located in the Vendor Performance Tracking System (VPTS) on the CPA website. VPTS is maintained by SPD. TWC is required by law to use the VPTS to determine whether to award a contract to a vendor reviewed in a negative manner as identified in the tracking system.<sup>125</sup>

### ***Debarment***

The Contract Developer/Purchaser checks the debarred vendor list posted on the CPA website to establish that the vendor has not been debarred by SPD. TWC does not award a contract to a debarred vendor.<sup>126</sup> Additionally, the Contract Developer/Purchaser must check TWC's debarred vendor list for contracts debarred under vocational rehabilitation department processes.

### ***System for Award Management (SAM)***

The Contract Developer/Purchaser checks the SAM database to verify that the vendor is not excluded from grant or contract participation at the federal level. A contract cannot be awarded to a vendor named on the U.S. Treasury Department, Office of Foreign Assets Control's master list of Specially Designated Nationals & Blocked Persons (with limited exceptions set forth in the Order).<sup>127</sup>

### ***Iran, Sudan, and Foreign Terrorist Organizations***

Governmental entities may not contract with a company doing business with Iran, Sudan, or a foreign terrorist organization.<sup>128</sup> Prior to award, the Contract Developer/Purchaser checks the divestment lists to determine if the potential awardee is in violation of this requirement.<sup>129</sup> The divestment lists are maintained by the Texas Safekeeping Trust Company and posted to the CPA website. If the business is in violation, TWC does not award a contract to that vendor.

### ***Boycott Israel Check***

Governmental entities may not contract with a company<sup>130</sup> for goods or services unless the contract contains a written verification from the company that it does not boycott Israel and will not boycott Israel during the term of the contract.<sup>131</sup> This requirement applies only to a

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<sup>124</sup> Tex. Gov't Code § 808.051.

<sup>125</sup> Tex. Gov't Code § 2262.055(d).

<sup>126</sup> Tex. Gov't Code § 2155.077.

<sup>127</sup> Executive Order 13224.

<sup>128</sup> Tex. Gov't Code § 2252.152.

<sup>129</sup> These lists are maintained by the Texas Safekeeping and Trust Company in accordance with Tex. Gov't Code §§2252.153, 2270.0201.

<sup>130</sup> Company has the meaning assigned by Tex. Gov't Code § 808.001, except that the term does not include a sole proprietorship.

<sup>131</sup> Tex. Gov't Code § 2270.002(b).

contract that is between a governmental entity and a company with 10 or more full-time employees and has a value of \$100,000 or more that is to be paid wholly or partly from public funds of the governmental entity.<sup>132</sup>

#### ***Boycott Certain Energy Companies Check***

Governmental entities may not contract with a company for goods or services unless the contract contains a written verification from the company that it does not boycott energy companies; and will not boycott energy companies during the term of the contract.<sup>133</sup> This requirement applies only to a contract that is between a governmental entity and a company with 10 or more full-time employees and has a value of \$100,000 or more that is to be paid wholly or partly from public funds of the governmental entity.

#### ***Discriminate Against Firearm or Ammunition Industries Check***

Governmental entities may not contract with a company for goods or services unless the contract contains a written verification from the company that it does not have a practice, policy, guidance or directive that discriminates against a firearm entity or firearm trade association and will not discriminate contract against a firearm entity or firearm trade association during the term of any contract executed with TWC.<sup>134</sup> This provision does not apply in contracts with a sole-source provider or where TWC does not receive any bids from a company that is able to provide the written verification required.<sup>135</sup>

#### ***Certain Foreign-Owned Companies in Connection with Critical Infrastructure Check***

Governmental entities may not contract with a company relating to critical infrastructure unless the contract contains a written verification from the company that neither it or its parent company, or any affiliate of the company or its parent company, is: (1) majority owned or controlled by citizens or governmental entities of China, Iran, North Korea, Russia, or any other country designated by the Governor under Texas Government Code Section 2274.0103, or (2) headquartered in any of those countries.<sup>136</sup>

Critical infrastructure means a communication infrastructure system, cybersecurity system, electric grid, hazardous waste treatment system, or water treatment facility.<sup>137</sup>

#### ***Warrant/Payment Hold***

The Contract Developer/Purchaser checks warrant hold status of the vendor in the following circumstances:

- transaction involves a written contract,
- payment is made with local funds, or
- payment card purchase is over \$500

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<sup>132</sup> Tex. Gov't Code § 2270.002(a).

<sup>133</sup> Tex. Gov't Code § 2274.002; Tex. Gov't Code Chapter 809.

<sup>134</sup> Tex. Gov't Code § 2274.002.

<sup>135</sup> Tx Govt Code 2274.002(c)

<sup>136</sup> Tex. Gov't Code § 2274.0102.

<sup>137</sup> Tex. Gov't Code § 2274.0101; Tex. Bus & Comm. Code Chapter 113.

TWC cannot proceed with a purchase made with local funds or a payment card purchase over \$500 until the warrant hold has been released.

For transactions involving a written contract, the warrant hold check must be performed not earlier than the seventh day before and not later than the date of contract execution. If the vendor is on warrant hold, TWC may not enter into a written contract with the person unless:

1. the contract requires TWC's payments under the contract to be applied directly toward eliminating the person's debt or delinquency, and
2. the requirement described in paragraph (1) specifically applies to any debt or delinquency, regardless of when it arises.<sup>138</sup>

Although payments made through the Uniform Statewide Accounting System (USAS) are automatically checked for holds and the system identifies payments issued to persons with outstanding state debt, this does not relieve TWC from conducting the warrant hold status check required by Section 2252.903 of the Texas Government Code.

### ***Franchise Tax***

The Contract Developer/Purchaser searches the vendor's franchise tax account status using the online Certificates of Account Status Directory located on the CPA website. Not all vendors are required to pay franchise tax; it is a privilege tax imposed on each taxable entity formed or organized in Texas or doing business in Texas. CPA is required by law to forfeit a company's right to transact business in Texas if the company has not filed a franchise tax report or paid a franchise tax required under Chapter 171 of the Tax Code.<sup>139</sup> If the corporate privileges are forfeited, the entity will be denied the right to sue or defend itself in a Texas court and each director or officer will be liable for the debt of the entity.<sup>140</sup> The Contract Developer/Purchaser will notify the PCSD Director prior to proceeding with an award to a vendor that does not have or appear to have the right to transact business in Texas.

### ***Secretary of State***

The Contract Developer/Purchaser searches the Secretary of State's SOSDirect database for business filings to determine current business entity status and legal name.

### ***Preparation of Access to Agency Premises***

Prior to contract award, the Contract Developer initiates certain activities to facilitate both parties' timely performance under the contract. Some of these activities depend on the contract.

At a minimum, the Contract Developer must notify internal personnel of the pending contract award so that end user personnel and, if assigned, the project manager may prepare for the commencement of the contract. The Contract Developer may coordinate communications between the contractor and TWC that are necessary for the contractor's performance under

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<sup>138</sup> Tex. Gov't Code § 2252.903.

<sup>139</sup> Tex. Tax Code §171.251.

<sup>140</sup> Tex. Tax Code §171.255.

the contract, such as gaining access to TWC’s premises, signing non-disclosure agreements, issuing building identification badges, assigning agency equipment and onsite workspace, or conducting criminal background investigations.

## Evaluation – Bid Tabulation Process

If the responses to an IFB are to be evaluated solely on objective criteria, the evaluation may be conducted by the Contract Developer. As a general rule, bids must be tabulated when opened, but there are times when this is not practical. It is recommended that the bid tabulation be prepared within a maximum of three (3) business days from the bid due date.

The following, as applicable, must be included on the bid tabulation:

- NIGP Class/Item;
- Confidential or Proprietary declarations by respondent;
- Vendor (Payee) Identification Number;
- Respondent name;
- HUB Status;
- Price Sheet Line Item Descriptions;
- Manufacturer/Brand;
- Product Number;
- Package Quantity Information;
- Unit Price;
- Delivery Days After Receipt of Order;
- Warranty;
- Comments/Remarks – Include indicators for disqualification and non-responsive; and
- Award Column to indicate the bidder receiving the award for any given item.

The bid tabulation prepared by the Contract Developer is confirmed by the Purchasing Director or his or her designee. After contract award, the bid tabulation must be available for release through the Texas Public Information Act.

### Best Practice

*It is best practice for the bid tabulation to undergo a second review prior to finalization to ensure that the evaluation was conducted in accordance with applicable purchasing procedures and that all calculations are correct.*

The Contract Developer must conduct a due diligence inquiry as to actual and potential conflicts of interest related to the submitted bids and gathers the Conflict of Interest Disclosure Statement<sup>141</sup> or Disclosure Statement for Purchasing Personnel.<sup>142</sup> Any actual or

<sup>141</sup> Tex. Gov’t Code § 2261.252(a).

<sup>142</sup> Tex. Gov’t Code § 2262.004.



potential conflicts of interest must be reported promptly in accordance with TWC’s Ethics Policy. See Ethics and Professional Standards of this Handbook or the TWC Ethics Policy for more information.

## Evaluation – Evaluation Committee Process

### ***Evaluation Committee***

Evaluation committee selection occurs prior to receipt of the solicitation responses. The end user or TWC Division director recommends evaluation team members to the Contract Developer which should consist of subject matter experts and stakeholders. The Contract Developer ensures the committee has diverse expertise and knowledge of the product or service being procured. The evaluation committee members may include participants in the procurement planning activities.

The committee may consist of both scoring and non-scoring members. Supervisors and their subordinates should not participate together on an evaluation team in order to avoid any undue influence on the evaluation outcome.

The Contract Developer serves as the committee chair. Depending on the procurement, the Contract Manager may participate as a scoring or non-scoring member. If there are both scoring and non-scoring evaluation committee members (technical advisors), this should be noted in the file.

The size of an evaluation committee is usually limited to three (3) to five (5) scoring members. To avoid potential individual bias, the committee should not have fewer than three (3) scoring members. Coordination and management of the evaluation process becomes more difficult as the size of the committee increases.

Each evaluation committee member must independently assess the content of each response using only the evaluation criteria and weights published in the solicitation. Accordingly, the evaluation committee members must fully understand the solicitation, be able to critically read and evaluate the responses, and document their decisions in a clear and concise manner.

Committee members must always keep in mind that any notes or comments required or made by the committee member are subject to a public information request and release to the public.

Procurements that exceed \$20 million must include the following information in the contract file:<sup>143</sup> The contract file must include the evaluators for the procurement and the following:

- person’s relevant qualifications; and
- reasons for selection.

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<sup>143</sup> Tex. Gov’t Code § 2262.051.

### ***Non-Disclosure Agreements and Conflict of Interest Disclosures***

Individuals serving on an evaluation committee or as technical advisors must sign a non-disclosure agreement prior to receiving the responses or participating in evaluation committee activities. The Contract Developer conducts a due diligence inquiry as to actual and potential conflicts of interest related to the submitted bids and gathers the Conflict of Interest Disclosure Statement<sup>144</sup> or Disclosure Statement for Purchasing Personnel.<sup>145</sup> The Contract Developer will provide the names of the respondents and proposed subcontractors to the committee members and any assigned technical advisors prior to providing access to the responses.

#### **Best Practice**

*The Contract Developer will provide the names of the respondents and proposed subcontractors to the committee members and any assigned technical advisors prior to providing access to the responses.*

Any actual or potential conflicts of interest must be reported promptly in accordance with TWC's Ethics policy. See Ethics and Professional Standards of this Handbook or the TWC Ethics policy for more information.

### ***Evaluation of Responses***

#### Overview

After the administrative review is complete but prior to evaluating the responses, the Contract Developer will schedule a meeting with the evaluation committee and any authorized non-evaluator subject-matter experts to provide, at a minimum, the following:

- Overview of the evaluation process;
- Evaluator responsibilities;
- Explanation of the numbering system used to identify evaluation committee members and track responses;
- Critical dates and deadlines;
- Scoring matrix, including evaluation factors or criteria;
- Relative weights and importance of criteria against which responses will be measured;
- Additional evaluation committee meetings; and
- How to handle questions that come up during the evaluation process.

This meeting may be held as a separate meeting before the first committee meeting or at the beginning of the first committee meeting.

The committee members are instructed as to their responsibilities including the critical

<sup>144</sup> Tex. Gov't Code § 2261.252(a).

<sup>145</sup> Tex. Gov't Code § 2262.004.

nature of confidentiality and the integrity of the evaluation process, including responses and information about the evaluation process. Evaluation committee members are also provided with the necessary documentation to conduct their evaluation.

Evaluators are also instructed to refrain from engaging in technical leveling, technical transfusion, or other improper activities.<sup>146</sup> The evaluation committee may not commence any discussions until each committee member has signed a non-disclosure statement and a preliminary assessment regarding actual and potential conflicts of interest has been conducted. An evaluation team member will not receive responses until the Contract Developer has received a signed non-disclosure statement from the evaluation team member. Evaluation Committee Guidelines are maintained by Procurement and HUB Services.

In the event one or more committee members' evaluations differ significantly from the majority, the committee chair will schedule a meeting with the entire committee to discuss the outliers to ensure the evaluation criteria were clear to all scoring members and that information was not overlooked or misunderstood. If after this discussion, a committee member determines that there was a misunderstanding of the criteria, the requirement, or information overlooked that was included in the response, the evaluator may provide a revised scoring matrix.

**Scoring Matrix**

The scoring matrix is a standardized form used by all of the evaluation committee members to record the scores for each the response based on the evaluation criteria and weights published in the solicitation and, if applicable, unpublished sub criteria. The scoring matrix is designed to objectively identify offers that most closely meet the TWC's needs. The scoring matrix must be quantitative and based on objective and measurable information requested in the solicitation.

The scoring matrix should be finalized prior to publishing the solicitation. However, if time does not permit the scoring matrix to be finalized prior to publication of the solicitation, the scoring matrix must be completed prior to the receipt of responses.

Best Practice
<i>Finalize the scoring matrix prior to publishing the solicitation.</i>

<sup>146</sup> Technical transfusion is prohibited by statute. Tex. Gov't Code § 2156.123(a) (A state agency shall avoid disclosing the contents of each proposal on opening of the proposal.)

### ***Technical Advisors***

Depending on the procurement, the evaluation committee may seek assistance from technical experts within TWC to gain a better understanding of certain aspects of the responses. Technical advisors are generally used when a particular area of subject matter expertise is not within the skill set of the evaluation committee members. For instance, an employee from TWC's Finance department may serve as a technical advisor during the evaluation committee's review of the financial capability documentation submitted by the respondents. Similarly, for an IT procurement, an employee from TWC's IT security business unit may serve as a technical advisor during the evaluation committee's review of the various data safeguard standards proposed by the respondents.

Technical advisors to the evaluation committee comply with the same non-disclosure and conflict of interest restrictions applicable to the evaluation committee. Accordingly, the technical advisors should not discuss the solicitation with anyone, even evaluation committee members, outside the committee meetings. The Contract Developer coordinates all communication between the evaluation committee and authorized technical advisors to ensure the integrity of the evaluation process.

### ***Price Component***

The price component of the response is usually assessed by using either a "reasonableness" standard or objective criteria. For a price criterion assessed using a reasonableness standard, the evaluation committee conducts the evaluation. If the price criterion is to be evaluated using only a mathematical formula, such as for an IFB, then it may be scored by the Contract Developer.

Unless prohibited by statute or TWC policy, the evaluation committee scores the entire response, including the price component, to facilitate a more comprehensive evaluation of the response (e.g., ensure that the proposed pricing aligns with the proposed products and services).

### ***Reference Check***

If required by the solicitation, respondents may submit customer references with their responses. The Contract Developer may conduct the reference checks or authorize a subcommittee of the evaluation committee to conduct reference check activities. All information obtained during the reference checks is documented in writing and filed in the official procurement file.

A script or format of questions is developed prior to the solicitation closing date. The script or format of questions must be used when conducting reference checks so that the results are consistent and fair to all respondents.

Events following solicitation issuance may shorten the procurement timeline such that reference check activities cannot be conducted in a timely manner. When the solicitation requires the submission of references or references are considered as part of the evaluation criteria, a decision must be made as to whether to verify customer references before the

solicitation closing date. TWC may use a statement in the solicitation document in lieu of checking references for all respondents as follows:

TWC reserves the right to check references prior to award. Any negative responses received may be grounds for disqualification of the proposal.

If reference checks are included in the solicitation but will not be conducted, this determination must be documented and placed in the procurement file.

### ***Clarification of Responses***

Clarifying questions may be asked of a respondent in order to resolve conflicting information, apparent ambiguities, or minor clerical errors within the response. If a clarification to the response is necessary, only the Contract Developer will contact the applicable respondent and distribute to the evaluation committee the written clarifications received by the respondent. A respondent’s clarification must be in writing and signed by an authorized representative.

Clarifications may not be used to “cure” deficiencies in the response or to revise the response; they may only be used to understand the information provided in the response.

### ***Competitive Range Determination***

Following initial scoring, the Contract Developer determines the competitive range.<sup>147</sup>

The scores are reviewed to identify a “natural break” that will determine the competitive range. An example of how to determine competitive range from maximum score of 100 is illustrated below.

<b>Evaluation Scores</b>	<b>Evaluation Scores</b>	<b>Evaluation Scores</b>
<b>Scenario 1</b>	<b>Scenario 2</b>	<b>Scenario 3</b>
97	97	97
93	93	96
90	82	90
89	81	89
88	79	88
65	68	86

- In scenario 1, the top five (5) respondents are in the competitive range.
- In scenario 2, the competitive range could include the top two (2) respondents or the top five (5) respondents.

<sup>147</sup> The competitive range refers to those responses determined to be reasonably considered for award selection and is an objective means of narrowing the field of respondents that will participate in subsequent evaluation activities such as oral presentations.

- In scenario 3, there is a six (6)-point difference between the 2<sup>nd</sup> and 3<sup>rd</sup> score, with the remaining scores close behind. Therefore, the only natural break is between the 2<sup>nd</sup> and 3<sup>rd</sup> scores. If more than two contracts will be awarded, the best option would be to include all six (6) respondents in the competitive range.

The rationale for the competitive range determination must be documented in the procurement file.

***Oral Presentations***

If included and permitted by the solicitation, TWC may elect, after reviewing the responses, to conduct oral presentations. Oral presentations provide an opportunity for respondents to highlight the strengths and unique aspects of their responses and to provide answers to clarification questions TWC may have regarding the responses.

Oral presentations may be scheduled for all respondents or limited to the top ranked vendors in the competitive range. Respondents will be notified of the time and place for the oral presentations, as outlined in the solicitation.

To ensure fairness, the time allowed and the agenda format will be the same for all presenters. Presentation order is determined in an impartial manner.

<p><b>Best Practice</b></p> <p><b><i>In order to ensure impartiality of the process, draw names to establish the presentation order for oral presentations.</i></b></p>
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Following the oral presentation, written questions are submitted to the respondent to document in writing the verbal clarifications provided by the respondent during the presentation. The answers to these clarification questions should be signed by an authorized representative of the respondent. Following all oral presentations, the evaluation committee will complete another scoring matrix using the evaluation criteria and weights published in the solicitation.

***Best and Final Offers***

After any oral presentations or demonstrations are completed, discussions may be held with respondents. If discussions are held, respondents must be given equal opportunity to discuss and submit revisions to proposals. Revisions of proposals are normally accomplished by formally requesting Best and Final Offers (BAFOs) at the conclusion of discussions with a deadline set for receipt of BAFOs and including instructions as to exactly what should be submitted in response to the BAFO. After consideration of all BAFO responses, TWC may choose to down select to a smaller number of respondents with which to commence negotiations.

### ***Evaluation Committee Recommendation***

Once the evaluation process is completed, the committee chair (who may be the Contract Developer) will prepare, sign and date the master scoring matrix, and proceed with a recommendation to either:

- award the contract to the highest ranked respondent without discussion,
- tentatively award the contract to the highest ranked respondent subject to successful completion of negotiations; or
- cancel the solicitation.

If the solicitation allows, the recommendation may be to award a contract award to more than one respondent; provided, however, that the awarded respondents are the highest ranked in the evaluation.

The master score sheet is distributed to each committee member to verify the accuracy of the scoring. Particular care should be taken to ensure that the raw data is accurately transcribed into the mathematical formulas and that the mathematical formulas are properly loaded into electronic spreadsheets/workbooks when such electronic aids are used. The master scoring matrix, as well as the scoring matrix of each evaluator, is retained in the official file.

### ***Evaluation Certification***

TWC's Procurement Director must certify in writing that the TWC assessed each response to the solicitation using the published or written evaluation criteria and that the final calculation of responses is accurate.<sup>148</sup>

Any change in the scoring that follows the initial assessment must be justified in writing. The justification must be reviewed and certified by the TWC's Procurement Director and placed in the procurement file.<sup>149</sup>

If TWC does not award a contract to the respondent with the highest score, TWC must state in writing the reason for making the award and file the reason in the procurement file.<sup>150</sup>

## **Preferences**

### ***Overview***

Preferences are established by statute. With the exception of the reciprocal preference, a vendor must claim the applicable preference(s) in its response by marking the appropriate preference on the preference form included in the solicitation. If the appropriate box is not marked on the preference form, a preference will not be granted unless other documents included in the responses sufficiently demonstrate that the bidder may receive the preference and is requesting the preference. Upon TWC request, the vendor must provide adequate documentation to support a claimed preference.

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<sup>148</sup> Tex. Gov't Code § 2261.0525.

<sup>149</sup> Tex. Gov't Code § 2261.0525.

<sup>150</sup> Tex. Gov't Code § 2261.054.

Any price adjustment that results from application of a preference occurs only during the evaluation process. The application of a preference does not alter the price to be paid by the agency under an awarded contract. A non-exhaustive List of Preferences is located in the Guide.

### ***Reciprocal Preference Law***

Texas law requires that responses from nonresidents from a state that grants resident bidder preferences for that state's purchases must be reciprocated in the same manner when competing against a bidder residing in Texas. In other words, the State of Texas will respond in kind to resident bidder preferences made by other states. Under the Texas reciprocal preference law, TWC may not award a governmental contract to a nonresident bidder unless the nonresident underbids the lowest bid submitted by a responsible resident bidder as identified in statute.<sup>151</sup>

Reciprocity and resident bidder preferences do not apply when evaluating responses that involve the use of federal funds.<sup>152</sup> The reciprocity preference is only applied during the evaluation process and only in situations where the out-of-state bidder is from a state that has a residency preference. SPD maintains a Summary of Other State Bidder Preference Laws on the CPA website.

### ***Resolving Tie Bids***

A tie occurs when two (2) or more responses receive the same score after evaluation. Priority of the claimed preference is given in the sequence listed below:

- Texas Agricultural Product
- Texas Product
- Texas Bidder
- U.S. Product

**Same Price – Same Preferences.** The award for any tied item is determined by drawing lots, tossing a coin, or drawing names with two (2) witnesses to oversee the tiebreaking activity.

**Same Price – Different Preferences.** If two (2) bidders propose the same price, but the preferences checked are different, the award is based on the priority for goods and/or for services.

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<sup>151</sup> Tex. Gov't Code § 2252.002.

<sup>152</sup> Tex. Gov't Code § 2252.004.



## CHAPTER 12 - CONTRACT FORMATION and AWARD

### Overview

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The fourth step of the procurement process is to enter into a legally enforceable contract that not only meets the TWC's business need but is also compliant with Texas procurement law. The contract between TWC and the selected vendor may be in the form of either a PO or formal signed agreement. If a formal signed agreement is used, the PO documents the encumbrance of funds by TWC for the transaction.

For many procurements, the Contract Formation and Award phase is a relatively quick process. For example, a contract to acquire a good or service from SPD Term Contracts may be awarded by PO immediately following the selection of the vendor. In contrast, the Contract Formation and Award phase may take longer for procurements where the parties desire to enter into a formal written agreement following the negotiation of terms and conditions.

### Negotiations

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#### Overview

TWC may negotiate terms and conditions during the procurement process. Not all procurement methods, however, allow for negotiation.<sup>153</sup> Prior to commencing negotiations, the Contract Developer must verify that negotiations are permitted under the applicable procurement method.

Negotiations are permitted for the following:

- purchases using competitive sealed proposals,
- purchases using requests for offers,
- purchases under DIR cooperative contracts,
- purchases of consulting services,
- purchases of professional services,
- TXMAS purchases,
- State Use Program purchases (when procuring services, not goods),
- sole source and competitive proprietary purchases, and
- emergency purchases when there is insufficient time to solicit bids.

Negotiation is not permitted under the IFB procurement method except when only one qualified bid is received. This exception is the only circumstance for TWC to negotiate contract terms, including price. In an IFB, the negotiation may not result in a material change to the advertised specifications.

Negotiations involving public sector entities (e.g., state government) are different than between private sector entities. For example, negotiations with an agency must not materially alter requirements of the published solicitation. Care must be taken by TWC to avoid inadvertently changing the advertised procurement objectives. If the procurement

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<sup>153</sup> 34 Tex. Admin. Code § 20.206(d).

objectives are changed through the negotiation process, an unlevel playing field occurs when respondents could have bid differently had they been aware of the changed procurement objectives. An unlevel playing field also results when the composition of the eligible vendor pool would have been different (e.g., the vendor pool may have been larger) if the changed objectives had been incorporated into the original solicitation.

If it appears that the procurement objectives may have been changed, OGC should be consulted before proceeding further.

## Negotiation Team

TWC employees with effective negotiation and communication skills are assigned to the negotiation team. For complex procurements involving high-dollar or high-risk projects, negotiations may be conducted by an experienced team of TWC employees.

A lead negotiator is designated to establish an organized and controlled negotiating environment to support an efficient, coordinated, and unified team effort. Rarely will the lead negotiator also be the Contract Developer in a complex procurement.

Team members are selected, or excluded, based on their leadership style, negotiation skills and subject matter expertise, to ensure the right people are present during negotiations. The negotiation team should include TWC personnel who have or have been delegated decision-making authority appropriate for the procurement.

## Preparation

To develop an effective negotiation strategy, the negotiation team must be prepared by becoming familiar with the documentation submitted by the vendor and be well-versed in the project business requirements, constraints, and any applicable overarching TWC objectives. The negotiation strategy should be tailored to suit the particular facts and circumstances of each procurement. Formal planning activities may include, but are not limited to, the following:

- identifying contract terms that are crucial to the agreement (i.e., terms upon which TWC is either unable or unwilling to compromise, as well as contract terms that TWC is willing to compromise or relinquish);
- understanding and prioritizing the acceptable trade-offs between the various negotiation goals;
- establishing the TWC's settlement range on the items to be negotiated; and
- anticipating the positions that will be taken by the vendor during negotiations.

## Technical Leveling, Technical Transfusion, and Other Improper Activities

Care must be taken not to engage in technical leveling and/or technical transfusion activities. Technical leveling is helping a respondent to bring its response up to the level of other responses through successive rounds of discussion, usually by pointing out weaknesses in the response.

Technical transfusion, which is prohibited by statute, is the disclosure of technical information or approaches by one respondent to other competitors in the course of discussion.

Prohibited auctioneering techniques include:<sup>154</sup>

- disclosure of competing respondents' cost/prices (even if the disclosure is made without identifying the vendor by name); and
- advising a respondent of its price standing relative to other respondents.

## Contract Formation

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### Overview

When negotiations are complete, a contract documenting the parties' negotiation and the terms and conditions of the performance must be finalized. Texas courts define a contract as a promise or a set of promises to which the law attaches legal obligation.<sup>155</sup> The law regards the performance of these promises as a duty and provides a remedy for the breach of this duty.

Contracts that deviate substantially from requirements defined in the solicitation are open to challenge from unsuccessful respondents. Awarding a different project from the one solicited undercuts competition and the contract could be considered void due to a violation of ESBD posting requirements.

### Approach to Contract Formation

Fundamentally, the purpose of a written contract is to serve as a reference document that records the terms of an agreement to prevent misunderstanding or conflict, and creates a legal, binding and enforceable obligation. Clarity of the terms and completeness of the issues are paramount. The TWC staff assigned to drafting the contract must be familiar with subject matter and concerns of the parties thoroughly enough to anticipate potential areas of disagreement and specifically address them in the contract.

Thoroughness and precision are necessary to determine the scope of a contract because contract law does not allow parties to add terms not part of the original contract without the consent of both parties. This rigidity in contract law is mostly seen as an advantage to both parties. However, this advantage may become a liability if TWC does not include all necessary language in the contract when executed.

Creating a contract for TWC is an exercise in balancing potential conflicting interests. The primary concern must always be the benefit of the contract to the State as a whole, or more specifically, the taxpayers of the State.

Care should be taken not to include unnecessarily harsh provisions in the contract; while such provisions may be legal, they usually have negative future consequences that outweigh the initial gains. Contractors who feel they have been aggrieved by the State are less likely to

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<sup>154</sup> Tex. Gov't Code § 2156.123(a).

<sup>155</sup> C & H Transportation Company v. Wright, 396 S.W.2d 443, 446 (Civ App.-Tyler 1965, ref. n.r.e.).

provide good service and are more apt to engage in legal action. In addition, these contractors may decide to not pursue future State contracts, thus limiting future competition.

## Contract Templates

TWC has several contract templates for different types of procurement matters. TWC's contract templates contain language that has been vetted through the internal review process. However, the template should be viewed as a "starting point" for contract formation.

### Best Practice

*Start the contract drafting process with the latest approved template, not with a prior or existing contract.*

Individuals drafting a contract must ensure they are using the latest approved template for the type of contract developed. The latest approved template contains up to date legal references and requirements and other modifications and improvements that a prior or existing contract will not.

Prior to final internal routing requirements, the individual drafting the contract should thoroughly review the contract to ensure it is in harmony with the solicitation and negotiations and encompasses all the required elements. There is no substitute for reading through the contract language again in the context of the current procurement.

The draft contract undergoes several reviews within TWC, including OGC. Modifications requested to required or essential contract clauses must be pointed out during the review process or fully vetted during the drafting process. Many of these are requirements stemming directly from statutory law for which TWC has no authority to negotiate or deviate from.

## Legal Elements of a Contract

The essential elements necessary to form a binding contract are usually described as follows:

- Offer
- Acceptance
- Legal Purpose
- Consideration
- Certainty of Subject Matter
- Competent Parties

These elements are further described in the Guide.

## Contract Terms

The following Essential Provisions are provisions from the Guide that TWC includes in a contract:<sup>156</sup>

1. Terms Necessary for the Formation of a Legally Binding Contract. The necessary elements of a contract are offer, acceptance, legal purpose, consideration, certainty of subject matter, and competent parties. Accordingly, each contract must include terms that address the following:

- Statement of work,
- Financial provisions (e.g., price and payment terms),
- Contract period (term) and termination provisions, and
- Identification of the contracting parties.

By their nature, these terms are transaction-specific; therefore, the text will vary for each contract.

2. Required Contract Clauses. The most common statutorily required contract clauses are compiled on the SPD's list of Texas Required Contract Clauses located in the Guide. For each required contract clause, the compendium provides both standard and alternate text that serves as a safe harbor for compliance with the applicable statute.

PCSD staff must seek assistance from OGC prior to modifying the standard or alternate text specified for the Texas Required Contract Clauses as slight variations may result in TWC's noncompliance with applicable statutes and rules.

Provisions that SPD recommends for inclusion in agency contracts are located in the Guide. SPD makes it clear that while these Recommended Clauses are not mandated by statute to be included in every contract, they also should not be treated as "optional." Rather, they are provisions that are typically included in most contracts. Recommended Clauses include, but are not limited to, the following:

- Administrative provisions,
- Provisions that allocate risk and specify remedies,
- Provisions that relate to the identification and safeguarding of confidential information, and
- Provisions that relate to rights and ownership of work product and intellectual property.

The determination as to the appropriateness of a particular contract term is dependent on the characteristics of the transaction. The list of Recommended Contract Clauses located in The State of Texas Guide comprises "sample" text because it is expected that the wording of the Recommended Clauses included in each contract will vary due to the unique contracting

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<sup>156</sup> Section 2262.051(d)(1) of the Texas Government Code requires that SPD include in its Guide model contract provisions which distinguish between Essential Provisions that an agency must include in a contract to protect the interests of the State and recommended provisions that an agency may include in a contract. The Guide must also recognize the unique contracting needs of the individual agencies with protecting the interests of the State.

needs of individual state agencies. For example, certain federal programs may require the inclusion of specific contract clauses. The TWC subject matter expert and OGC should identify these clauses. No clause should be added to a contract without undergoing OGC review. Note that this does not cover provisions that apply only in certain circumstances (such as iron/steel in construction contracts).<sup>157</sup>

It is common practice for a contracting entity to utilize its respective standard terms and conditions, often referred to as “boilerplate,” in order to provide uniformity across the transactions. When drafting a contract, care should be taken not to automatically adopt terms and conditions, even boilerplate, from another contract without a thorough and independent review of how those terms and conditions relate to the current purchase and determine whether they are applicable.

TWC OGC ensures that its contract terms suit the particular purchase. OGC reviews the terms and clauses of contracts and identifies additional terms to be included or revisions to be made. Questions regarding legal terms and clauses should be forwarded to OGC.

## Authority to Contract

Only persons having actual authority to act on behalf of TWC can bind TWC in a contract. The powers of all state officers are set by law. All persons dealing with state officers must know the limits of their authority and determine if the contemplated contract is within their statutory authority.

No other TWC staff may execute a contract absent express authority.

## Binding Signatures

Original signatures pose the least risk for forgery or unauthorized signatures. However, contracts are valid if signed by an individual authorized to obligate that party, whether that individual’s signature is hand-made or represented electronically or digitally as those terms are defined by the CPA in 34 Texas Administrative Code § 20.3. Due to time and expense considerations, TWC accepts alternatives that meet the CPA’s requirements to original signatures in instances in which the potential risk for forgery or unauthorized signatures has been determined to be minimal.

Furthermore, TWC has established specific delegations of signature authority based on threshold amounts.<sup>158</sup> Only those authorized to sign on behalf of TWC may do so in accordance with this delegation. For example, the TWC Executive Director, by delegation of authority from the Commission signs all contracts and awards exceeding \$1 million. By state law, the Commission may also delegate authority to the Deputy Executive Director to sign contracts and awards exceeding \$1 million.<sup>159</sup>

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<sup>157</sup> Tex. Gov’t Code § 2252.203.

<sup>158</sup> <https://twcgov.sharepoint.com/sites/BusOPS/BusOpsIntra/PCSMaterialsHandbooks/Authorized%20Agency%20Signatures/Acknowledgement%20of%20Delegated%20Signature%20Authority%20Letter%20with%20DocuSign%20Link%2009.2021.pdf> OR TWC SharePoint link [Delegated Signature Authority Letter](#)

<sup>159</sup> Tex. Gov’t Code § 2261.254(d) (2019).

The signature routing process depends on the award and signature thresholds. The Contract Developer is responsible for ensuring the contract is routed through the appropriate process.

## Form of the Contract

### **Overview**

Evidence of an agreement or contract can be documented in different formats including, but not limited to, a “four-corner contract” or a PO. Each of these forms of contract has advantages and disadvantages. Determining the most appropriate format should follow an assessment of the risks involving contract construction or interpretation. The contract delivers an offer in a form requested by TWC and TWC indicates acceptance of the offer. The documents that comprise the offer and acceptance are the evidence of the agreement.

TWC has “four-corner” contract templates as well as a template PO.

### **Four-corner contract**

In a “four-corner” contract, the provisions are contained within the four-corners of a single document. This type of contract must be signed by an authorized representative of the parties. Contract management is sometimes easier when all of the provisions regarding the duties, obligations and responsibilities of each party is logically organized within one document. On the other hand, “four-corner” contracts require more time to plan and prepare.

An alternative to the “four-corner” contract is a layered approach in which the solicitation, response, and other documents are incorporated by reference into or attached to a top-level document such as a formally signed agreement or PO. The top-level document should be carefully drafted to incorporate all documents that are part of the agreement and address an order of preference and any conflicts between them. All final terms and conditions that vary from either the solicitation or the vendor’s offer should be specifically identified.

### **Purchase Order (PO)**

Depending on the transaction, the PO will be either the contract or an associated contract document issued to encumber funds for a “four-corner” contract. The PO will generally refer to or incorporate either an existing contract or an offer made by a vendor. For example, TWC may issue a PO against an existing DIR schedule contract to purchase laptop computers. A PO can also be used to accept or counter a vendor’s quote for a purchase made under delegated authority. The terms and conditions of the incorporated contract or offer must be carefully reviewed to ensure they meet TWC’s needs. TWC may include its own terms and conditions on a PO to supplement the existing contract or to address unacceptable terms proposed by the vendor.

## Pre-Award Reviews and Compliance Checks

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### Overview

Once the contract has been drafted and just prior to execution, TWC determines whether review by an oversight agency is required and, if applicable, obtains the requisite approval(s) prior to contract award. To ensure compliance with applicable procurement law, pre-award due diligence checks should also be conducted. Pre-award contract compliance checks include confirmation that certain internal reviews and approvals have been performed, required disclosure statements have been completed, and verification that the award to the selected vendor is not prohibited by law.

### Reviews and Approvals by Oversight Agencies

#### ***QAT – Major Information Resource Project***

A contract for development of a major information technology project with a value expected to exceed \$10 million is not valid unless TWC:

- provides a copy of the final version of the contract including all appendices and attachments, signed by the contractor but not the state agency, to QAT; and
- obtains prior written approval of the contract from QAT.<sup>160</sup>

Information regarding the steps involved in initiating, monitoring, completing, and submitting deliverables to the QAT for a major information resources project is available on the Project Delivery Framework page located on the DIR website. The Procurement Director can facilitate interaction with QAT on behalf of TWC.

#### ***DIR – Statements of Work (SOW)***

TWC prepares and submits to DIR certain DIR SOW for contracts that exceed \$50,000. A DIR SOW executed by TWC under a contract for an IT commodity item is not valid and money may not be paid to the contractor under the terms of the DIR SOW unless DIR first signs the DIR SOW.<sup>161</sup>

### Agency Reviews and Approvals

#### ***Agency Verification of Best Review Standards***

The TWC Contract Developer or Procurement Director must:

1. approve each TWC contract for which TWC is required to purchase goods or services using the best value standard;<sup>162</sup>
2. ensure that, for each contract, TWC documents the best value standard used for the contract;
3. acknowledge in writing that TWC complied with TWC's Handbook and the Guide in the purchase; and
4. ensure that TWC evaluates the contractor's performance based on:

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<sup>160</sup> General Appropriations Act, Senate Bill 1, 85th R.S. at Article IX, Section 9.01(d).

<sup>161</sup> Tex. Gov't Code § 2157.0685.

<sup>162</sup> Best value standards include, but are not limited to Tex. Gov't Code §§ 2155.074, 2156.007, 2157.003, 2254.003, and 2254.027.



- information prepared by TWC in planning the procurement that assessed the need for the purchase together with the specifications for the good or service and the criteria to evaluate the responses resulting in an award and contract;
- compliance with the material terms of the contract;
- ability to correct instances of contractual non-compliance; and
- other evaluation criteria presented in the on-line vendor performance tracking system.<sup>163</sup>

### ***Agency Signature – All Contracts***

TWC has established internal procedures for required approvals and thresholds for contractual transactions.<sup>164</sup> The Contract Developer is responsible for ensuring the contract is routed to the correct TWC staff member with the signature authority to execute the contract.

### ***Agency Signature – Contracts with a Value Exceeding \$1 Million***

TWC may enter into a contract for the purchase of goods or services that has a value exceeding \$1 million only if the governing body of TWC (the three (3)-member Commission) approves the contract and the approved contract is signed by the presiding officer of TWC.<sup>165</sup> In accordance with the statutory authority, signature authority may be delegated to the agency executive director or deputy executive director.<sup>166</sup> A copy of this delegation order is maintained by the TWC’s Office of General Counsel.

### ***Agency Verification – Contracts with a Value Exceeding \$5 Million***

A contract for the purchase of goods or services that has a value exceeding \$5 million must have the PCSD Director verify in writing that the solicitation and purchasing methods and contractor selection process comply with state law and TWC policy.<sup>167</sup>

Furthermore, the PCSD Director must submit information on any potential issue that may arise in the solicitation, purchasing, or contractor selection process to the three-member Commission.<sup>168</sup>

### ***Agency Review of Required Disclosures***

#### *State Auditor’s Office (SAO) Nepotism Disclosure Statement for Purchasing Personnel*

For contracts that are valued at \$1 million or more, purchasing personnel, as defined in TGC, Section 2262.004, must disclose the relationship (if any) with the selected vendor (or any

<sup>163</sup> <sup>159</sup> 34 Tex. Admin. Code § 20.217(a).

<sup>164</sup> [160 The memorandum identifying the signature authority and thresholds is located on the TWC intranet at http://intra.twc.state.tx.us/intranet/hr/docs/executive-director-letter-17-01-twc.pdf.](http://intra.twc.state.tx.us/intranet/hr/docs/executive-director-letter-17-01-twc.pdf)

<sup>165</sup> Tex. Gov’t Code § 2261.254(c).

<sup>166</sup> Tex. Gov’t Code § 2261.254(d).

<sup>167</sup> Tex. Gov’t Code § 2261.255.

<sup>168</sup> Tex. Gov’t Code § 2261.255.

employee, stockholder, contractor, etc.) to the TWC Executive Director on a form prescribed by SAO.<sup>169</sup> The Nepotism Disclosure Statement form is on the PCS SharePoint site.

#### *TEC Disclosure of Interested Parties (Form 1295)*

Certain contracts for goods or services with a value of \$1 million or more, that require an action or vote by the three-member Commission, or are for services that would require a person to register as a lobbyist under Texas Government Code Chapter 305 require vendors to complete the Form 1295 Certificate of Interested Parties which is located on the Texas Ethics Commission (TEC) website. Before contract award, the vendor must submit to TWC a completed and signed form with the certificate of filing number and date.<sup>170</sup> The Contract Developer acknowledges the Form 1295 at the TEC website. TWC, as a best practice, includes a reference to Form 1295 in the solicitation in order to allow the vendor to gather the pertinent information early in the process.

#### *Procurement and Contract Management Conflict of Interest Disclosure*

Each TWC employee or official who is involved in procurement or in contract management for TWC shall disclose to TWC any potential conflict of interest specified by state law or TWC policy that is known by the employee or official with respect to any contract with a private vendor or bid for the purchase of goods or services from a private vendor by the TWC.<sup>171</sup> A TWC employee or official is required to disclose any potential conflict of interest specified by state law or TWC policy that is known by the employee or official at any time during (1) the procurement process, from the initial request for bids for the purchase of goods or services from a private vendor until the completed final delivery of the goods or services, or (2) the term of a contract with a private vendor.<sup>172</sup>

## Vendor Compliance Verifications

Immediately following award, TWC conducts vendor compliance verifications. These verifications are identical to those conducted for each vendor during the minimum qualification review. See section titled Vendor Compliance Verifications for detailed information, above.

In addition to these vendor compliance verifications being conducted again prior to contract signature, the Contract Developer/Purchaser reviews TWC's systems to determine whether the vendor has any unemployment insurance overpayment debt and tax delinquency, the tax standing of the entity and state status, labor law non-compliance history and career school fees and assessments payable to the State of Texas.

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<sup>169</sup> Tex. Gov't Code § 2262.004.

<sup>170</sup> Tex. Gov't Code § 2252.908.

<sup>171</sup> Tex. Gov't Code § 2261.252(a).

<sup>172</sup> Tex. Gov't Code § 2261.252(a-1).

## LBB Reporting Requirements

TWC must notify LBB prior to expending any funds to make a payment on a contract valued at \$1 million for a non-competitive or emergency purchase; or for a competitive purchases valued at \$10 million or more.<sup>173</sup> See Chapter 14, Report to the Legislative Budget Board.

Value	>\$50,000
Type	All Contract Types
Due date	Within 30 days of award or amendment
Reporting Provisions	GAA, Article IX §7.04, TGC §322.020
Documentation Requirements	Requires solicitation and contract documents

The notice requirement applies to vendor contracts, grants, revenue generating contracts, interagency and interlocal agreements, and purchase order contracts, and any amendment, modification, renewal or extension of a purchase for goods or services.

Failure to timely comply with the notification requirements may result in recommendations for enhanced monitoring of agency procurement and contract management processes. The LBB provides an attestation form for use by agencies to assist in compliance with this requirement. The ECPS Administrator obtains the Executive Director's attestation and submits it to the LBB on behalf of the agency.

## Post Award Actions

### Internal Notification

Immediately following award, the Contract Developer must provide an executed copy of the contract to the Contract Manager and any other internal point of contact and the contractor.

### Contract & Amendment Notifications and Postings

With the passage of legislation in 2015, more focus has been placed on state agency contracting practices, resulting in an emphasis of transparency through various reporting requirements and generally making information available to the public. TWC must carefully and timely comply with all of these requirements; they are reviewed and scrutinized by several oversight agencies as well as reported to the Texas Legislature.

Depending on the type or amount of the transaction, TWC may be required to provide one or more notifications of the contract award. These notifications may be in the form of a notice of award published to the ESB, a report to an oversight agency, such as the LBB, or a website posting.

<sup>173</sup> General Appropriations Act, Art. IX, § 7.11, 87th, R.S. (2021).

Contracting information is generally considered public and must be released unless excepted from disclosure.<sup>174</sup> Care must be taken to ensure that information that is confidential or that the attorney general determined is excepted from public disclosure is redacted from the contract or related documents. Contact the TWC OGC if there are any questions on the release of information in response to requests for public information.

## Debriefings with Vendors

The Purchasing Director, in accordance with TWC procedures, may conduct a “debriefing” meeting at the request of an unsuccessful vendor. In preparation for the meeting, the Purchasing Director must be prepared to discuss the strengths and weaknesses of the vendor’s response relative to the advertised evaluation criteria as well as how TWC’s decision complied with applicable procurement law and the published solicitation.

Several vendor representatives may attend the meeting, which may be conducted by phone conference. A list of the vendor attendees should be requested in advance of the scheduled meeting. If the vendor’s legal representative will attend the meeting, the Purchasing Director must promptly notify the PCSD Director, who in turn may notify OGC.

Debriefing meetings must be limited to a discussion of the vendor’s response — the Purchasing Director or his or her designee must not engage in discussions about how the vendor’s response compared to other responses. Care is taken to not divulge confidential information regarding a competitor’s response.

Debriefing meetings are beneficial to both the vendor and TWC. During the debriefing meeting, the vendor may obtain information as to why its response was unsuccessful so that it may apply “lessons learned” in future procurement initiatives with the State. Similarly, a debriefing meeting provides an opportunity for TWC to obtain valuable insight, from the vendor’s perspective, of the procurement process.

## Protest of Award<sup>175</sup>

When a protest is received, TWC follows its rules to assess the merits of the vendor’s protest and correct any unlawful procurement actions. TWC staff should never assume that protests are frivolous; it is expected that most vendors would be reluctant to file a protest against a state agency with which it wants to conduct business unless they believe that egregious errors occurred during the solicitation process. Even if the protest is not sustainable under the TWC’s protest rules, TWC should proactively make appropriate improvements to its procurement practices if any shortcomings are uncovered during the protest.

## Lessons Learned – Internal

The Contract Developer should call a ‘lessons learned’ meeting after the conclusion of each solicitation and prior to transition of the contract to the Contract Manager. This meeting should takeplace within two (2) weeks of contract execution so that team members recall

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<sup>174</sup> Tex. Gov’t Code § 552.0222.

<sup>175</sup> Tex. Gov’t Code § 2155.076.

details in order to provide more feedback during the meeting. The meeting must include, at a minimum, the team assigned to the solicitation, but it can also include other TWC staff involved in the process.

The purpose of the lessons learned meeting is review the solicitation from initiation through signature and document the strengths and weaknesses of the particular solicitation and process, as well as recommendations for improvement for that particular solicitation or the process in general.

The Contract Developer retains documentation or a summary of the meeting in the procurement file and sends a copy to the PCSD Director and the Procurement Director. A Lessons Learned template is maintained by Purchasing and HUB Services. The Contract Developer must also place a copy in the file. The PCSD Director and the Procurement Director review the document and may act accordingly on recommendations. The lessons learned document should be reviewed prior to a new solicitation for a similar procurement.

The Contract Developer may include the Contract Manager in the lessons learned meeting, or combine the lessons learned meeting with the transition of the contract file from the Contract Developer to the Contract Manager.

## CHAPTER 13 - CONTRACT MANAGEMENT

### Overview

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The final step in the procurement process is contract management. The objective of contract management is to ensure the contract is performed satisfactorily and the responsibilities of both parties — TWC and the contractor — are properly discharged. Effective contract management prevents, minimizes and resolves problems and potential claims and disputes. For contract management to be successful, the Contract Manager must be involved throughout the Procurement Cycle.

Contract management includes up to eight general processes:

- Planning
- Monitoring
- Inspection, Testing and Acceptance
- Payment approval
- Change control
- Dispute resolution
- Termination
- Contract closeout

### Contract Manager Assignments

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TWC business units shall ensure that each contract or group of contracts is assigned to a TWC Contract Manager who is responsible for management and oversight of the TWC contract.

In the event that a Contract Developer was involved in the contract through signature, a transition will need to occur from the Contract Developer to the Contract Manager. For relatively simple and routine procurements, like purchases using the set aside programs, Texas SmartBuy, or informal bidding, transition activities are documented as TWC procedure.

For other procurements, especially high-risk and/or high-dollar procurements, the transition occurs through a post-contract award meeting. At a minimum, meeting attendees include the Contract Developer, the Contract Manager, end-users, and, if assigned, the project manager. During this meeting, the Contract Developer ensures that the Contract Manager, as well as other stakeholders, have an understanding of the key procurement activities that have occurred prior to contract execution.

#### Best Practice

***For high-risk and/or high-dollar procurements, it is best practice for internal staff to hold a post contract award meeting.***

To the extent that the Contract Manager did not participate in precontract award procurement activities, the Contract Developer facilitates the transition of documents and foundational knowledge of the solicitation and contract.

The transition is the ideal time for all TWC staff involved in the procurement to ensure that original documents have been provided to the Contract Developer or Contract Manager for proper retention in the official file. While convenience copies may be maintained, they should be marked or stored to indicate the original has been forwarded to the file. Even convenience copies, duplicate copies and drafts must be provided to OGC Open Records in the event of a public information request if there are notations or other markings on them in addition to the original text.

The Contract Developer provides a thorough review of the statement of work and relays the contract terms and conditions, agreed-upon inspections and acceptance criteria, extension and renewal potential, and articulated remedies. After the team has been briefed on the events preceding the contract award, the Contract Manager begins the administration of the contract.

## Contract Manager Responsibilities

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The Contract Manager is the designated lead responsible for ensuring that the contract requirements are satisfied, that the goods and services are delivered in a timely manner, and that the financial interests of TWC are protected. The Contract Manager must have a thorough understanding of all components of the solicitation and contract and be experienced with the type and size of the procurement. The extent of contract administration will not be the same for all contracts. The level of contract administration depends upon the complexity and level of risk of the contract, the contract term, and dollar value.

All guidance provided to a contractor must be within the scope of the contract. The Contract Manager must be careful to not impose additional requirements upon the contractor or manage the contractor's operations to the extent that the contractor is relieved of its responsibility to perform.

The primary responsibilities of the Contract Manager include the following:

- Participating, as necessary, in solicitation development, including determining whether the contractor's compensation structure is appropriate for the work to be performed, and the review of contract documents;
- Becoming familiar with the contract and all associated documents and expectations of all parties;
- Contacting the PCSD Director regarding any concerns or issues, who may consult with OGC to address any legal concerns and/or issues;
- Serving as the primary point of contact for agency communication with the contractor regarding all matters pertaining to the contract;
- Managing any state property used in contract performance, (e.g., computers, telephones, identification badges);
- Implementing a quality control and contract monitoring process and plan;

- Monitoring the contractor’s progress and performance to ensure goods and services procured conform to the contract requirements and keep updated records of findings;
- Managing, approving, and documenting any changes to the contract through the amendment process authorized by the terms of the contract;
- Inspecting and approving the products and/or services by submitting a written document accepting the deliverables or obtaining documentation from the end users responsible for receipt that inspection and approval have been completed;
- Verifying accuracy of invoices and authorizing payments consistent with the contract terms, if assigned this function;
- Monitoring the contract budget to ensure sufficient funds are available throughout the term of the contract, if assigned this function;
- Identifying and resolving disputes with the contractor in a timely manner or elevating the disputes through the proper internal channels in a timely manner;
- Exercising state remedies, as appropriate, when a contractor’s performance is deficient;
- Maintaining appropriate records in accordance with the records retention schedule;
- Timely providing required notices and addressing renewal options;
- Confirming all products and/or services have been delivered and delivery is completed prior to the expiration date of the contract; and
- Performing contract closeout processes by ensuring the contract file contains all necessary contract documentation, formal acceptance is documented, vendor performance reported to VPTS, and document lessons learned.

Contract Managers are not authorized to:

- Allow the contractor to commence work before the contract is fully executed;
- Change the scope or extend the term of the contract without complying with the formal amendment process prescribed by the contract;
- Authorize the contractor to perform work that is not specifically described in and funded by the express terms of the contract; or
- Allow the contractor to recover costs incurred prior to the effective date of the contract or recover costs above the budget limit set by the contract.

The number of TWC staff participating in the contract administration process may vary from one to many depending on the size, level of risk and complexity of the contract. Early in the procurement process, the end user or the Purchasing Director may identify staff, in addition to the assigned Contract Manager, who will participate in the contract management process. The Contract Manager must document the assignment of roles and responsibilities in the contract file.

The Contract Manager is responsible for maintaining a master contract file of records produced throughout the life of the contract and completing the master contract file checklist and including it in the file. Contract Managers collaborate with Purchasers to ensure compliance with state law regarding maintaining contract records by identifying the location of all documents on the Procurement and Contract Checklist (TWC Form 1400) that are



required to support the lifecycle of all contracts from solicitation through contract closure.

## Contracts Exceeding \$20 Million

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Procurements that exceed \$20 million must include the following information in the contract file:<sup>176</sup>

- The contract file must include the evaluators for the procurement.
- The contract file must include the person’s relevant qualifications and reasons for selection.

For contracts in excess of \$20 million TWC must provide notice to potential vendors at least two (2) months in advance and prior to the posting of the solicitation on the ESBD.

## Planning and Risk Assessment Tools

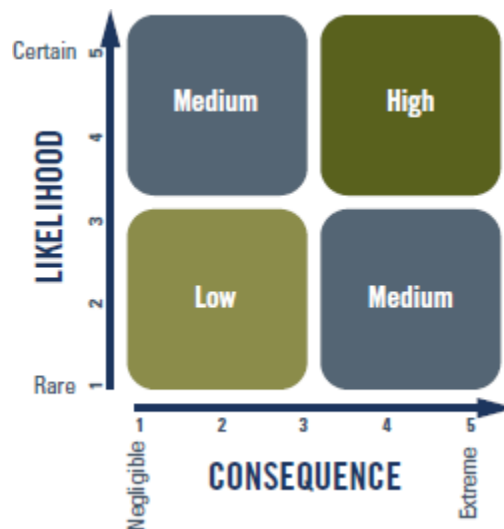
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### Overview

Various methodologies are used by TWC to assess risk. Each methodology has been designed with the type of contract assessed. These models then focus monitoring resources on contracts with the highest risk of noncompliance.

TWC’s risk assessment process is designed to estimate the following:

1. The likelihood of the event is estimated (e.g., rare to almost certain).
2. The consequence of the event is estimated (e.g., negligible impact to extreme).<sup>177</sup>



TWC’s risk management process includes:

- Risk identification;
- Risk analysis;

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<sup>176</sup> Tex. Gov’t Code § 2262.051.

<sup>177</sup> National Association of State Procurement Officials, *State and Local Government: A Practical Guide 72* (Lexington 2nd ed. 2015).

- Risk evaluation;
- Risk treatment and contingency plan; and
- Risk monitoring.

## Risk Factors

General risk factors that are considered include, but are not limited to, the following:

- The contractor's previous experience with the type of work to be performed;
- The contractor's past performance (and past performance of similar contractors);
- The dollar value of the contract;
- Reimbursement methodology (e.g., fixed price, time and materials, cost reimbursement);
- Acquisition complexity (e.g., office supplies, temporary staff, design/build/implementation project, outsourcing project);
- Acquisition involves (TWC and/or contractor) confidential and/or propriety information;
- Acquisition involves products or services that are relatively new in the marketplace;
- Acquisition involves the use of technology or implementation of processes that are new to TWC;
- Acquisition has an interdependency with other contracts;
- Acquisition has statewide impact (e.g., involves large number of constituents, a vulnerable client population);
- Findings from monitoring efforts, such as the variance between expected and actual performance;
- Turnover in key personnel of the agency and/or contractor;
- Significant problems with payment requests;
- Results of monitoring visits with the same contractor that are completed for other business units within TWC or other agencies;
- The length of time since the last monitoring activity;
- TWC personnel experience with the product provided or the type of work to be performed; and
- Available level of effort to support the monitoring activities (e.g., ContractManager workload).

## Assessing Risk

After the risk factors are identified, weights are assigned to each factor. Weights describe how significant each factor is in identifying the contracts that should be monitored. However, weights may also be designed to ensure statutory or policy requirements. A contractor is also rated on the risk elements.

Since risk assessment is a dynamic process, it is updated regularly to reflect the results of monitoring visits, reviews of payment vouchers, desk reviews, etc. For example, if a contractor has fallen significantly behind schedule in delivering services, the risk assessment should be updated to indicate the elevated risk, and this impacts how the contract is monitored in the future. Likewise, if a contractor is well ahead of schedule in delivering

services, the risk assessment should be updated to indicate the lower level of risk.

## Contractor Conference or Orientation

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Shortly after award of the contract, the Contract Manager must schedule a conference or orientation between the contracting parties to ensure that all parties are aware of the performance requirements and administrative procedures agreed in the contract. This may take place in the form of a formal post-award contractor conference or an informal conference call. Factors used to determine whether a post award conference is appropriate include:

- Type of contract;
- Level of risk associated with the contract;
- Value and complexity;
- Length of contract, period of performance and/or delivery requirements;
- Procurement history of the products or services required and expertise of the contractor;
- Urgency of delivery schedule;
- TWC's prior experience with the contractor;
- Training requirements;<sup>178</sup>
- Any special or unusual contract requirements; and
- Any special or unusual payment requirements.

For less complex, low risk, low-dollar value contracts, a telephone call with the contractor may be sufficient.

Conducted soon after the contract is awarded, the conference or telephone call is an orientation for the Contract Manager to ensure a clear and mutual understanding of all contract terms and conditions, and the respective responsibilities of all parties. Although the contractor and the TWC personnel should already be fully aware of the contract requirements, the post award conference ensures that anyone involved directly in the contract administration process understands all contract performance requirements. Other staff that will be involved in the contract may be invited to the meeting.

Care should be taken to ensure that discussions that occur during the post award conference do not result in performance expectations that do not align with the terms of the contract. The Contract Manager should utilize the post award contractor orientation agenda to conduct the meeting.

During the conference or telephone conversation, the Contract Manager reviews the major points of the contract with the contractor, such as the value of the contract, major performance milestones, deliverables, reports, meetings, and time and place of delivery.

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<sup>178</sup> For example, cybersecurity training is required for certain state contractors who have access to a state computer system or database. This includes subcontractors of the contractor, and officers or employees of the contract. The person who oversees contract management for TWC must report the contractor's completion of the training program to DIR. Tex. Gov't Code § 2054.5192.

Additional items to cover include the amendment process and relevant TWC policies and procedures. The Contract Manager must be available to provide this information again at any time during the term of the contract.

## Monitoring Methods

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### Overview

TWC monitors its contracts to ensure that the contractor is performing all contract obligations and for TWC to be aware of and address any developing problems or issues. Depending the type of contract, monitoring activities may be conducted by the Contract Manager or a contract monitoring unit within the TWC Division of Fraud Detection and Compliance Monitoring.

Tools assist in determining which monitoring method is appropriate. Small dollar value or less complex contracts normally require little, if any, monitoring. However, that does not preclude more detailed monitoring if it is deemed necessary by TWC. Large dollar contracts may need little monitoring if the items or services purchased are not complex, and TWC is comfortable with the contractor's performance and the level of risk associated with the contract. Past agency experience with a contractor may factor into risk assessment.

Follow-up is essential as a problem will not correct itself simply by identifying it in a monitoring report. The results for the monitoring efforts should be periodically reviewed by the Contract Manager to:

- ensure corrective actions have been taken,
- ensure required training has occurred;<sup>179</sup>
- identify common problem areas that might require training, and
- improve contract requirements for future contracts.

Telephone calls and meetings must be substantiated in writing and maintained as part of the contract file. Such documentation must include the date and time that phone calls or meetings occurred as well as a summary of topics discussed (e.g., meeting minutes) including pending action items and decisions that were made.

### Desk Reviews

TWC desk reviews are examinations of reports submitted by the contractor. Various types of reports may be required by the contract; however, to be an effective monitoring tool, the "type" of report should be tailored to the contract requirements. Examples of reports include progress reports, status reports, activity reports and financial reports. A Contract Manager should also review VPTS reports filed by other agencies for the contractor.

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<sup>179</sup> For example, cybersecurity training has occurred, and the certification is one file as required by Tex. Gov't Code § 2054.5192.

## Site Visits

More complex contracts and any contracts that TWC perceives as having a higher degree of risk may require both reviews and visits to the contractor's facilities to ensure progress is in accordance with the contract schedule. Site visits may be used to verify actual performance against scheduled or reported performance. These visits can be an opportunity to verify that the contractor is dedicating sufficient resources and appropriate personnel to the contract.

Although site visits are an efficient tool for monitoring, it is possible for a site visit to interfere with the contractor's ability to accomplish the work if monitoring is excessive or includes unnecessary checks; the Contract Manager should consider this when arranging visits.

## Monitoring by Third Parties

In some instances, the obligation of monitoring the progress of a contract is assigned to another contractor. This is also known as independent oversight. For highly technical work, consultant subject matter experts may perform monitoring services independently or in conjunction with TWC staff.

## Enhanced Contract and Performance Monitoring

TWC contracts that receive an overall rating of high risk must receive enhanced contract monitoring to be performed by the Contract Manager. The enhanced contract monitoring may include, but is not limited to, the following:

- Weekly/monthly progress reports
- Documented controlled correspondence
- Regular site visits
- Project team meetings
- Documentation of corrective actions

Contracting monitoring activities for contracts under enhanced contract monitoring are documented and reported by PCSD Director to the Commission on a quarterly basis.

Agencies are required to establish by rule a procedure to identify each contract that requires enhanced contract or performance monitoring. This information must be submitted to the agency's governing body or, if the agency is not governed by a multimember governing body, the officer who governs the agency. The TWC's PCSD Director shall immediately notify the agency's governing body or governing official, as appropriate, of any serious issue or risk that is identified with respect to a contract monitored under this process.<sup>180</sup>

For each contract that has a value exceeding \$1 million, TWC must develop and implement contract reporting requirements that provide information on (1) compliance with financial provisions and delivery schedules under the contract, (2) corrective action plans required under the contract and the status of any active corrective action plan, and (3) any liquidated

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<sup>180</sup> Tex. Gov't Code § 2261.253(c).

damages assessed or collected under the contract.<sup>181</sup> In addition, the Contract Manager must verify (1) the accuracy of any information reported that is based on information provided by a contractor, and (2) the delivery time of goods or services scheduled for delivery under the contract.<sup>182</sup>

An agency that is currently reported by the State Auditor's Office as requiring additional monitoring during contract management and termination must provide additional information. Within 30 days of the contract closeout the following information must be included in the contract file, and provided to the State Auditor, the comptroller, or CAT upon request:

- each of its performance expectations for the contract;
- the performance indicators it monitored during the contract;
- the methods it used to monitor performance indicators;
- whether the contractor met its performance expectations;
- a summary of corrective action plans and corrective actions taken by the contractor;
- any liquidated damages assessed or collected from the contractor; and
- a summary of lessons learned during management of the contract that the agency will apply to future procurements.

Enhanced contract monitoring is required for a Major Information Resources Project (MIRP) of a state agency designated for additional monitoring under Texas Government Code Section 2261.258(a)(1) if the development costs for the project exceed \$5 million.<sup>183</sup>

## Inspection, Testing, and Acceptance

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### Overview

State law requires TWC to (1) inspect and evaluate at the time of receipt all goods or services that the agency receives to determine whether the goods or services comply with the contract under which they were purchased, and (2) certify, if true, that the goods or services comply with contract requirements and that the invoice for them is correct.<sup>184</sup> If the goods or services are not compliant with the contract, TWC staff must notify the Contract Manager. The Contract Manager will determine further appropriate action.

### Testing

Goods are subject to inspection and testing by the TWC. Authorized TWC personnel shall have access to a contractor's place of business for the purpose of inspecting contracted merchandise. Latent defects may result in revocation of acceptance of any product. OGC should be consulted if latent defects are discovered. Tests may be performed on samples

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<sup>181</sup> Tex. Gov't Code § 2261.254(a).

<sup>182</sup> Tex. Gov't Code § 2261.254(b).

<sup>183</sup> Tex. Gov't Code §2054.003(10).

<sup>184</sup> Tex. Gov't Code § 2155.322.

obtained by request of TWC or taken from regular shipments. When products tested fail to meet or exceed all applicable specifications, the costs of the sample used, and any testing performed shall be borne by the contractor.

TWC staff should consult with the Contract Manager when needed.

## Shipping and Receiving

At TWC's option, goods that have been delivered and rejected in whole or in part may be returned to the contractor at contractor's risk and expense or disposed of in accordance with SPD rules or applicable statutes. The contractor may request that goods be held at contractor's risk for a reasonable period of time for later disposition at the contractor's expense. TWC staff that accepts shipments should be aware of the following:

**Shipment Acceptance.** Acceptance of a shipment must only occur when goods delivered match the items on the PO and corresponding receiving report meet the quantities ordered and the specifications required. TWC staff must immediately inspect all shipments received as fulfillment of POs and report any discrepancies to the contractor. A contractor must be notified immediately or within the timeline outlined in the contract.

The following are for TWC staff to consider when inspecting shipments. The PO should be reviewed for shipment specifications.

**Inside Delivery and Pallets.** If the PO specified "Inside Delivery," it is the sole responsibility of the contractor to deliver to the exact floor and room number on the PO. TWC staff must conduct an inspection to verify whether the requirements for inside delivery were met.

- **Shipments Delivered in Error.** When a shipment includes an item not ordered by TWC, the shipment must be refused when the error has been confirmed by checking the PO and/or receiving documents.
- **Package/Container Count Discrepancy.** The shipment must be inspected for the number of containers listed on the Bill of Lading. If the number does not match, the discrepancy must be noted on the Bill of Lading prior to the driver leaving. Document the same information on the receiving documents. This documentation is necessary to validate the receipt of the containers received by the transportation company.
- **Non-Conforming or Incorrect Items Received.** Compare the items received with the PO for brand name and product number. If the items in the delivery do not match the items on the PO, the shipment may be refused. If the shipment is signed for before it is inspected and the error is discovered after the driver departs, contact the contractor for replacement and pick up immediately upon discovery. Goods found to be non-conforming to specifications during inspection must be documented on all receiving reports and the contractor must be contacted by telephone and with an email confirmation of the telephone notice. Pictures of the incorrect or non-conforming goods may be taken for documentation.
- **Minor Visible Damage.** Minor damage visible on the outside of the containers must be noted on the Bill of Lading prior to signing and prior to the departure of the

- driver. Recording the damage provides documentation if there is concealed damage. The contractor will be aware of the minor visible damage by the information provided on the Bill of Lading.
- Severe Visible Damage to Container or Contents. TWC may refuse the entire shipment or refuse only the damaged containers upon discovery of severe damage to container and contents. If the entire shipment is refused, record the reason for refusal on the Bill of Lading and notify the contractor that the shipment was refused and reshipment is required due to severe damage. Pictures may be taken of the incorrect or nonconforming goods for documentation.
- For FOB Origin, if the shipping containers are damaged enough that it is probable that the contents are also damaged, accept the shipment and then record the damage on the carrier's freight bill. TWC is responsible for filing freight claims with the carrier.
- Concealed Damage to Contents. Damages to the contents found during inspection and unpacking of a container must be immediately documented and reported to the contractor by telephone and with an email confirmation of the telephone notice. Pictures may be taken of the incorrect or non-conforming goods for documentation. If the end user or other person inspecting the contents is not the Contract Manager, then the end-user must contact the Contract Manager as well as the TWC accounts payable department so that payment is not made on the damaged goods.

Internal Receiving Report. The shipment must be compared to the PO or receiving document. Locate the PO number on the shipping documents and after immediate inspections of the shipment when the containers are opened, check the following against the PO:

- order quantity per item;
- number of items per package or container; and
- unit of measure for each line item.

If the shipment does not conform to the PO, the following may apply:

- Pickup and Return of Shipments. The contractor may be required to pick up the damaged goods and those not conforming to specifications and provide replacement in the timeline outlined by TWC or in the original terms of the PO/contract. This must be provided at no additional cost to TWC.
- Quantity Overages. TWC is not obligated to pay for amounts over the stated quantity on the order unless allowed in the terms and conditions of the contract. If overages are accepted by TWC, a Purchase Order Change Notice must be processed. It is important to notate overages as well as shortages.
- Partial Shipment Considered Complete. The contractor must be contacted to confirm the partial shipment; this step must be taken prior to processing a POCN. After confirmation that no other goods will be received, and by mutual agreement the partial order is considered complete, a POCN and/or contract amendment must be processed and an accurate payment must be based on the goods received at the time of shipment.



- Partial Shipment. For partial shipments, TWC must request a timeline, in writing, from the contractor for the balance to be delivered. Free on Board (FOB) Destination, freight included, and the delivery for the balance must be at no additional cost to TWC. The remainder of the partial delivery must be received by TWC within the contracted delivery days after receipt of order for each item or the delivery will be considered late.

## Invoice Review and Payment

### Invoice Review

Invoices must be carefully reviewed to verify that (1) the description of goods and services is insufficient detail to identify the order relating to the invoice and that the quantities and unit measures correspond with the referenced PO and (2) the invoice conforms to CPA invoicing standards.<sup>185</sup>

Invoicing	
The contractor is billing only for goods or services received by the agency.	The goods or services have been inspected and accepted.
The invoice is correct and complies with the pricing, terms, and conditions of the contract.	The total payments do not exceed the contract limits.
Red flags that may indicate fraud include	
Invoices with no physical address for the vendor.	Frequent undocumented or unapproved adjustments, credits, and write-offs.
Invoices for services/goods not rendered.	Multiple remittance addresses for the same vendor.
Payments to the vendor that have increased dramatically for no apparent reason.	Inconsistent invoicing time periods.

TWC staff reviewing and approving invoices. TWC staff approving invoices must be familiar with the payment and pricing terms applicable to each contract. TWC staff must also monitor performance under the contract to verify that comparable costs are being charged for comparable goods and services.<sup>186</sup> Note that TWC may only pay restocking or cancellation fees if TWC determines the charge is justifiable. The extent of these fees should be anticipated when drafting the contract.<sup>187</sup>

In the event someone other than the Contract Manager is reviewing and approving invoices, the Contract Manager should be consulted in the event of questions, issues or concerns.

<sup>185</sup> 34 Tex. Admin. Code § 20.487.

<sup>186</sup> Tex. Gov't Code § 2261.203.

<sup>187</sup> Tex. Gov't Code § 2155.384.

## Approving Payment

TWC staff responsible for authorizing and distributing payments must follow all applicable federal, state and TWC policies and procedures. TWC makes payments in accordance with the Texas Prompt Payment Act. Payment processing must consider:

- Program income requirements
- Approved budget limits
- Appropriate and allowable funding streams
- Whether payments are for allowable, reasonable and properly allocated costs; and
- Prompt payment requirements.

A payment is considered overdue on the 31st day after the later of the date of:

- the receipt of the goods;
- performance of the services; or
- receipt of the invoice for the goods or services.<sup>188</sup>

In some cases, a contractor may suspend performance under a contract for nonpayment.<sup>189</sup> To avoid a possible suspension, TWC staff or the Contract Manager must promptly review invoices and, following TWC's internal procedures, notify the contractor of a disputed invoice if the invoice is determined to be inaccurate.

## Withholding Payment

Although law requires that TWC pay its contractor promptly within the requirement of the Texas Prompt Payment Act, TWC also has the responsibility to protect TWC interests. Despite best efforts to resolve an invoice issue, some circumstances may require that payment approval be withheld.

Circumstances where it may be necessary to withhold payment include, but are not limited to, the following:

- invoice errors;
- undocumented and/or unsupported costs;
- remediating overpayments to the vendor; and
- contractor's performance is non-conforming or unacceptable.

If an invoice issue cannot be resolved, internal procedures must be followed to escalate the issue. This may include any or all of the following:

- notify TWC accounts payable;
- notify business unit management and the Contract Manager;
- notify the contractor of invoice issues in writing as soon as possible;
- request assistance, if needed, from OGC to timely send a disputed invoice letter; and
- maintain documentation for inclusion in the official procurement file and VPTS reporting regarding the incident resolution.

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<sup>188</sup> Tex. Gov't Code § 2251.021.

<sup>189</sup> Tex. Gov't Code § 2251.051.

The vendor must be notified of an error or disputed amount in an invoice submitted for payment not later than the 21<sup>st</sup> day after receipt of the invoice.<sup>190</sup> Notification to the vendor must include the following:

- A detailed statement of the amount of the invoice which is disputed.
- TWC may withhold from payments required no more than 110 percent of the disputed amount.

## Payment

### ***Purchase Order (PO)***

A Purchase Order (PO) is the document most frequently used method to authorize the purchase of goods and services. A requisition is entered with the good or service description. The requisition is then sourced to a Purchaser who will write the PO that will be submitted to the contractor. Once the services are performed and/or goods are received, the contractor will request payment by submitting an invoice to TWC along with the PO.

### ***Commercial Charge Card***

A commercial charge card, the ProCard, is mainly used for transactions that require payment upfront. The TWC staff person making the ProCard purchase must enter a requisition in WRAPS in order to reconcile the transaction made on the ProCard.

The ProCard may be used as a payment method for goods and services purchased for dollar amounts within TWC's delegated purchasing authority. TWC's processes for use of the ProCard must be followed.

### ***Interagency Transaction Voucher (ITV)***

TWC may process a payment between agencies for procured goods and services through an Interagency Transaction Voucher (ITV), which is used to transfer funds held in the State Treasury between two (2) agencies. The interagency payment must be accompanied by a Recurring Transaction Index (RTI). The transaction agency (the agency initiating the transfer of funds) must know the receiving agency's RTI Number to process the ITV. This is a common payment method when agencies have entered into an IAC for the exchange of goods and/or services between agencies.

## Change Control

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### Overview

Throughout the term of the contract changes may become necessary. These changes may be minor, administrative changes such as a change of address, or they can be substantial changes that affect the price and delivery.

The TWC Contract Manager is responsible for identifying the need for a contract amendment or renewal and coordination of the development, review, approval and execution process for the amendment or renewal.

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<sup>190</sup> Tex. Gov't Code § 2251.042.

The Contract Manager should conduct a midyear budget review of each contract to determine whether contract expenditures are occurring as expected. A contract may need to be amended in accordance with the budget review findings and, if necessary, expenditures adjusted or managed according to the review.

TWC's change management process includes, but is not limited to, the following:

- Requiring formal, written approval of all changes prior to the change taking place. Do not verbally authorize the contractor to begin working on a change before the change is fully analyzed, documented and the contract is amended in writing in conformance with contract requirements.
- Evaluation of the impact of each change to the contracting objective, the corresponding product and/or service, the schedule, cost, and increase in TWC overhead resulting from the change, impact to work in progress or completed work, standards, and acceptance criteria.
- Development and implementation of a plan for how any draws against this allowance will be requested and approved, as the contract contains a contingency allowance.
- Documentation of all changes, no matter how small and avoid and undocumented change process.
- Establishment of a single point of contact to recommend or authorize any change. Document the change as approved or disapproved. If a change is approved, document the change and the impact to the statement of work through a written contract amendment or POCN, whichever is applicable.

## Contract Amendments

### **Overview**

There are two (2) types of contract amendment.

1. **Bilateral Amendment.** All parties to the contract agree that a modification is necessary because the statement of work, the term of the contract, or some other provision must be altered.
2. **Administrative Amendment.** The terms and conditions in the contract determine how the agency may exercise a right to modify the contract without the contractor's consent.

An amendment will either be administrative, substantive, or constructive in nature. Care should be taken not to inadvertently change contract terms through course of performance. All contract amendments must be appropriately documented and conform to the contract and TWC processes.

Any amendment must be within the scope of the existing contract; it cannot substantively change the terms of the contract or the scope of the solicitation.

### **Administrative Changes**

Administrative changes occur within the scope of the contract and do not affect or alter the rights of the parties. These changes are typically executed through a written notice. The

process for such notice is included in the contract. Examples of administrative changes include:

- changes in billing instructions or address;
- corrections of typographical errors not affecting the substance of the contract;
- changes as permitted by the specific contract language; and
- changes in agency personnel assigned to the contract.

### ***Substantive Changes***

Substantive Changes are contractual changes that affect the rights of both parties. Such changes generally require bilateral amendments (agreement by both parties). Examples of substantive changes include:

- a change in the price of the contract;
- a change in the delivery schedule;
- a change in the quantity;
- a change of deliverables (e.g., the specifications);
- a change of key personnel; or
- a change of any terms and conditions.

### ***Constructive Changes***

If a contractor perceives that work beyond the scope of the contract was ordered by TWC, the contractor may claim that the contract was “constructively” changed, and the contractor may be entitled to additional compensation for the changes. TWC staff must exercise caution to ensure the terms of the contract are not revised by informal means that could result in a constructive change.

Constructive changes may occur when TWC personnel:

- accelerate the delivery schedule without written agreement;
- direct the work to be performed differently;
- change the sequencing of the work;
- postpone the acceptance or rejection of deliverables;
- delay reviewing invoices and approving payment; or
- interfere with or hinder performance.

### ***Contract Amendment Analysis***

Whether a contract may be changed depends upon certain principles. State law requires a competitive process in most situations. The specific method of competition depends upon the type of goods or services needed. If a competitive process was used, the resulting contract must be consistent with what was solicited during the competition. Inconsistencies between the solicitation and contract can violate the competitive process requirements.

When determining what constitutes scope changes to advertised specifications, the crucial question is whether the changes are material or substantial. Material or substantial changes are not measured by the number of changes made to the original specifications; they are measured by determining if the extent of the changes so substantially alters the original

specifications that not re-advertising the revised specifications would deny a potential vendor an opportunity to respond to the revised specifications. If a revision is substantial, a new solicitation is needed to ensure compliance with the bidding statutes.<sup>191</sup>

Other legal requirements may be applicable, depending on the type of contract. For example, for certain IT-related contracts, a contract may not be amended if it is at least 10 percent over budget or 10 percent behind schedule, unless a cost-benefit analysis is conducted, and it is submitted to QAT.<sup>192</sup>

Amendments that will cause a contract to exceed \$1 million in value require that notice be provided to the LBB.<sup>193</sup>

## Assignment by Contractor and Contractor Name Change

### **Overview**

Contract law generally permits assignments.<sup>194</sup> TWC contracts contain a provision requiring the submission of a written request from the contractor to the Contract Manager to change the contractor's name or to recognize a successor in interest to the contract. The PCSD Director approves the assignment. TWC staff should refer questions regarding assignments to the Contract Manager or the PCSD Director. The PCSD Director will consult OGC, if necessary, regarding requested assignments. An assignment is effectuated through a written amendment to the contract.

Certain contracts involving major information resources projects or sensitive personal information are subject to additional notice requirements to the Legislative Budget Board.<sup>195</sup>

### **Payment Assignment**

It is a common business practice for a party to transfer the right to receive payment. Once TWC receives a notice of a financial assignment, it is legally bound to make payment to the assignee. Assignments may be requested by the contractor to show changes in the payee on an order.

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<sup>191</sup> See *Roark v. Stallworth Oil and Gas Inc.*, 813 S.W.2d 492, 496 (Tex. 1991).

<sup>192</sup> Tex. Gov't Code § 2054.1181(j).

<sup>193</sup> General Appropriations Act, Art. IX § 7.12, IX-38, 86<sup>th</sup> R.S. (2019).

<sup>194</sup> The general rule: all contract rights are assignable unless the assignment materially alters the obligor's duties (especially personal services contracts where there is a relationship of trust/confidence between parties), the assignment materially varies the risk (e.g., insurance contracts), or the assignment impairs the obligor's ability to perform. For sales contracts under the TEX. BUS. & COM. CODE, Chapter 2, a party may assign or delegate a contract unless otherwise agreed upon or if the other party has a substantial interest in having the original promisor perform. TEX. BUS. & COM. CODE § 2.210

<sup>195</sup> Tex. Gov't Code 2262.056(b): A vendor awarded a services contract by a state agency may not assign the vendor's rights under the contract to a third party unless the assignment is approved by the state agency.

(c) At least 14 days before a state agency rejects or approves a vendor's proposed assignment under Subsection (b), the state agency shall notify the Legislative Budget Board of the proposed assignment if the contract subject to the assignment: (1) is for a major information resources project; or (2) involves storing, receiving, processing, transmitting, disposing of, or accessing sensitive personal information in a foreign country.

The following steps must be taken:

1. Requests for assignments must be in writing from the contractor receiving the order on the company letterhead with the signature of an authorized representative.
2. The agency must issue an assignment letter acknowledging the assignment. The vendor identification number (VIN) will remain that of the original awarded contractor, but the contractor name and payments will be mailed to the assignee.

**Delegated Purchases.** When a payment assignment is requested on a delegated purchase, TWC must receive a letter from the original awarded contractor assigning the order to the new contractor and a letter from the new assignee noting acceptance of the assignment. Any reference to an SPD order number should be deleted. A copy of the notice is retained in TWC's procurement file. TWC is responsible for setting up the assignment mail code for the VIN number of the original contractor in TINS so that the payment may be processed.

**Authority to Assign.** Generally, a person may assign the right to receive a payment from the State in the same way that the person may assign the right to receive a payment from a private person or entity. Additional information may be found in the eXpendit State Purchase Policies located on the CPA website.

### **Name Change**

Any name change requires documentation from the original contractor on company letterhead stating the circumstance of the name change and the new name. The letter should be signed by an authorized representative, showing the change and the effective date. A copy of the assumed name certificate filed with the Secretary of State or a sales tax permit may be obtained as proof of name change. TWC will initiate an amendment to the contract and/or PO.

### **Buyout or Sale**

A buyout or sale occurs when one company is purchased by another. In order to effectuate an assignment from one contractor to another, the contractor of record must send TWC a letter stating the circumstances of the buyout or sale and information about the successor contractor. In no event is an assignment effective absent TWC review and approval and may be subject to additional requirements.<sup>196</sup>

To change the contractor of record TWC should, as applicable, either issue a letter amending the PO or obtain an amendment to the contract. The new contractor should be directed to contact the CPA Tax Policy Division to obtain a new VIN, if applicable, in order to secure payment.

### **Replacement Contractor**

If the contractor is requesting to recognize a successor, the Contract Manager must perform all due diligence to evaluate the proposed new contractor's eligibility and ability to perform. The Contract Manager should request the documents executed by the contractors that constitute the transaction underlying the proposed assignment. The Contract Manager and

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<sup>196</sup> See Tex. Gov't Code § 2262.056.

OGC must review the transaction documents. For certain contracts, the proposed assignment may be subject to additional notification to the Legislative Budget Board.<sup>197</sup>

If the assignment to the replacement contractor is approved, the Contract Manager initiates an amendment transferring all rights and responsibilities under the contract to the assignee.

### ***Extensions and Renewals***

At a minimum of 90 days before expiration of a contract, and if the contract has an option to extend or renew, the Contract Manager should assess whether the option will be exercised by TWC. The number, length, and process for exercising renewals and extensions should be specified in the contract.

Ordinarily a contract renewal extends the contract for the full amount of time allowed by the terms of the contract; however, a contract may be renewed for a shorter time, if the renewal will be completed before the contract expires or any pending issues are resolved with the contractor.

A short-term contract extension may be processed as an amendment to the contract to extend the current contract term for a shorter amount of time than a contract renewal; and may modify existing contract terms and conditions.

A short-term extension allows additional time for TWC to complete the processing of a contract renewal for the next available renewal term; determine whether to initiate a contract renewal amendment for the next available renewal term, if pending issues are unresolved; or determine if a new procurement for the goods or services is needed.

A short-term contract extension must be processed before the expiration of the current term; to provide sufficient additional time for TWC to resolve pending issues with the contract before expiration of the extension; and to provide sufficient additional time to procure the goods and services needed if the contract term is going to be allowed to expire.

The Contract Manager must get written approval from their supervisor for a short-term renewal needed to complete a new procurement or resolve a pending issue. The approval documentation must be retained in the contract record. A supervisor may approve a short-term renewal up to 90 days beyond the expiration of a contract that has no remaining renewal options. An extension of a contract with no remaining renewal options for longer than 90 days must be submitted with written justification to the PCSD Director. The PCSD Director will review the justification, and consult as needed with OGC, Finance, the Director of Business Operations, or an affiliated Program Division Director. The PCSD Director will provide a written response to the request. If approved, the written approval must be retained in the contract record.

The Contract Manager must carefully review all requirements for extending a contract and document the contract file accordingly. For example, certain requirements are statutory, such as cybersecurity training.<sup>198</sup> If an extension or amendment modifies a provision for liquidated

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<sup>197</sup> See Tex. Gov't Code § 2262.056.

<sup>198</sup> Tex. Gov't Code § 2054.5192.



damages or another provision relating to the contractor's liability for damages, this must be documented in the file.<sup>199</sup>

CMs should minimize the use of contract extensions that extend a contract beyond the base term and any optional extensions provided in an existing contract.

TWC may not use funds appropriated under the General Appropriations Act (GAA) to pay for an extension to an existing agency contract beyond the base term and any optional extensions in that contract unless **all** of the following conditions are met:

1. The extension is limited in duration and cost to not more than one additional option period, as defined in the contract, to address the immediate operational or service delivery needs. If a contract does not contain a defined option period, the extension is limited to one year.
2. PCS Data Analysis (DAU) must provide the LBB notice of the extension at least 30 days prior to execution of the extension including, but not limited to the following information:
  - the cost of the contract;
  - the duration of the contract;
  - the reason for the extension of the contract; and
  - a plan to ensure that the contract can be completed within the extension period, signed by the executive director or TWC designee.
3. DAU and CM must ensure that prior to providing the LBB notice of the extension that all information and documents have been uploaded to the LBB contract database regardless of the other LBB reporting provisions under GAA Article IX 7.11(d).

### ***Force Majeure***

Performance may be suspended when the failure to perform is due to excusable causes. An excusable cause must be beyond the contractor's control, and without the fault or negligence of the contractor.

If the contractor's performance failure is due to a subcontractor, to qualify as an excusable cause, the default must arise out of a cause beyond the control and without the fault or negligence of either the contractor or the subcontractor. Even if this requirement is met, the cause will not be excusable if the supplies or services to be provided by the subcontractor could have been obtained from other sources in time to meet the contract delivery schedule.

## **Dispute Resolution**

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TWC contracts include as a term of the contract a provision stating that the dispute resolution process provided for in Chapter 2260 of the Texas Government Code must be used to attempt to resolve any dispute arising under the contract.<sup>200</sup> The objective of any dispute resolution

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<sup>199</sup> Tex. Gov't Code § 2261.204(c).

<sup>200</sup> Tex. Gov't Code § 2260.004.

process is to resolve problems before they escalate. To avoid escalation of problems, TWC personnel must respond promptly to all contractor inquiries.

In the event of a dispute, initial steps to be taken are:

- Identify the problem - many times what may appear to be a problem can be resolved by providing the contractor with information or clarification. TWC must follow internal escalation points if a legal dispute arises.
- Research facts - TWC must obtain all the information regarding the potential problem from all relevant sources, including the project manager and the contractor.
- Evaluation - TWC must review the facts in conjunction with the requirements and terms and conditions of the contract. TWC then determines the appropriate course of action.

TWC's rules must be followed in the event the contractor invokes Chapter 2260.<sup>201</sup>

## Termination

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Most contracts expire by their terms without any affirmative action on the part of TWC. There are times, however, where TWC may want to terminate a contract early. Termination of a contract may be accomplished by:

- termination by mutual agreement;
- termination for convenience;
- termination for cause; and
- termination for non-appropriations.

When a contract is terminated, the parties are relieved from further unperformed obligations in accordance with the agreed terms and conditions.

Actions that may lead to contract termination should be coordinated through the PCSD Director, who will coordinate with OGC and other required TWC staff to ensure compliance with legal requirements, as well as an alternative method for the provision of goods or services covered by the existing contract.

### Termination by Mutual Agreement

A termination by mutual agreement occurs when both parties consent to the termination of the contract before the expiration date. This type of termination must be documented by the exchange of formal written correspondence or as a contract amendment.

### Termination for Convenience

A termination for convenience, also known as no-fault termination, allows TWC to terminate any contract, in whole or in part, at any time in its sole discretion, if it is determined that such termination is in the best interest of TWC. This option should be provided in every contract.

TWC must provide the contractor with written notice specifying whether TWC is terminating

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<sup>201</sup> 40 Tex. Admin. Code Chapter 800, Subchapter K.

all or part of the contract and the date of termination. The contract must specify the basis for settlement with the contractor upon a termination for convenience, and TWC must follow the contract terms. Upon receipt of any invoice from the contractor for work performed prior to the notice of termination, TWC thoroughly reviews the invoice to ensure that no excessive costs are included.

## Termination for Cause

### **Overview**

A termination for cause occurs when TWC concludes that the contractor has failed to perform or make progress, or in any way has breached the contract. TWC is not required to terminate a contract even though the circumstances permit such action. TWC may determine that it is in its best interest to pursue other alternatives and work with the contractor in getting the contract back on track. The Guide includes several factors to consider prior to making a termination for cause decision.

If a contract is terminated for cause, the contractor is liable for actual damages and costs incurred by the State unless otherwise stated in the contract. The contractor may be liable for costs associated with re-procuring the goods or services by TWC. The termination must be carefully drafted to state the facts pertinent to the cause for termination. Staff must consult OGC prior to initiating a termination for cause.

### **Cure Notices**

Prior to terminating a contractor for default, depending on the type of breach, a cure notice may be sent to the contractor if the contract requires it. A cure notice is a letter provided to the contractor that specifies a period of time, such as 30 days, to correct or “cure” the deficiency or violation. Not all defaults can be cured. If the contractor fails to cure the situation or provide satisfactory explanation as requested, the contract may be terminated for cause.

### **Corrective Action Plan**

If there is a contract breach, the parties may implement a formal corrective action plan. A corrective action plan is a written document that identifies specific activities that must be performed by the contractor to restore compliance with the contract.

The plan must be tailored to address the identified deficiency, clearly state the desired outcome, and establish a time frame for the contractor to demonstrate improved performance.

## Termination for Non-Appropriation, Excess Obligations Prohibited

TWC is required to include a termination for non-appropriations clause, or “funding out” clause, in a contract if the contract term will cross a fiscal year. TWC is prohibited from incurring obligations in excess of amounts lawfully appropriated by the Legislature over the course of a biennium.

Additionally, the contract must contain a clause that enables TWC to cancel the agreement if the Legislature curtails or fails to appropriate money to cover the term of the agreement; this is necessary to prevent any unconstitutional excess obligation. An example of a contract clause is as follows:

“Any contract resulting from this solicitation is contingent upon the continued availability of lawful appropriations by the Texas Legislature.”

TWC is prohibited from incurring obligations in excess of amounts lawfully appropriated by the Legislature over the course of a biennium.<sup>202</sup> Therefore, any installment purchase, lease or any other type of purchase that incurs an obligation beyond the current appropriation must be expressly conditioned upon continued legislative appropriation or funding availability.

There is one exception to the prohibition against incurring excess obligations. SPD may determine that a proposed installment purchase arrangement is cost effective and certify this finding in response to TWC’s request. PCSD staff make the request to SPD.

## Contract Close-Out

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The contract close-out process serves as verification that both parties to the contract have fulfilled their contractual obligations. Accordingly, the Contract Manager must conduct the contract close-out in a timely manner and do so using the contract file closeout checklist.

As part of contract close-out, the Contract Manager compares actual performance against performance measures, goals and objectives, to determine whether all required work has been completed. The Contract Manager also ensures reporting and file retention requirements are addressed.

A contract is completed when:

- all goods or services have been received and accepted;
- all monitoring issues have been resolved;
- all reports have been delivered and accepted;
- all administrative actions have been accomplished;
- all TWC-furnished equipment and materials have been returned;
- all property inventory and ownership issues are resolved including disposition of any equipment or licenses purchased under the contract;
- final acceptance from the project manager has been received;
- final payment has been made to the contractor;
- vendor performance is reported to VTPS
- the contractor is aware of and in compliance with records retention requirements;
- the contract file has been reviewed to ensure completeness prior to closing out the contract, including lessons learned retained in the file; and

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<sup>202</sup> TEX. CONST. art. III, § 49a; TEX. CONST. art. VIII, § 6; General Appropriations Act, Senate Bill 1, 85th R.S. at Article IX, Section 6.03.

- issues have been documented that may require retaining the contract file for longer than what is required by the TWC Records Retention Schedule (RRS) (see Handbook, below).

## Vendor Performance Reporting

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### Overview

A contractor's performance must be reported to VPTS once a contract with a value of over \$25,000 is completed or otherwise terminated.<sup>203</sup> If the value of a contract exceeds \$5 million, the vendor performance must be reviewed and reported at least once each year during the term of the contract and at each key milestone identified for the contract.<sup>204</sup> For contracts exceeding \$5 million, the contract may not be renewed or extended without this required review and report.<sup>205</sup> Open enrollment contracts are exempt from vendor performance reporting requirements on VPTS.

Best value criteria considerations are required when determining and reporting vendor performance grades<sup>206</sup> and are determined during the contract management phase of the Procurement Cycle.<sup>207</sup> Vendor performance reporting is important as it can affect the contractor significantly on current and future procurement initiatives, so the Contract Manager must consider all information collected when scoring a contractor.

The Contract Manager requests best value criteria from the Contract Developer and reviews contract documents. In assessing contractor performance, the Contract Manager must also consider the following:

- Did the contractor meet the requirements in the contract?
- Were there any other criteria besides meeting specifications in the contract and price?
- If so, the Contract Manager must consider those criteria in the vendor performance evaluation.

The Contract Manager consults with all TWC personnel involved in the contract, including the Contract Developer and the end user, to determine the fulfillment of best value criteria. All comments must be reviewed by TWC staff and are typically used to explain low scoring vendors. Comments entered into the VPTS will be retained internally, and can always be requested from the program.

### Vendor Reference Requests

TWC staff are not authorized to provide written or verbal recommendations or references for vendors. The only authorized method for feedback is through TWC Purchasing and Contract

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<sup>203</sup> Tex. Gov't Code § 2155.089; 34 Tex. Admin. Code § 20.115.

<sup>204</sup> Tex. Gov't Code § 2155.089.

<sup>205</sup> Tex. Gov't Code § 2155.089(b-1).

<sup>206</sup> Tex. Gov't Code § 2155.0755(b); 34 Tex. Admin. Code § 20.509.

<sup>207</sup> Tex. Gov't Code § 2155.075.

Services (PCS) to the Comptroller of Public Accounts (CPA). TWC must use the Vendor Performance Tracking System (VPTS) and report vendor performance on all purchases over \$25,000 from CPA administered contracts or any other purchase made through delegated authority granted by CPA. CPA is required to provide VPTS under Texas Government Code, §2262.055 and Texas Administrative Code (TAC) §20.509 and §20.115. Government Code §2155.089 requires agencies to report vendor performance.

## Interpreting Existing Vendor Scores

Contract Developers and evaluation committees use vendor performance scores during the evaluation of responses. Contract Developers should read the reports in order to make their determination based on the notes left by reporting agencies utilizing the vendor being evaluated, not just limit the review to the evaluation scores from the current solicitation. Vendor performance scores are available on VPTS.

It is important to note that there is a difference between the report score and the vendor score.

- The report score is the score an agency assigns for one particular report. Historic reports (prior to February 2017) were graded on a satisfactory/unsatisfactory scale. The score is displayed as “Legacy Satisfactory” or “Legacy Unsatisfactory.” New reports are graded by the agency on an A-F scale.
- The vendor score is the score calculated by averaging all of a vendor’s report scores to provide an overall vendor score. Vendors receive an overall grade that considers both historic reports(Historic Vendor Score) and new reports.

The Guide explains how the vendor score is calculated.

## Barring Vendors from Participating in State Contracts

SPD has authority to bar a vendor from participating in state contracts, including any contracts where the purchasing authority is delegated to a state agency. CPA may bar a vendor from participating in state contracts for repeated unfavorable performance reviews<sup>208</sup> or repeated unfavorable classifications received by the vendor after considering the following factors:<sup>209</sup>

- the severity of the substandard performance by the vendor;
- the impact to the state of the substandard performance; any recommendations by a contracting agency that provides an unfavorable performance review;
- whether debarment of the vendor is in the best interest of the State; and
- any other factor the SPD considers relevant, as specified by CPA rule.

If a vendor is barred from participating in state contracts, SPD shall determine the period of debarment. The period for debarment must be commensurate with the seriousness of the vendor’s action and the damage to the State’s interests.<sup>210</sup>

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<sup>208</sup> Tex. Gov’t Code § 2155.089.

<sup>209</sup> Tex. Gov’t Code § 2262.055.

<sup>210</sup> Tex. Gov’t Code § 441.1855(b) and (c).

## Records Retention

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TWC staff participating in a procurement must be familiar with procurement and contract records retention requirements, including legal requirements and TWC's records retention schedule. TWC staff participating in a procurement are responsible for ensuring that the required and original documents are retained in the procurement or contract file, whether hard copy or in ECPS. Certain documents, such as solicitation documents, are required by statute to be retained in electronic format.<sup>211</sup>

Aside from the responsibility of maintaining the contract file, the Contract Manager, or designated responsible TWC employee, is also responsible for ensuring that contract documents are retained by TWC for the appropriate amount of time as determined by applicable law and TWC's records retention schedule.

TWC's Records Retention Schedule (RRS) requires retention of contract records until the seventh anniversary of the later date of (1) the contract completion or expiration or expires, or the resolution of all issues that arose from any litigation, claim, negotiation, audit, open records request, administrative review, or other action involving the contract or documents.<sup>212</sup>

- If the contract or renewal of a contract was executed on or after September 1, 2015, most documents in the contract file will have a minimum retention period of AC + 7 years (after close of contract plus seven (7) years).<sup>213</sup>
- If the contract was executed before September 1, 2015, then the minimum records retention period is AC + 4 years (after close of contract plus four (4) years).

TWC may not destroy any state record if any litigation, claim, negotiation, audit, public information request, administration review, or other action involving the record is initiated; all action involving the record must be completed and all issues arising from the action resolved before a state record may be destroyed.

Although the RRS for contract files is AC + 7 years, the TWC may opt to maintain contract files longer if there is a business justification for the retention. The reason for retention of records beyond the official retention schedule must be documented in writing.

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<sup>211</sup>Tex. Gov't Code § 441.1855(b) and (c).

<sup>212</sup>Tex. Gov't Code § 441.1855.

<sup>213</sup>AC is defined as "after close" meaning after the end date of the contract or the date on which the final issue associated with the contract has been resolved.

## CHAPTER 14 - REPORTS to the LEGISLATIVE BUDGET BOARD

### Legislative Budget Board (LBB) Notification Requirements

Agency reporting to the LBB is completed by the Data Analysis Unit including Attestation letters and associated documentation.

This section refers to all contracts, grants, agreements, amendments, renewals, extensions, purchase orders or written expression of terms into for the purchase or sale of good and/or services.

The agency may not expend funds to make payments on a contract (referenced above) of appropriated funds if the amount of said contract is to exceed or expected to exceed the following thresholds until notice is provided to the Legislative Budget Board (LBB):

- >\$10 million; or
  - Notice to LBB is within 15 calendar days of award General Appropriations Act (GAA), Article IX §7.11
  - Attestation letters are required competitive purchases exceeding this threshold.
- >\$1 million in the case of a contract awarded;
  - Notice to LBB is within 15 calendar days of award GAA, Article IX §7.11
  - as a result of an emergency or following an emergency procedure allowed by statute;
  - or without issuing a request for proposal, request for bid, or other similar process common to participation in the competitive bidding processes required by statute, rule, or ordinary and commonly recognized state policies and procedures.
  - Attestation letter required noncompetitive purchases exceeding this threshold.
- Emergency >\$1 million - Notice to LBB is within 5 calendar days of award GAA, Article IX §7.11.
  - if the contract was awarded as a result of an emergency or following an emergency procedure allowed by statute.
  - Such a purchase must be necessary to avoid an immediate hazard to life, health, safety, or the welfare of humans, or to avoid an immediate hazard to property
  - Attestation letter required noncompetitive purchases exceeding this threshold.
- >\$50K is within 30 calendar days of award or amendment GAA, Article IX §7.04, TGC §322.020

Documentation Requirements include but are not limited to;

- Solicitations and all associated documentation
- Contracts/Grants/Agreements/Purchase Orders and all associated documentation
- Attestation Letters where appropriate

#### Attestation Letter Requirements

- Information regarding the nature, term, amount, and the vendor(s) awarded the contract including all associated documentation. Signed by the TWC Executive Director.



<b>Contract Reporting Requirements</b>					
<b>Value</b>	<b>&gt;\$50,000</b>	<b>&gt; \$100,000</b>	<b>&gt;\$1 Million</b>	<b>&gt;\$1 Million</b>	<b>&gt;\$10 Million</b>
<b>Type</b>	All Contract Types (ex. construction contract <sup>214</sup> , professional services <sup>216</sup> (other than physician or optometric), consulting services <sup>217</sup> , Open Enrollment)	Management Information System <sup>215</sup>	Non-Competitive/ Sole Source	Emergency	All Contract Types
<b>Due date</b>	Within 30 days of award or amendment	Within 30 days of award or amendment	Within 15 days of award	Within 5 days of award	Within 15 days of award
<b>Reporting Provisions</b>	GAA, Article IX §7.04, TGC §322.020	Tex. Gov't Code § 2054.008(b)	GAA, Article IX §7.11.	GAA, Article IX §7.11.	GAA, Article IX §7.11.
<b>Documentation Requirements</b>	Requires solicitation and contract documents	Requires solicitation and contract documents	Requires attestation letter, solicitation and contract documents	Requires attestation letter, solicitation and contract documents	Requires attestation letter, solicitation and contract documents
<b>All Revenue Contracts are Reported Regardless of Value</b>					

<sup>214</sup> Tex. Gov't Code § 2166.2551.

<sup>215</sup> Tex. Gov't Code § 2054.008(b).

<sup>216</sup> Tex. Gov't Code § 2254.006.

<sup>217</sup> Tex. Gov't Code § 2254.0301(a).

## CHAPTER 15 - SUGGESTED BUSINESS UNIT PROCEDURES

The following is a list of suggested standard internal operating procedures that each business unit should consider developing in order to meet the procurement and contracting requirements. Each business unit may differ and may require additional or fewer procedures.

Please contact the PCSD Director for guidance on creating procedures, that may include a brief meeting covering the requirements and the underlying need for the procedure (such as guidance from the Comptroller, internal or State Auditor audits, etc.)

- Basic procurement request and approval outline (within the division that harmonizes with the overall TWC procurement process)
- Needs assessment and cost estimate analysis
- Routing/signature process (factoring in the Delegation of Signature Authority)
- Assignment of a Program Lead and Contract Manager
- Invoice review process
- Record keeping
- Auditing of contract deliverables and performance measures
- Vendor Performance Review and Reporting
- Contract monitoring (desk reviews, site visits)
- Fiscal monitoring
- Communication log
- Work order review/creation (if work orders are used)
- Training
- Division authority and responsibility designations