

TEXAS HISTORICAL COMMISSION

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# Contract Management Handbook

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# General Provisions

## 1.1 Purpose of the Contract Management Handbook

The purpose of this handbook is to establish consistent contract management policies and procedures that must be followed by the Texas Historical Commission (THC).

The THC must ensure that their respective rules, policies, and procedures do not conflict with the requirements in this handbook.

This handbook provides a baseline for policies and procedures that support:

- Ethical standards of conduct for contracting staff;
- Contracting activities from planning to closeout;
- Contract management requirements and best practices;
- Risk assessment and issue resolution;
- Risk-based contract monitoring;
- Application of sanctions and remedies;
- Escalation of contract performance issues; and
- Contract termination and lessons learned.

Procurement and Contracting Services (PCS) will regularly update this handbook, based on changes in contracting laws, regulations, and policies.

THC utilizes the Texas Comptroller of Public Accounts' (CPA) State of Texas Procurement Manual and Contract Management Guide to ensure proper procurement and contracting procedures are followed.

## 1.1.1 Applicability of this Contract Management Handbook

This handbook applies to the management of contracts into which the THC enters, including:

1. Contracts for purchase of goods or services;
2. Professional Services Contracts including Consultant Contracts;
3. Interagency Contracts;
4. Interlocal Contracts;
5. Sole source, proprietary, and emergency purchase contracts;
6. Purchase orders;
7. Administrative contracts;
8. Statewide term contracts;
9. Cooperative or “piggy back” contracts;
10. Construction contracts;
11. Memoranda of Understanding (MOU);
12. Memoranda of Agreement (MOA);
13. Letter agreements;
14. Revenue generating contracts; and
15. Other agreements that bind the THC in any manner.

## 1.1.2 THC Agency Roles and Responsibilities

THC agency staff serves a critical role in different phases of the contract lifecycle and may assume more than one role during different lifecycle phases. For example, THC agency program staff may participate in developing the statement of work, then provide technical assistance to the contractor and finally, assist with contract closeout. The project manager serves in a leadership role in all phases of the contract lifecycle and is the primary point of contact for the management of the contract after contract execution.

In roles, program staff must coordinate with the project manager to:

- Assist with contract development, and other lifecycle phases;
- Ensure project manager has easy access to information about the contract;
- Assist with contract amendments, waivers, and renewals;
- Request any changes to the statement of work, including changes to the service level agreement, requirements, or deliverables;
- Report monitoring findings and information on risk and issues;
- Apply sanctions and remedies; and
- Participate in “lessons learned” during closeout, if needed.

The following table, *THC Agency Roles and Responsibilities*, outlines the key roles of THC agency program staff, procurement and contracting staff (PCS) during key phases of the contract lifecycle.

THC Agency Roles and Responsibilities	
Key Contract Lifecycle Function	Responsible Party
<b>1. Planning and Development:</b> Identify contracting needs, objectives, strategies, timelines, deliverables, performance measures, and contract management needs.	<b>Program staff or project manager</b> , in consultation with contract manager, procurement staff, general counsel, THC risk management, other subject matter experts.
<b>2. Procurement:</b> Follow procurement statutes and rules and fairly select the most qualified contractors.	<b>Procurement staff</b> in consultation with contract manager, project manager, program staff, and legal counsel.
<b>3. Contract Execution:</b> Development contracts that provide best value, and that contain clear measures, terms, and conditions needed to hold contractors accountable for performance.	<b>Contract Manager</b> in consultation with project manager, program staff, contractor, and if needed with procurement staff, general counsel, and other subject matter experts.*
<b>4. Contract Management:</b> Conduct risk assessments, develop monitoring plans, effectively monitor outcomes to enforce contract requirements and terms, file maintenance, record keeping, and payment approval.	<b>Project Manager</b> in consultation with contract manager, program staff, contractor, and if needed with procurement staff, legal counsel, and other subject matter experts.
<b>5. Contract Termination and Closeout:</b> Conclude the contract, complete the contract management file, and report on the contractor's performance.	<b>Contract Manager</b> in consultation with project manager, program staff, monitoring staff, contractor, procurement staff, and if needed with, general counsel, and other subject matter experts.*

\* **Contract Manager** specifically refers to the assigned procurement and contracting specialist that is currently certified as a Certified Texas Contract Manager.

### 1.1.3 Procurement and Contracting Services (PCS)

PCS conducts procurements and contracting services for the THC. THC agency staff, including project managers, work with PCS staff to plan procurements, develop solicitation documents, evaluate proposals, conduct negotiations, and determine final award. PCS assists with the execution of contracts while THC agency staff carries out contract management activities through closeout. See the *THC Procurement Plan* for more details on the procurement process.

PCS also conducts the following activities:

- Oversees THC contracts;
- Maintains procurement/contract files;
- Facilitates routing and approval of contracts and amendments;
- Develops procurement and contracting policies and procedures;
- Provides technical assistance to THC divisions and programs;
- Provides procurement training and contracting management training;

## 1.1.4 Responsible, Accountable, Consulted, and Informed (RACI) Matrix

The RACI matrix is useful for assigning roles and responsibilities for any programs or functions, including procurement and contract management. The matrix describes the participation of various individuals or entities in completing tasks or deliverables for a project. Definitions of the RACI matrix elements are:

- Responsible (R): The individual or entity performing the work and participating in the decision-making process.
- Accountable (A): The individual or entity ultimately accountable for completing the work and for making decisions with the participation of responsible individuals.
- Consulted (C): The individual or entity consulted by the responsible individual during the completed tasks or when making of a decision.
- Informed (I); The individual or entity that is informed of a decision or completion of a task.

THC agency staff may collaborate within their program areas to identify all responsibilities and tasks involved in phases of the contract lifecycle, and to assign roles to the appropriate staff. The chart below provides an example of an RACI Matrix, which can be completed with any level of detail needed.

Key Contract Lifecycle Responsibilities				
Phase	R	A	C	I
Planning	Project manager	Executive management	<ul style="list-style-type: none"> <li>• Contract manager</li> <li>• Procurement staff</li> <li>• THC risk management*</li> <li>• Information technology*</li> </ul>	<ul style="list-style-type: none"> <li>• General counsel*</li> <li>• Information technology*</li> </ul>
Contract/ Amendments Development	Contract manager	Executive management	<ul style="list-style-type: none"> <li>• Program manager</li> <li>• Procurement staff</li> <li>• General counsel</li> <li>• Information technology*</li> </ul>	<ul style="list-style-type: none"> <li>• THC risk management*</li> </ul>
Procurement	Procurement staff	Executive management	<ul style="list-style-type: none"> <li>• Contract manager</li> <li>• Program staff</li> <li>• General counsel*</li> <li>• Information technology*</li> </ul>	<ul style="list-style-type: none"> <li>• THC risk management*</li> </ul>
Contract Management	Project Manager	Executive management	<ul style="list-style-type: none"> <li>• Program staff</li> <li>• Contract Manager</li> <li>• Monitoring staff</li> <li>• THC risk management*</li> <li>• Contractor</li> </ul>	<ul style="list-style-type: none"> <li>• Procurement officer</li> <li>• Legal counsel*</li> <li>• Information technology*</li> </ul>

\*Consulted or informed as needed depending on type and complexity of procurement and contract.

## 1.2 Ethics and Standards of Conduct

All THC agency staff involved in purchasing and contracting must act ethical, impartial, transparent, and in a professional manner according to THC policy. State employees must uphold ethical values when carrying out their official duties. Because THC goods and services are purchased using public funds, it is critical that all involved staff remain independent and free from the perception of impropriety. Any erosion of public trust or hint of impropriety is detrimental to the integrity of the purchasing and contracting process.

### 1.2.1 THC Ethics Rules for Agency Staff Involved in Contracting

All THC agency staff involved in procurement and contracting activities must act in the best interest of the state and avoid any activity that could potentially impair the ability to carry out their duties with independence and objectivity. Failing to abide by these rules or to disclose a potential conflict of interest could result in dismissal or referral to state or federal law enforcement agencies.

### 1.2.2 THC Ethics Policies and Employee Conduct

The purpose of the THC Ethics and Standards of Conduct Policy and Standards of Conduct for State Officers and Employees is to ensure that THC agency staff maintain the highest standards of conduct in the performance of their duties and while serving clients and the taxpayers of Texas. All THC agency staff must be familiar with THC's ethics policy and comply with it.

The THC's Personnel Manual, Section 2: Conditions of Employment discusses standards of conduct, work rules, and other requirements for THC employees. Violation of these policies can result in disciplinary action including dismissal and in some cases, referral to state or federal law enforcement agencies.

### 1.2.3 State Employee Conflicts of Interest

“A commission member, employee, or appointee may not have an interest in, or in any manner be connected with, a contract or bid for a purchase of goods or services by an agency of the state; or in any manner, including by rebate or gift, accept or receive from a person to whom a contract may be awarded, directly or indirectly, anything of value or a promise, obligation, or contract for future reward or compensation. A commission member, employee, or appointee who violates this section is subject to dismissal. The Conflict of Interest acknowledgement form is located in Section 10 of the THC Personnel Manual.

As required by statute, state employees are prohibited from accepting employment from a person or entity for two years after leaving employment with the state, if the employee participated on behalf of the agency in a procurement or contract negotiation involving that person or entity.

## 1.2.4 Reporting Ethics Violations

All THC agency staff has a duty to report any potential ethics or standard of conduct violations. A project/contract manager has an obligation to remain vigilant for signs of potential violations of ethics rules, policies, and standards of conduct. A project/contract manager must use the following options for reporting and investigating known, alleged, or suspected fraud or other illegal activities in the agency.

- **Reporting to Immediate Supervisor:** A THC employee may report any potential or known ethical or standard of conduct violations to their immediate supervisor. Contact may be verbal or written and may be made by anyone having knowledge. The supervisor must report all allegations to executive management for a preliminary review and determination as to the necessity for proceeding with an investigation of the reported fraud or illegal activity. The executive management may consult with general counsel, Human Resources and any other agency staff as appropriate for advice and assistance. If an investigation is warranted, the matter must be reported to the Office of Inspector General for further action.
- **Reporting to Office of Inspector General or State Auditor's Office:** A THC employee may report fraudulent or other illegal activities anonymously, or if reporting to the supervisor would be unproductive, to: Office of Inspector General's Fraud, Waste, and Abuse Hotline by calling 1-800-436-6184, or to the State Auditor's Office by calling the Fraud, Waste, and Abuse Hotline at 1-800-TX-AUDIT or by completing the form located at: <https://sao.fraud.state.tx.us/hotline.aspx>.

## 1.2.5 Training for Contracting and Procurement Staff

All THC contract managers must complete the Comptroller of Public Accounts (CPA) *Ethics in Contracting* course, as required by statute. The THC shall determine if any additional staff must complete the training and should include those with:

- Procurement and contract approval authority, including executive management, financial and legal staff;
- Procurement responsibilities, including bid/proposal evaluators;
- Contract management and monitoring responsibilities;
- Contract oversight and support responsibilities; and
- Those with discretion to select services.

## 1.2.6 Contractor Conflict of Interest

Statute prohibits agencies from entering into employment, professional services, or consulting services contracts with former or retired employees before the first anniversary of the last date on which the individual was employed by the agency.<sup>1</sup>

THC agency contract terms and conditions must contain provisions related to organizational conflicts of interest, restrictions on recruitment of state employees, and kick-backs, such as:

- Warrant that providing services will not constitute an actual or potential conflict of interest nor reasonably even create the appearance of impropriety;
- Disclose any current, former, or proposed employees who are current or former employees of the state;
- Disclose proposed personnel who are related to current or former employees of the state; and
- Warrant that they have not given, nor intend to give, any gift or thing of value to employees participating in the solicitation.

## 1.2.7 THC Agency and Contractor Relationship

While THC agency staff and project/contract managers must fulfill their responsibilities, contractors must in turn fulfill their contractual obligations. Maintaining cooperative relationships with contractors is important to successful contracting outcomes. However, THC must maintain an ethical arms-length business relationship with contractors. In addition, THC must be recognized as the final authority and decision maker on all matters.

## 1.2.8 Legal Consultation

THC's general counsel provides legal assistance, guidance, and review including:

- Providing input on the proposed procurement method and approach;
- Reviewing solicitations for purchases of \$100,000 or more;
- Signing contracts for purchases of \$10,000 or more;
- Reviewing any changes to the THC agency terms and conditions;
- Interpreting and ensuring compliance with state and federal contracting laws and regulations (e.g., Compliance with Codes of Federal Regulations (CFR), etc.);
- Advising PCS and the agency on contracting with a debarred party;
- Supporting PCS and the agency in dispute resolutions, including mediations with contractors;
- Developing a letter for contract remedy with the agency and PCS;
- Assisting the agency and PCS on contract termination or suspension, including reviewing settlement claims when terminating a contract for clause.

# Planning and Development

## 2.1 Procurement and Contract Planning Process

Identifying and defining the need begins the contract lifecycle and provides the basis for the contract.

By clearly defining the need at the beginning of the lifecycle, the following outcomes should be achieved:

- Facilitate effective prioritization of the required funding to make the purchase;
- Promote common agency-wide understanding of the need;
- Identify type and level of service required to meet the need;
- Identify contract objective;
- Provide framework to develop the statement of work, solicitation, evaluation, and contract documents;
- Determine whether or not confidential information will be exchanged under the contract and assess the information security risk level; and
- Provide necessary information to determine how performance and quality of goods or service delivery will be measured, documented and tracked.

Factors that must be considered when assessing need:

- State or federal laws, rules, or regulations;
- THC policies and procedures;
- Potential benefits of the procurement and contract;
- Any potential ethical or conflict of interest/disclosure issues that may arise;
- Any potential risks to the agency that may result if the need is not met;
- Level of priority or importance of the need;
- Availability of funding, staff, expertise, and other resources to meet the need;
- Cost-effectiveness of the goods and services;
- Availability of funds;
- Any legal concerns or potential issues;

- Availability of other sources to meet the need; and
- Leveraging based on existing opportunities to reduce cost or resources.

- 2.1.1 Procurement Initiative/Approval to Advertise

Before purchasing any goods and services, each division must submit a requisition into THC's Online Requisition System (ORS). The ORS and the Requisition Manual is located on the agency's intranet under Tools and Support.

Before advertising the solicitation, all appropriate approvals must be documented on the submitted online requisition.

- 2.1.2 Emergency Purchases

An emergency are purchases of \$5,000 or more. An emergency is a situation requiring the state agency to make the purchase as quickly as possible in order to:

- Prevent a hazard to life, health, safety, welfare, or property, or
- Cause undue additional cost to the state.

To initiate an emergency purchase, each division must submit a requisition into THC's Online Requisition System (ORS) and a letter of justification, which must be signed by the executive director. Prior to purchasing, all appropriate approvals must be documented on the submitted online requisition. Depending on severity of the situation, the purchase may be competitive or non-competitive.

- 2.1.3 Sole Source/Proprietary Purchases

To initiate a non-competitive sole source or proprietary purchase of \$5,000 or more, each division must submit a requisition into THC's Online Requisition System (ORS) and a letter of justification, which must be signed by the executive director. Prior to purchasing, all appropriate approvals must be documented on the submitted online requisition.

- A proprietary product or service is manufactured or offered under exclusive rights of ownership, including rights under patent, copyright, or trade secret law. A product or service is proprietary if it has a distinctive feature or characteristic which is not shared or provided by competing or similar products or services.
- A sole source purchase is a purchase that is directed to a specific vendor, even though the goods and services may be available from other vendors. A sole source procurement must be directed to a single vendor for a valid reason.

All sole source and proprietary awards over \$25,000 must be posted to the Electronic State Business Daily (ESBD). In addition, all sole source and proprietary purchases over \$100,000 must be sent to the CPA for approval.

## 2.2 Procurement Lead Times

For each procurement, the assigned PCS purchaser, in coordination with the project/contract manager and THC program staff, will develop a timeline. The timeline should include all key milestones for completing the procurement within the required deadlines. When establishing the timeline, consider all factors that may impact timing including:

1. **THC agency budget approval:** Budget must verify the availability of funds at the planning stage and prior to contract execution.
2. **Procurement initiation and approval to advertise:** Before purchasing any goods and services, each division must submit a requisition into THC's Online Requisition System (ORS). Before advertising the solicitation, all appropriate approvals must be documented on the submitted online requisition.
3. **Justification for Sole Source, Proprietary, or Emergency Purchases:** To initiate a sole source, proprietary, or emergency purchase that will exceed \$5,000, each division must submit a requisition into THC's Online Requisition System (ORS) and a letter of justification, reviewed by the PCS. Prior to purchasing, all appropriate approvals must be documented on the submitted online requisition.
4. **Delegation from the CPA:** For service purchases over \$100,000, PCS must obtain a written letter of delegation from the CPA prior to making the purchase.
5. **Preparation of the solicitation document:** In addition to the time needed for THC agency preparation and approval, also consider the time required for PCS to finalize the solicitation document. PCS is responsible for ensuring the document is complete, allows for competition, and follows all applicable statutes, rules and procedures.
6. **Draft procurement or RFI:** Add additional time for the release of a draft procurement document on ESBD for comments or a request for information (RFI) from potential contractors. In some instances, federal funding sources require draft solicitations to be posted prior to posting the final solicitation.
7. **HUB Subcontracting Plan (HSP):** For contracts of \$90,000 or more, the PCS must review the draft documents to determine if subcontracting opportunities are probable and identify the applicable class and item codes for the procurement. An additional 24-hours after bid/proposal deadline is allotted for construction solicitations.
8. **Contract Advisory Team Review and Delegation (CATRAD):** Procurements that result in contracts with an expected value of \$10 million or more require review by the Contract Advisory Team Review and Delegation (CATRAD).
9. **Electronic State Business Daily (ESBD):** PCS must submit notice of any procurement valued over \$25,000 on the ESBD website. A 30-day solicitation period is typical for most RFPs. Formal IFBs usually require 14 or 21 days depending on any applicable ESBD requirements. However, if the procurement is very complex and requires respondents to submit significant documentation or complex pricing, additional time of the solicitation period should be allowed.
10. **Screening and evaluation of responses:** The time needed for screening and evaluating responses will depend on the type and complexity of the procurement. Complex RFPs may have an evaluation team, oral presentations, discussions, and best and final offers.
11. **Contract negotiation and formation:** Timeframes will vary depending on the type and complexity of the procurement.

12. **Contract execution:** The timeframe will differ significantly between a purchase order and a contract. Additionally, contracts \$1,000,000 or more require signature by the executive director.
13. **Consultant contract greater than \$15,000:** The THC must post notice of a major consulting procurement in the Texas Register at least 30 days before entering into a contract and provide notice to the Governor's Office.

## 2.3 Statement of Work and Scope of Work

An important tool in effective contract management is a clearly written and sufficiently detailed statement of work. The statement or scope of work (SOW) is the detailed description of what the agency is purchasing and what the contractor is required to provide in order to satisfactorily perform the work.

It is important that the statement of work:

- Secures the best value for the state;
- Be clearly defined;
- Be contractually sound;
- Be unbiased and non-prejudiced toward respondents;
- Encourage innovative solutions to the requirements described, if appropriate;
- Allow for free and open competition to the maximum extent reasonable possible.

A statement of work can be performance based, a design specification, or a mixture of both.

- Performance based specifications focus on outcomes or results rather than process, and the required goods and services rather than how the goods and services are provided.
- Design specifications outline exactly how the contractor must perform the service or how the goods perform.

The following references provide guidance on preparing the statement of work:

- <http://comptroller.texas.gov/procurement/pub/contractguide/chapter3/PreparingtheSolicitation.pdf>
- <http://comptroller.texas.gov/procurement/pub/contractguide/chapter3/PreparingtheStatementofWork.pdf>

### PROCEDURES

1. A project manager must participate in the development of the statement of work.
2. Primary sources for developing the statement of work are:
  - a. The needs assessment
  - b. The previous procurement for the service; and
  - c. The current contract for the service.
3. Below are common statement of work provisions. Usage will depend on what goods or services are being purchased.

- **Deliverables or service description:** Describe the goods or services the agency is purchasing and what the contractor must deliver under the contract. Specifications must be clear and understandable to the respondents and permit competition between goods or services of equal quality.
- **Location of work areas:** Describe where the work is to be performed (e.g., region, county, city, zip code).
- **Period of performance:** Specify the allowable time for the project, such as start and end date, number of hours needed to perform the work, and anything else that relates to scheduling.
- **Deliverables schedule:** List and describe what is due and when, including any reports the contractor is required to submit.
- **Minimum qualifications:** List the minimum acceptable qualifications for the service provider's staff and organization.
- **Applicable standards:** Describe any regulatory, agency, or industry specific standards that need to be followed in fulfilling the contract.
- **Acceptance criteria:** Specify how the agency will determine/measure if the product or service is acceptable.
- **Type of contract and payment schedule:** Define the payment methodology, basis for payment, and invoicing process. Consider milestones, progress payments, or incentives to encourage early completion.
- **Transition and turnover planning:** Identify any transition activities the new contractor will be required to perform at the end of its contract in order to effectively transition services to a subsequent contractor.

### • 2.3.1 Writing the Statement of Work

Tips to keep in mind when writing a statement of work:

1. **Use simple descriptions:** Write so a person unfamiliar with the good or service can easily understand what the agency is buying.
2. **Avoid acronyms and definitions:** Avoid acronyms and references to definitions contained in other sections of the solicitation, including a glossary. Every section should be self-contained and not require the respondent to refer to numerous sections to understand the requirements.
3. **State requirements once:** The statement of work should not duplicate terms and conditions or other provisions in the solicitation, contract, or terms and conditions.
4. **Use non-proprietary terminology:** Requiring the use of proprietary goods or services limits competition and increases the risk of bid challenge or allegation that the requirements are slanted to a particular contractor.
5. **Write with the evaluation criteria in mind:** The statement of work must include all of the requirements that will be used to evaluate and choose a contractor. A well-written statement of work will allow the agency to differentiate between competing proposals.

# 2.4 Contract Performance Standards and Key Measures

Contracts must include performance measures that set clear expectations for the contractor and hold contractors accountable for those expectations. Performance measures encourage routine improvement, effectiveness, and efficiency. Strong performance measures allow the agency to:

- Establish performance measures with clearly defined indicators;
- Develop processes for collecting performance data and information;
- Develop processes for analyzing and reporting data and information;
- Contract quality improvement planning, implementation, and evaluation;
- Ensure contract goals, objectives, and strategies align with outcomes;
- Operate efficiently and effectively;
- Maximize resources; and
- Provide data to determine whether contractors are meeting their objectives.

Contracts must specify remedies for noncompliance and should include incentives for exceeding standards. Performance standards will vary based on the contract and additional standards may be necessary.

Characteristics of Good Key Measures
<ul style="list-style-type: none"> <li>✓ <b>Simple:</b> Can our stakeholders understand it?</li> <li>✓ <b>Relevant:</b> Does it matter to key stakeholders?</li> <li>✓ <b>Stable:</b> Is it usable during business cycles over time?</li> <li>✓ <b>Timely:</b> Is it taken when and where results appear?</li> <li>✓ <b>Accurate:</b> Does it consistently measure what it purports to?</li> <li>✓ <b>Used:</b> Does it change what the agency is doing? <i>Not sure what "used" means.</i></li> <li>✓ <b>Informative:</b> Does it tell us about what we are doing, or should be doing?</li> <li>✓ <b>Specific:</b> Does it allow for, or factor out, other measures?</li> <li>✓ <b>Unique:</b> Is it measuring something already measured?</li> <li>✓ <b>Cost-effective:</b> Is measuring worth it, and how good is good enough?</li> <li>✓ <b>Non-disruptive:</b> Does it create ethical, legal or other types of conflicts?</li> </ul>

Types of Performance Measures	
Types and Definitions	Examples
1. <b>Outcome and Effectiveness:</b> Measurable indicator of the agency's effectiveness in reaching the mission, goals, and objectives.	<ul style="list-style-type: none"> <li>• Percentage of tourism increase.</li> <li>• Percentage of raised awareness after educational training.</li> <li>• Percentage of website activity increase</li> </ul>
2. <b>Output:</b> Measurable indicator of the number or volume of services an agency produces. Used to assess workload and the agency's efforts to address those demands.	<ul style="list-style-type: none"> <li>• Number of active contracts.</li> <li>• Number of website "hits".</li> <li>• Number of web tours.</li> </ul>
3. <b>Efficiency:</b> Measurable indicator of productivity expressed in unit costs, units of time, or other ratio-based units. Used to assess the cost-efficiency, productivity, and timeliness of agency operations, outcomes and outputs.	<ul style="list-style-type: none"> <li>• Average hourly fee.</li> <li>• Average time per educational workshop.</li> <li>• Average cost per educational workshop.</li> </ul>
4. <b>Explanatory/Input:</b> Indicator of factors, agency resources, or requests received that can impact an agency's performance.	<ul style="list-style-type: none"> <li>• Percentage of project reviews completed.</li> <li>• Number of vendors registered.</li> <li>• Number of project reviews received.</li> </ul>

## 2.5 Contractor Compensation

The method of payment has a direct impact on how the statement of work is written and how the contract is managed. THC must measure or verify that the work is complete and how much and how often the agency will pay the contractor. Payments should be:

- Consistent with the type of product or service delivered;
- Structured to fairly compensate the contractor and encourage timely and complete performance of work;
- Approximately equal to the value of the completed work; and
- The solicitation should specify the payment type (fees, cost, and price) that is consistent with the type and value of work performed and a defined in the solicitation.

## 2.6 Determination of Payment Type

Determination of the appropriate compensation method to make payment to the contractor helps ensure the state receives the best value. Agency staff must determine the most effective compensation method or primary payment type during the procurement planning stages. The payment type selected will be one that best ensures:

- Delivery of services;
- Encourages efficiencies and effectiveness of service; and
- Provides the best value to the program and its consumers.

In some cases, the best structure may include multiple payment types for different services within the same contract.

There are several payment types, including:

- Cost Reimbursement – Client service contracts, usually associated with state and federal grants. Example: Contracts for services in remote areas.
- Cost Plus Incentives – Materials contracts wherein the materials are unknown at the time of contract award. Example: Construction contracts.
- Fee-for-Service – Contracts wherein a fee can be established for a unit of service. Example: Providing flu shots to patients. Unit of service is one flu shot.
- Firm Fixed Price – Contracts wherein a firm fixed price can be established for work to be performed. Requires that the statement of work provide clear and accurate specifications. Example: Common goods and services such as office supplies, furniture, etc.
- Firm Fixed Price with Escalator – Same as above and for longer term contracts or contracts where the costs of material and labor are subject to market fluctuations. Because the contract allows for market adjustments, contractors are less likely to inflate prices to protect themselves against possible increases in operating costs. Example: Lumber, steel, paper.
- Progress – Construction contracts or contracts that are completed in phases or stages. Example: Building, Construction, Consulting Services.
- Time and Material – Labor contracts wherein the amount of labor or material required for the work cannot be forecast. Recommend other payment types possible. For example – instead of paying the contractor \$25 per hour for labor plus the cost of the materials, establish pricing for common units of work such as “labor and material to install a 120 power outlet”. Example: Electrician, plumber, carpenter, etc.<sup>ii</sup>

## 2.7 Determination of Contract Monetary Value

THC agency program staff, project manager, in consultation with the contract manager and procurement staff, must base its determination of the proposed length of and compensation during original term of the contract on:

- Best practices;
- State fiscal standards;
- Applicable law, procedure, and regulations.

Staff must not artificially split (or parcel) any of these factors in order to avoid the dollar thresholds during the original term of the contract or to circumvent any additional required review submission such as to the Contract Advisory Team (CAT).

The payment method and source of funds should not be considered in determining whether the estimated total value will exceed dollar thresholds. THC agency and procurement staff must make a good faith determination as to the estimated total value at the time of planning. PCS staff must be notified before any changes in the estimated amount that would impact or trigger a required review such as CAT review.

## 2.8 Development of Contracts of \$10 Million or More

The Contract Advisory Team (CAT) assists state agencies in improving contract management practices by reviewing and making recommendations on solicitation and contract documents that have a value of at least \$10 million dollars.<sup>iii</sup>

By statute, state agencies must comply with CAT recommendations or provide a written explanation for not complying with the recommendation.<sup>iv</sup>

### **PROCEDURES**

- PCS is the point of contact for the CAT review process and will work on behalf of the THC to consult with CAT using the automated Contract Advisory Team Review and Delegation (CATRAD) application form.
- The CAT will review the solicitation documents within 30 days of receipt.
- If PCS does not receive a response from CAT within 30 days of initial receipt of the solicitation documents, PCS and the THC may proceed with the issuance of its solicitation.
- PCS will work with the THC program staff to provide a written explanation of any specific recommendation that is not applicable to the contract under review.

## Procurement

The THC identifies the term “contract manager” as agency purchasing personnel that have been certified by the CPA as a Certified Texas Contract Manager. The contract manager plays an important role in supporting the project manager, program staff, and the PCS.

### 3.1 Consulting Contracts

By statute, a consulting service is the service of studying or advising a state agency under a contract that does not involve the traditional employer and employee relationship.<sup>v</sup> A major consulting contract is a consulting services contract that may be reasonably foreseen to exceed a value of \$15,000.<sup>vi</sup>

PCS is responsible for securing consulting services and meeting the numerous statutory requirements for these contracts.

A state agency may only contract with a consultant if:

- There is a substantial need for the service; and
- The agency cannot adequately perform the services with its own personnel or obtain the consulting services through a contract with a state governmental entity.<sup>vii</sup>

In selecting a consultant, THC program staff, in consultation with PCS must:

- Base its choice on demonstrated competence, knowledge, and qualifications and on the reasonableness of the proposed fee for the services; and
- If other considerations are equal, give preference to a consultant whose principal place of business is in the state, or who will manage the consulting contract wholly from an office in the state.<sup>viii</sup> However, if the contract is funded wholly or in part with federal funds, contract staff should consult with general counsel, as federal law sometimes pre-empts and prohibits the use of local or state geographic preferences, depending on the funding stream.<sup>ix</sup>

Statute also established state agency oversight requirements for the use of private consultants detailed below.<sup>x</sup> The Office of the Governor maintains applicable Consultant Contract Guidelines at: <http://gov.texas.gov/bpp#a6>.

## PROCEDURES

1. If the consultant contract is over \$14,000, the following is required:
  - a. **10 Day LBB notification:** THC must notify the LBB within 10 days of entering into the contract.<sup>xi</sup>
  - b. **Final report:** THC must forward copies of all consultant documents, files, recordings, or reports to the Texas State Library. Final reports must be submitted to the Governor's Budget and Planning Office.<sup>xii</sup>
2. For major consulting contracts over \$15,000, the following is required:
  - a. Notification of intent and finding of fact: Prior to submitted the requisition to PCS, the THC must submit the *Consultant Contract Notification and Finding of Fact* form. After receiving the finding of fact approval letter from the Office of the Governor, the THC will attach the approval letter to the purchasing and contract file.<sup>xiii</sup>
  - b. 30-Day RFP publication: At least 30 days before entering into a major consulting contract, the THC must file the following with the Secretary of State for publication in the Texas Register:
    - An invitation for consultants to provide offers of consulting services;
    - The PCS purchaser's contact information;
    - The closing date for receipt of offers;
    - The procedure for awarding the contract;
    - If applicable, notification that the services were previously provided by a consultant; and
    - If applicable, notification that the agency intends to award to its previous consultant unless a better offer is received.<sup>xiv</sup>
  - c. 10-Day LBB notification: The THC must notify the LBB within 10 days of entering into the contract.<sup>xv</sup>
  - d. 20-Day selection publication: Within 20 days of contracting with a consultant, the THC must file the following with the Secretary of State for publication in the Texas Register:
    - A description of the activities to be performed by the consultant;
    - The name and business address of the consultant;
    - The total value and the beginning and ending dates of the contract; and
    - The dates on which the deliverables (e.g., reports, documents) are due.<sup>xvi</sup>
  - e. Final report: The THC must forward copies of all consultant documents, files, recordings, or reports to the Texas State Library. Final reports should be submitted to the Governor's Budget and Planning Office.<sup>xvii</sup>

3. For renewals, extensions, and amendments, the following are required:

Cost of original contract	Other	30-day RFP publication	Finding of Fact	10-day LBB notification	20-day Selection Publication	Final Report
Greater than \$15,000	Renewal, Amendment, or Extension <\$15,000	No	No	Yes	Yes	Yes
Greater than \$15,000	Renewal, Amendment, or Extension >\$15,000	Yes	Yes	Yes	Yes	Yes
Less than or equal to \$15,000	Original Amount Plus Renewal, Amendment or Extension > \$15,000	Yes	Yes	Yes	Yes	Yes
Less than or equal to \$15,000	Original Amount Plus Renewal, Amendment or Extension < \$15,000	No	No	Yes	Yes	Yes

## 3.2 HUB Determination

To maximize the inclusion of minority, woman-owned, service-disabled veteran businesses in state contracting and to accomplish the THC’s mission, PCS administers the Historically Underutilized Business (HUB) Program.<sup>xviii</sup> The purpose of the HUB program is to promote full and equal business opportunities in state contracting through openness, fairness, and the highest ethical standards.

The goal of THC is to provide the opportunities for minority, woman-owned, or service-disabled veterans’ businesses to have full and equal access to state procurement opportunities, through contracts and subcontracts. By statute, when issuing a new solicitation with a resulting contract estimated value of \$100,000 or more, state agencies must determine whether subcontracting opportunities are probable.<sup>xix</sup> The THC has elected to lower the resulting contract estimated value to \$90,000 or more.

To make a subcontracting determination, the HUB Program will consult with THC program staff, the project manager, and PCS purchasing staff to ensure a HUB subcontracting plan (appropriate language is included in the solicitation). All interested respondents must submit a completed HSP response with their proposals when subcontracting opportunities are probable.

## 3.3 Solicitation Conference

A solicitation conference is a meeting facilitated by PCS in collaboration with the project manager and program staff, which is designed to help potential bidders/respondents understand the requirements of a solicitation. These meetings can also be called pre-bid, proposal, or vendor conferences.

THC may opt to conduct a solicitation conference by working with the PCS purchaser to include notification of the solicitation conference in the procurement document. The PCS purchaser will conduct the conference in coordination with the THC program staff and project manager.

Benefits to conducting the solicitation conferences are:

- Allowing potential respondents to address specific questions or concerns;
- Providing for on-site visits by potential respondents before submitting responses;
- Providing information, schematics, plans, reports, or other data that is not easily accessible from the ESBD; and
- Facilitating subcontracting relationships that may develop through the conference.

Typically, potential respondents are not required to attend the solicitation conference. However, conferences should be mandatory if an on-site visit is required to have a full understanding of the procurement, or if the solicitation is so complex that attendance is critical for respondents to fully understand it. Before including a mandatory solicitation conference in the procurement, the THC program staff should consult with PCS because this requirement may limit competition.

The PCS purchaser will work with THC program staff and the project manager to answer any questions submitted at the conference and to post the written answers on the ESBD.

## 3.4 Request for Proposal Evaluation

THC program staff and the project manager will work with the PCS purchaser to develop the evaluation criteria and the evaluation tool and to identify and train the evaluation team.

### **EVALUATION CRITERIA**

All RFPs must contain evaluation criteria. Evaluation criteria are those requirements included in the solicitation document that will be used to evaluate proposals and determine the best value to the state. It is important that the RFP is clear about the evaluation criteria that will be used and the priority of the evaluation criteria.

In an RFP, the criteria can range in detail from best value factors ranked in order of importance (i.e., broad criteria that will need to be further defined before evaluation) to the inclusion of the weighted evaluation tool (i.e., very detailed evaluation criteria with corresponding weights that will be used as written to evaluate proposals).

The contract manager, in consultation with the project manager and the THC program staff must ensure that the evaluation criteria relates to the requirements in the statement of work

### **EVALUATION TEAM**

At a minimum, an RFP evaluation team should consist of three to five agency stakeholders representing different subject matter areas related to the final product or service. The project manager should ensure appropriate subject matter representation on the team, including program, project management, finance,

IT, and others as needed. The PCS purchaser serves as the evaluation team facilitator and is a non-voting member.

Evaluation team members may have input into the solicitation document especially the evaluation criteria and assigned weights. The evaluation team members should:

- Fully understand the requirements of the solicitation;
- Be able to critically read and evaluate responses and to document their judgements concisely and clearly in accordance with their evaluation; and
- Must agree to adhere to the proposed timeline required to evaluate proposals.

For complex contracts, a three-tiered evaluation team approach is recommended, and consists of:

- **Initial screening team** to check proposals for compliance with mandatory submission requirements;
- **Business/Technical solution team** to evaluate the business proposal/technical solutions based on the criteria in the RFP; and
- **Financial/Cost team** to evaluate the vendor's cost proposal for completeness, competitiveness, reasonableness, and compliance with RFP requirements.

## EVALUATION TOOL

As best practice, the evaluation tool should be completed before publishing the solicitation document. Often, additions or revisions are needed to the solicitation document when developing the scoring matrix. Those changes are more easily made prior to posting the final document.

If time does not permit the evaluation tool to be completed before publishing the solicitation, the tool must be completed before reviewing the solicitation responses.

Evaluation tool questions should be cross-referenced to their corresponding RFP numbered sections.

## EVALUATION TRAINING

The PCS purchaser will ensure that all evaluation team members complete any required ethics, confidentiality, and disclosure forms prior to reviewing or discussing any proposals. Additionally, the PCS purchaser will ensure team members receive evaluation training on their roles and responsibilities, evaluation criteria and scoring methodology, and the evaluation process.

## 3.5 Contract Negotiations

Contract negotiation during the procurement process phase involves communicating with a potential contractor to reach agreement on the terms of the final contract. Contract negotiation will depend on the procurement method and the items being negotiated but will always be guided by obtaining the best value for the state.

For a request for proposal with more than one potential contractor, negotiations may be used to further evaluate offers and to select one or more contract award.

To enhance the agency's negotiating position, a potential contractor is not told if it is the only potential contractor the agency is negotiating with. This information should be shared only when it is pertinent in the negotiation.

The PCS purchaser must give the same information to all potential contractors that are being considered. No contractor being considered for award should receive information that would give it a competitive edge over the others. Information about an offer is not shared with any other potential contractors.

## RESOURCES

- <http://comptroller.texas.gov/procurement/pub/contractguide/chapter5/BestandFinalOffers.pdf>
- <http://comptroller.texas.gov/procurement/pub/contractguide/chapter5/Negotiations.pdf>

## PROCEDURES

- THC program staff and project manager will work with the PCS purchaser to negotiate with any potential contractors.
- The PCS purchaser will facilitate the negotiation and manage the technical and financial evaluation outcomes of the negotiation to ensure selection of a best value potential contractor.
- For request for proposals (RFP), the PCS purchaser may limit the field of competition for negotiations to offers that received the highest or most satisfactory evaluations.
- PCS retains all negotiation documents as part of the procurement file, which is subject to public disclosure.
- All negotiated changes must be included in writing in the final contract.

**Negotiation Team:** The PCS purchaser will coordinate the evaluation and negotiation process with the THC program staff and project manager and others with needed expertise on the team, such as information technology staff. The project manager must ensure that the team is adequately staffed with needed expertise.

**Negotiation Process:** Negotiations may include discussions of any ambiguities or deficiencies in the business proposal, the cost proposal, service delivery strategies, and any other terms. Negotiation may also be used to obtain clarifications, improvements, and revisions to the original offer. All changes or revisions to the offer must be documented in writing.

**Best and Final Offer:** After discussions with potential contractors, THC program staff and the project manager will work with the PCS purchaser to request a best and final offer (BAFO). BAFO may be requested prior to negotiation and may be used to narrow the field of competition. BAFOs are only used in the evaluation of RFPs.

## Contract Formation

Before a contractor provides goods or services, an authorized representative of the contractor and the THC signature authority must execute a written contract. PCS and the project manager will work with appropriate staff, to develop the contract and include all required contract documents and the appropriate contract terms and conditions.

A contract can be documented in different formats, including a four-corner contract or purchase order.

- The term four-corner contract is used to describe a single document that includes all of the terms and conditions with the four-corners of a single document.
- Purchase orders (PO) are also contracts but instead of containing all of the terms and conditions in a single document, the PO incorporates the terms and conditions, statement of work, and other relevant documents by reference.

### 4.1 Contract Documents

A written contract must include or incorporate by reference the following documents, if applicable:

- The appropriate version of the contract terms and conditions;
- The solicitation document, including any addenda;
- The contractor's response;
- Any negotiated changes;
- The required budget documents; and
- Any other required forms.

The required forms will vary by THC in accordance with internal processes, procedures, policy, and the type of contract.

## 4.2 Contract Terms and Conditions

PCS have developed uniform or standard contract terms and conditions that are applicable to their specific contracted services. These terms and conditions addresses areas such as:

- Governing laws and regulations;
- Procedures for amendments and other contract modifications;
- Terms and conditions of payment; and
- Data Use Agreement requirements.

The project manager must ensure the appropriate terms and conditions are used, in consultation with the THC agency program, PCS, and general counsel. THC uniform terms and conditions may be used, as appropriate.

## 4.3 Minimum Contract Requirements

At a minimum, a contract must contain the following terms and conditions;

- Begin and end date;
- Description of the goods and services to be provided;
- Payment and invoicing information;
- Renewal periods available to the THC;
- Any service level standards or agreements;
- Points of contacts and notice provisions;
- The process to change or amend the contract;
- A clause that the contract is subject to cancellation by the THC;
- Termination provisions; and
- A clause that states continuation is contingent on the availability of state or federal funding.

## 4.4 Coordination and Preparation

The contract manager is responsible for the coordination and preparation of the appropriate contract agreement.

The contract manager must:

- Coordinate with appropriate THC stakeholders such as the project manager, PCS purchaser, finance staff, general counsel, program staff, division management, and executive leadership to ensure mandatory terms and conditions are incorporated into the contract.

- Ensure the necessary procurement documents including: responses, negotiations, statement of work, performance measures, and any other pertinent incorporation by reference are included into the contract.
- Review whether the contractor will access confidential information, or approved language has been incorporated into the contract;
- Assign a unique contract number as a means to properly identify, track, and report necessary contract information and data through THC's Online Contract Management System (CMS); and
- Conduct the required checks and certifications which may vary depending specific contract language and whether the contractor is located in the state of Texas or outside of the state.

## 4.5 Conducting Required Checks and Determining Contractor Qualifications

The contract manager, in coordination with PCS, must ensure that contractors are qualified to do business with the State of Texas. Contract managers must maintain documentation to support the outcome of the required checks, and contractor qualifications in the contract management file.

PCS will develop policies and procedures for the completion of required checks that include specific instructions for notifying agency leadership, or a needed, obtaining legal counsel when the results of a check identify any issues.

Required checks may include:

- **Texas Identification Number (TIN):** A TIN is required to enter into a contract and to receive payment.
- **Vendor Hold:** State agencies may not enter into a contract with an entity that is indebted to the state, unless arrangements are made to pay off the debt. State debt includes tax delinquency, child support delinquency, or student loan default.
- **Franchise Tax Account Status:** Franchise tax account status check is required to verify whether a contractor has a right to transact business in Texas. Governmental agencies are exempt from this check.
- **Debarred Vendors:** Verify that an entity has not been debarred or excluded from doing business with the state.
- **Federal Excluded Parties:** Exclusion records identify those parties excluded from receiving federal contracts, certain subcontracts and from certain types of federal financial and non-financial assistance and benefits. Federal Excluded Parties are verified in the System for Award Management (SAM), Excluded Parties List System (EPLS).

## 4.6 Reviewing the Contract for Accuracy

The contract manager, in consultation with the project manager, THC program staff, and general counsel should review the draft contract for content and accuracy. The contract manager should ensure that the contract addresses all concerns or issues raised during the review process. Contract review and approval should be completed before executing the contract. Reviewers check the following:

- **Contractor name:** The contractor name on the contract should be the complete legal name of the entity and should match on all the required contract forms;
- **Signature authority:** The individual designated to sign the contract on behalf of the contractor and the THC must be authorized to bind the party in contracting decisions;
- **Contract forms:** All required forms must be completed correctly and attached to the contract;
- **Payment and invoicing information:** If there is a total dollar amount it must be correct and budgets must be calculated accurately; and
- **Effective dates:** The effective begin and end dates must be specified and correct.

## 4.7 Delegated Signature Authority for Execution and Amendments

As granted by the THC Commission, the THC executive director has authority to commit a THC agency to a contract. The executive director delegates authority to PCS staff to sign certain agency purchase orders and agreements.

This policy applies to all documents that obligate or involve the THC agency in the acquisition of goods and services, including:

- Contracts
  - Including when THC agency is the performing agency or recipient of funds;
  - Memoranda of understanding (MOU);
  - Memoranda of agreement (MOA);
  - Letters of commitment;
- Amendments and change orders (i.e., renewals and extensions);
- Purchase orders and purchase order change notices; and
- Binding and non-binding commitments.

Contract managers must route contracts for appropriate signature approval. PCS maintains a copy of the contract in the procurement/contract file.

## 4.8.1 Contract Agreements for \$1 Million or Greater

The THC Commission has delegated signature authority to the executive director, which includes contracts that are \$1 million or greater and amendments that equal \$1 million or greater.

The contract manager must ensure:

- Completion of required forms;
- Receipt of final review and approval by THC program staff;
- Completed forms and associated contract documentation are forwarded to PCS;
- Distribution of executed contract to the contractor and PCS, if appropriate; and
- THC's Online Contract Management System is updated.

## 4.8.2 Contract Agreements under \$1 Million

For contract agreements that are under \$1 million, the contract manager must ensure that:

- The contract has been signed by the authorized contractor signature authority;
- The contract is routed to the appropriate signatures;
- The executed contract is distributed to the contractor and PCS, if appropriate; and
- THC's Online Contract Management System is updated.

# Contract Management

## 5.1 Contract Management Overview

While not THC-specific, the Comptroller's State of Texas Contract Management Guide: <http://comptroller.texas.gov/procurement/pub/contractguide/>, gives an overall structure for understanding general governmental contracting in Texas. Contract and project managers should refer to the guide for basic contracting principles expected of state agencies and their staff, including assistance on ensuring the best quality combined with the best value for the taxpayer.

A contract manager must:

- Coordinate with general counsel to make effective contract decisions and promote accountability;
- Promote the use of best practices throughout the contract lifecycle;
- Behave ethically at all times and exercise informed and professional judgement throughout the contract lifecycle;
- Be vigilant for any potential conflicts of interest that may arise, and report any concerns;
- Communicate and coordinate with all stakeholders involved with the contract;
- Have thorough knowledge of assigned contracts and of the program purposes they are intended to achieve; and
- Comply with statutes, rules, and policies related to THC programs and contracts.

## 5.2 Contract Management Responsibilities

Effective contract management requires that a contract manager be involved throughout each stage of the contract lifecycle. Program staff must develop procedures to guide the project manager to:

- Effectively and efficiently manage and oversee quality contracting outputs and outcomes.
- Provide adequate training and guidance to ensure project managers understand roles and responsibilities.
- Oversee and ensure overall management of contracting risks through planning, data analysis, reporting, and mitigation or resolution of contract risks and issues.

- Oversee contract management activities and ensure compliance with statutes, rules, regulations, and policies.
- Ensure proper maintenance and retention of contracting related documents, such as the contract management file, which will be sent to PCS following the expiration of the contract.

**Contract management is an essential function that involves:**

- Ensuring all applicable state and federal rules and regulations, THC policy, and the terms and conditions of the contract are adhered to;
- Being well versed in the contract terms, including its purpose, scope, requirements, and deliverables to ensure the contractor is held accountable for performance;
- Coordinating a well-defined statement of work with input from stakeholders;
- Establishing specific, time-bound, performance measures and requirements to ensure contractor accountability;
- Staying informed and involved throughout all stages of the lifecycle to ensure successful contract outcomes;
- Maintaining required documentation, such as required disclosure and conflict of interest forms, correct signature authority, amendments, and monitoring results;
- Maintaining thorough and up to date documentation as required; and
- Overseeing performance and receipt of quality services and deliverables.

**Responsibilities throughout the lifecycle may include:**

- Coordinating with PCS on amendments;
- Ensuring that the statement of work or purchase order clearly defines contractor responsibilities and performance outcomes and expectations;
- Assisting with contract negotiation;
- Conducting and maintaining required contractor checks (including reference, licensure checks, if applicable);
- Assessing risk;
- Establishing a contract monitoring plan;
- Ongoing coordinating and communicating with necessary contractor and agency staff;
- Facilitating access and security to agency systems, as required, and ensure timely termination of contractor personnel;
- Reviewing and approving billing and tracking budget trends;
- Coordinating with PCS regarding any contract changes;
- Conducting risk-based monitoring activities;
- Tracking and reviewing performance measures and outcomes (verifying receipt of quality services, goods, and other deliverables);
- Providing technical assistance by answering questions, participating in meetings, engaging in correspondence and communication with the contractor, and working with PCS to resolve complaints;
- Assist PCS with contract closeout/termination activities, vendor performance reporting;
- Assisting in planning the next contract cycle; and
- Documentation of lessons learned.

## 5.3 Project Manager Designation and Authority

THC's policy requires a formal contract for services valued at \$10,000 or more. Procurements that have high risk, such a construction may be required at a value less than \$10,000. Consequently, a project manager must be designated to manage the contract. PCS must ensure a project manager is assigned the responsibilities and designated authority.

Depending on value, scope, and complexity, project managers may be responsible for one or more contracts.

## 5.4 Certified Texas Contract Manager Training and Certification Requirements

In accordance with Section 2262.053 of the Texas Government Code, designated contract management staff must be certified through the Certified Texas Contract Manager (CTCM) process administered by the Texas Comptroller of Public Accounts (CPA). Therefore, the contract manager and project manager must work closely from contract execution to contract closeout.

Contract managers must:

- Complete three training sessions;
  - Contract management
  - Project management
  - Negotiation skills and strategies
- Take and pass the certification exam
- Maintain certification by:
  - Completing 80 hours of additional training over the course of five years
    - No more than 36 CEH's may be applied per year
  - Apply for recertification

For additional information, see: <http://comptroller.texas.gov/procurement/prog/training-cert/>

Executive staff must complete the 45 minute *Governing Bodies Webinar Training S.B. 1681* and fill out and submit the acknowledgement form to the CPA.

To register, visit: <http://comptroller.texas.gov/procurement/prog/training-cert/webinar-training/>

# 5.5 Contract Management through the Lifecycle

Although each contract type may be different, understanding what information is needed throughout the contract lifecycle is critical. The contract lifecycle offers a framework in which to plan for contract management requirements, timelines, and contingencies.

<b>Considerations and tasks throughout the lifecycle:</b>	
Contract and Procurement Planning	<ul style="list-style-type: none"> <li>• Federal or legislative mandates, requirements and timelines</li> <li>• Documented need</li> <li>• Designate contract manager</li> <li>• Define contract objective</li> <li>• Identify those who need to be involved from planning to execution</li> <li>• Identify level of approval needed</li> <li>• Collaborate with stakeholders</li> <li>• Identify potential constraints for contracting</li> <li>• Identify potential risks based on type of service and dollar amount</li> <li>• Identify subcontracting opportunities</li> <li>• Procurement initiation and approval to advertise or delegation from the CPA</li> <li>• Develop statement of work</li> <li>• Develop performance measures</li> <li>• Consider best value factors</li> <li>• Determine monetary value of contract based on budget approval</li> <li>• Coordinate with PCS to develop timeline and ensure procurement requirements are met</li> </ul>
Procurement	<ul style="list-style-type: none"> <li>• Prepare solicitation document</li> <li>• Consider benefits of conducting a solicitation conference and determine if one is needed</li> <li>• Develop evaluation criteria, consulting PCS purchaser as needed</li> <li>• Create and finalize evaluation tool prior to posting of solicitation</li> <li>• Conduct solicitation conferences, if applicable</li> <li>• Coordinate with PCS purchaser to finalize solicitation document</li> <li>• HUB Determination</li> <li>• Identify subject matter experts who will participate in the evaluation, ensuring conflict of interest and non-disclosure statements are complete</li> <li>• Evaluation responses to solicitation</li> </ul>
Contract Formation	<ul style="list-style-type: none"> <li>• Determine contract award</li> <li>• Ensure required checks are complete</li> <li>• Conduct contract negotiations</li> <li>• Review required documents ensuring completion</li> <li>• Finalize contract award</li> <li>• Coordinate appropriate signature based on identified signature authority</li> </ul>

Contract Management	<ul style="list-style-type: none"> <li>• Conduct post award meeting, if applicable</li> <li>• Maintain official contract record</li> <li>• Review and approve billing and track budget</li> <li>• Assess risk and document any decisions, actions and progress in contract file</li> <li>• Coordinate and communicate with necessary contractor and agency staff on an ongoing basis</li> <li>• Administer contract changes</li> <li>• Track and review performance measures and outcomes</li> <li>• Provide technical assistance as needed</li> <li>• Conduct required contract monitoring</li> </ul>
Contract Termination and Closeout	<ul style="list-style-type: none"> <li>• Document termination decision and communicate with key stakeholders while receiving approval for termination, if applicable</li> <li>• Determine any settlements and negotiate as needed for contract closeout</li> <li>• Resolve any outstanding issues</li> <li>• Complete vendor performance reporting</li> <li>• Document lessons learned</li> <li>• Complete closeout or termination in THC's Online Contract Management System (CMS)</li> </ul>

## 5.6 Contractor Communication, Training and Technical Assistance

Contract and project managers must hold contractors accountable for ensuring compliance with state and federal regulations, contract terms and conditions, and protecting the state's financial interest. Communication is essential for a successful partnership; and contract managers may find providing training and technical assistance necessary for overseeing compliance, supporting successful contract outcomes, and more transparent expectations.

### 5.6.1 Training

Project managers and agency staff may provide training to contractors in order to address program requirements, reporting requirements, changes in agency policies, or to meet state and federal requirements. Project managers should coordinate with PCS regarding curriculum, materials, presenters, training dates, and locations.

The project manager must ensure training is adequately documented and maintain the following in the contract management file:

- Date, time and locating of training;
- Sign-in sheet with the name and signature of each contractor in attendance;
- Copy of the curriculum and/or materials.

## 5.6.2 Technical Assistance

Project managers and agency staff may provide technical assistance, as needed, throughout the term of the contract. Technical assistance may be provided by phone, email, or during on-site visits, and can include circumstances such as:

- Turnover in key agency or contractor staff;
- Difficulty with following contract terms and conditions, policies and procedures, or reporting requirements;
- Clarification of agency policies;
- Clarification of monitoring and oversight requirements;
- Billing or payment issues; or
- Other identified needs.

Project managers may determine that specific contractors would benefit from technical assistance in instances when the contractor:

- Has minor problems with compliance that does not warrant formal actions;
- Has technical problems or issues with billings; or
- Has difficulty in determining an approach to correct a problem or issue.

The project manager must ensure technical assistance is adequately documented and maintain the following in the contract management file:

- The name of contractor;
- The contract number;
- Date of technical assistance; and
- Summary of technical assistance provided.

# 5.7 Contract Management Tips and Best Practices

Contract management best practices are techniques that may be used to improve the contracting process:

Contract Management Best Practices	
<b>Be Timely and Proactive</b>	<ul style="list-style-type: none"> <li>• Assign a project manager early in the procurement process to actively participate throughout the contract lifecycle.</li> <li>• Updating the THC's Online Contract Management System (CMS) when project manager is designated.</li> <li>• Designate a project manager or point of contact, as back up.</li> <li>• Meet internal and external deadlines and submit reports and other information as required.</li> <li>• Make mutually agreeable arrangements ahead of due dates if a deadline cannot be met.</li> </ul>
<b>Communicate Effectively</b>	<ul style="list-style-type: none"> <li>• Keep open, consistent, and clear communication with those involved in the contract, including program staff, management, and contracting partners.</li> <li>• Work to ensure common understanding of key terminology, both internally and externally.</li> <li>• Seek advice early on, from general counsel, program staff, and management before a problem worsens and becomes more difficult to resolve or increases risk to the agency.</li> <li>• Document contract performance issues timely to ensure general counsel, program staff, and management have ready access to information when needed.</li> <li>• Identify and communicate with appropriate internal and external stakeholders, including those with authority to act on behalf of the contractor.</li> <li>• Communicate and consult with PCS on contractor performance issues that may impact the entire agency.</li> <li>• Determine roles and responsibilities, including knowing who has authority for decisions, who is responsible for taking actions, and who should be consulted and informed.</li> <li>• Adhere to THC policies and procedures that delineate levels of approval authority, including those with signature authority.</li> </ul>
<b>Know the Contract</b>	<ul style="list-style-type: none"> <li>• Understanding of the base contract prevents costly mistakes when amending it such as duplicating costs for services and goods already included in the original contract.</li> <li>• Understanding of requirements and performance measures is essential to ensuring successful contract outcomes.</li> </ul>
<b>Understand the Impact of Decisions</b>	<ul style="list-style-type: none"> <li>• Use all available information, data, and reports when analyzing a potential course of action.</li> <li>• Continually assess contractor risk, and take into consideration how potential decisions and actions can decrease, or increase contract risks.</li> <li>• Seek input on key decisions from subject matter experts to reduce the risk of unintended consequences, foster mutual cooperation, and promote effective contract management.</li> </ul>

## 5.8 Amendments, Change Orders and Renewals

Project managers may initiate contract changes that do not alter the scope of the original contract to meet unanticipated post-award changes at any point during the life of the contract. Needed contract modifications can be identified by the contractor, agency program staff, or the project manager. Changes to contracts require a documented request.

The procurement and contract documents serve as the primary guide in establishing whether or not the modification can be allowed. The contract must contain provisions that allow changes to services, deliverables or other aspects of the contract agreement. Additionally, the project manager, with assistance from PCS, must ensure contract modifications comply with applicable law, THC agency policy, and do not violate procurement requirements.

A new procurement is required if the proposed change is outside the scope of the original procurement. Examples of changes that may be outside the scope of procurement include:

- Providing new or additional services that were not described in the original procurement; or
- Providing services in geographic areas not defined in the original procurement.

### 5.8.1 Review for Renewal, Amendment, or Re-procurement

Project managers must regularly review assigned contracts to determine which contracts expire in the near future. The project manager should consult with THC agency management to determine whether the contract will be renewed, extended, re-procured, or allowed to expire. If no more renewals remain available under a contract, project managers should consult with program staff to determine whether the services are still needed and a new solicitation must be issued. The project manager's assessment should consider all required internal and external timeframes necessary for successful renewal or re-procurement.

### 5.8.2 Contract Amendments and Change Orders

A written contract amendment or change order, signed by the THC signature authority, general counsel and the contractor, is required if there is a change to:

- The contract terms and conditions;
- The services or the statement of work, including performance measures;
- Dollar amount; or
- Contract period that is outside of the contract period stated in the contract.

*\* All contract amendments and change orders must be reviewed and issued by PCS and routed to the appropriate THC signature authority, general counsel, and contractor for signature.*

A contract amendment or change order must be documented in the contract record and include:

- An effective date; and
- A detailed description of the change.

### 5.8.3 Contract Renewals

A contract renewal is the continuation of the contract period according to the timeframes specified in the contract. Typically, a renewal is limited to only extending the designated period of time with a purchase order change notice. If a renewal changes any other terms and conditions, it is considered an amendment.

A contract renewal cannot cause the total contract period to exceed limits in the contract or any THC agency statute or rule. Contracts or procurement documents must contain provisions that allow for renewal.

When considering if a renewal is appropriate, the project manager should consult with THC agency program staff to determine:

- Whether a re-procurement or renewal is the most cost effective for the agency;
- The continued need for the service;
- If a more competitive contractor pool, or potential for improving best value exists;
- Changes to THC agency statutes or rules;
- Funding allocations for the new contract period;
- Any contractor performance issues or emerging risks and issues; and
- HUB Subcontracting Plan compliance and monitoring requirements.

### 5.8.4 Routing for Contract Amendment and Change Order

A contract amendment and change order must be routed and approved according to THC agency procedures prior to the execution. The purpose of routing the amendment is to ensure appropriate review of the transaction, source of funding, and terms and conditions.

PCS is responsible for:

- Review and approval;
- Assembling the contract amendment or change order and required documentation;
- Routing for appropriate signatures, which should include legal review;

- Obtaining the contractor's signature;
- Distributing the executed contract amendment and change order; and
- Entering the contract in the THC's online Contract Management System (CMS).

## 5.8.5 HUB Requirements for Amendments, Change Orders, and Renewals

The project manager must notify the agency's HUB Program of proposed amendments, change orders, renewals, and extensions when the aggregate contract amount approaches \$90,000 or more and when contracts are procured with an initial value of \$90,000 or greater.

When the original statement of work expands beyond the subcontracting opportunities designated by the NIGP class or item codes in the original solicitation, then the contractor will submit a revised HUB Subcontracting Plan because these new NIGP class or item codes may contain additional subcontracting opportunities.

## 5.9 Contract Records

Maintaining and documenting contract management activities is crucial to effectively managing contracts, making informed decisions, settling claims or disputes, and accurately accounting for and reporting contract data. PCS is the official source of record for THC contract information.

All THC contracts (including agreements such as Interagency contracts, MOUs and MOAs) must be entered in to the THC's online Contract Management System (CMS), and all contracts must identify the designated project manager responsible for the contract. PCS must ensure that the contract record is updated throughout the lifecycle to contain accurate and complete information.

### **Examples of THC Contract Management Essential Elements include, as Applicable:**

- Division and department
- Designated project manager
- NIGP class and item code
- Signed contract document and purchase order
- Statement of Work
- Insurance requirements
- Contract term
- Subcontracting requirements
- Disclosures and conflict of interest forms
- Risk assessment
- Contract amendments, change orders, renewals, and extensions

- Vendor performance reports (including deliverables or monitoring documents)
- Closeout documentation

Supplemental contract records, including automated systems, electronic files and paper records, may also be maintained but do not replace THC requirements.

**Examples of Supplemental Documentation Include, as Applicable:**

- Meeting records and minutes
- Contract correspondence
- Routine contractor reports
- Invoices, discounts, fee adjustments
- Contractor certifications and disclosures
- Reference checks
- Risk and monitoring working papers
- Contract assessment and lessons learned

## 5.9.1 Disclosure of Contract Records

All contract records and documents are subject to examination and audit by the CPA, the State Auditor’s Office, THC Internal Audit, the Office of Inspector General, Contract Oversight and Support, and other state and federal auditors.

The statutory requirements that apply to governmental bodies that have received requests for public information can be found in the Public Information Act, which is codified at chapters 552 of the Government Code. For instructions regarding open records requests, refer to the following link: <https://www.texasattorneygeneral.gov/og/open-government>.

## 5.9.2 Contract Records Retention

In accordance with the Texas Government Code, all contract documents must be retained for a minimum of seven years after a contract is complete (expired, terminated, or otherwise closed) or the last action related to the contract is resolved, whichever is later. Consult with general counsel and THC agency records retention personnel for detailed retention requirements.

## 5.10 Risk Assessment, Monitoring, and Risk Response

All THC contracts must be monitored to verify that the contract is performing effectively and efficiently in accordance with contract terms and conditions. Contract monitoring includes planned, ongoing,

periodic, or unscheduled activities that measure and ensure compliance with the terms, conditions, acquisition, service delivery, and related requirements of a contract.

The objective of contract monitoring is to promote accountability and ensure the State gets what it pays for by:

- Determining compliance with the terms and conditions of the contract, including applicable state and federal regulations;
- Providing feedback and technical assistance to prevent non-compliance;
- Evaluating system and process controls to ensure reliable validation of service deliverables; and
- Assessing and evaluating progress towards successful completion of performance requirements and outcomes.

Project managers and program staff must complete the THC Risk Assessment Questionnaire (Form A) for all applicable contracts in order to prioritize monitoring activities and establish a monitoring plan.

A monitoring plan must:

- Document the contracts that will be monitored during an established timeframe;
- Document the monitoring activities developed for individual contracts based on the complexity, value, and risk of the contract; and
- Track the status and progress of monitoring requirements.

By assessing risk and allocating monitoring resources accordingly, THC can more effectively focus limited resources on contracts that pose the highest risk to the State. A risk-based approach does not mean lower risk contracts are not monitored; rather more complex or higher risk contracts may receive more frequent in-depth monitoring.

Risk must be assessed on an ongoing basis in order to identify and account for changes that require an adjustment in the prioritization of contract monitoring activities. If new or greater risks are identified for a contract during the fiscal year, contracts may be added to the monitoring plan.

## 5.11 Risk Assessment

THC project managers must evaluate contracts for the level of risk they present to the State. The purpose of risk assessment is to:

- Strengthen contract management activities in order to mitigate risk;
- Help identify the potential for fraud and abuse;
- Prioritize contract monitoring; and
- Determine the highest risk contracts across the THC.

Within 14 calendar days of the effective date of the contract, project managers, in collaboration with program staff, as appropriate, must conduct a risk assessment using the THC Risk Assessment Questionnaire (RAQ).

- The THC RAQ is required for:
  - All formal contracts that have a value of \$10,000 or more (these may include formal contracts that are deemed high risk initially).
- The THC RAQ is not required for:
  - Contracts that have a value less than \$10,000.
  - Interagency contracts, Memorandums of Understanding or Agreement that have no monetary value.

## 5.12 Contract Monitoring

Contract monitoring is the systematic review of a contractor’s records, business processes, deliverables, and activities to ensure compliance with the terms and conditions of the contract. Monitoring includes planned, ongoing, periodic, or unscheduled activities.

The goal of contract monitoring is to ensure delivery of quality goods and services, and protect the financial interests of the State.

Each project manager is responsible for actively monitoring all contracts by documenting contractor compliance with contract terms and conditions. In addition, the agency must ensure that effective monitoring policies and protocols are in place, including the development of a monitoring plan.

### 5.12.1 Monitoring Plans and Activities

A monitoring plan establishes the monitoring schedule and the activities required for individual contracts. It also tracks the status and progress of monitoring requirements. Each project manager is expected to develop a monitoring plan based on risk that defines which contracts will be monitored within what timeframe (volume and frequency).

The monitoring plan must include:

- Methodology for determining which contracts require monitoring
- Which contracts require enhanced monitoring (meaning greater frequency or more robust monitoring tools), based on the outcome of the agency’s Risk Assessment Questionnaire (Form A). This document is required to be completed by the project manager and program staff and returned to PCS for every solicitation and contract. PCS will assist the project manager and program staff to identify potential areas of risk and develop a monitoring plan.

Monitoring plans must be documented and made available upon request.

#### **Examples of Monitoring Plan Development:**

Risk factors are indicators that assess the risk of the contract or project objectives not being achieved. General risk factors may include, but are not limited to:

- The contractor’s past performance (and past performance of similar contractors);
- Turnover in key personnel;
- The dollar amount of the contract, greater than \$1 million would be considered high;
- Number of years in business;
- Significant problems with payment requests;
- Results of previous monitoring visits;
- Results of monitoring visits completed by other divisions that contract with the same contractor;
- The length of time since the last monitoring visit; and
- How experience the contractor is with the type of work to be performed.
- Hazards or risks involved

Contracts identified on a monitoring plan must be monitored unless adjustments are documented, justified, and approved by agency leadership. Additional contracts can be added to the monitoring plan at any time based on increased risk or other factors.

Contract monitoring activities can be conducted in a variety of ways, as long as they are objective, address contract complexity, value, and risk and are documented in the contract record.

#### **Examples of Monitoring Activities:**

- **Billing validation:** A review of contractor invoices, documents that support service delivery, and expenditure requests to determine if the rates and services are the same as allowed by the contract and to validate claims. Determine if the supporting documents such as cost reports, third party receipts for expenses, detailed client information, etc. adequately support the request for payment. If the contractor consistently provides incorrect invoices or the supporting document is insufficient to support the request, additional monitoring, such as an on-site visit, may be necessary.
- **On-Site visit:** Monitoring conducted at the contractor’s location or service delivery site to review information and documents, personnel, physical facilities, live operations, service delivery, client records, or their observable characteristics to objectively validate compliance with contract requirements. Reviewing documents such as invoices, files, system reports, audit files, system reports, audit files and system data, as well as face-to-face interviews may be effective methods to use during sites visits.
- **Desk review:** Monitoring conducted at an agency office to review information and documents to objectively validate compliance with contract requirements. Reviewing documents such as invoices, files, system reports, audit files, financial records, system data, personnel files, or phone interviews may be effective methods to use during desk reviews.
- **Third party monitoring:** Monitoring conducted by an independent party to validate and verify compliance with contract requirements. This monitoring may be conducted as either a site visit, desk review or both.
- **Process improvement monitoring:** An approach using statistical data and pool sampling methodology (e.g. six sigma) that measures overall quality to help determine likelihood of compliance and applies to root cause analysis to negative findings to support corrective measures. This approach is also used to conduct targeted monitoring for specific requirements to ensure compliance with quality standards.

- **Team approach:** Monitoring conducted by multiple individuals either simultaneously or at different times with different scopes. A team approach may be most appropriate for extremely complex or large contracts. It may include implementation of a contract management governance framework or committee, which includes formal structures to oversee contractors’ obligations and objectives and ongoing communication to promote positive performance and adherence to the contract. All representatives of the review team should be on the same page regarding any issues and corrections, sanctions, or remedies.

## 5.12.2 Determining the Scope of Monitoring Activities

There are standard items that each division may review across all contracts being monitored. For example, all contracts that involve an exchange of confidential information must be monitored for information security compliance. Monitoring activities, questions, methods, and tools should also target specific elements or issues of concern unique to each contract. In determining what monitoring activities to conduct for a given contract, consider the following:

- Contract requirements;
- Changes in the contractor’s operations, personnel, or environment (e.g., shifts in population demographics or staff turnover);
- Individual risk factors. Consider focusing on risk factors that identify weaknesses and help develop solutions for improvement.
- Prior monitoring history and past performance (e.g., problems recently resolved, recurring issues);
- Contractor strengths in areas tested and proven to be continuously compliant, in which case it may be appropriate to omit or reduce monitoring of those areas; and
- Recent reviews from or collaboration with other divisions or PCS to coordinate monitoring efforts, reduce duplication, and promote consistency.

The scope of monitoring may be categorized into particular types or may include elements of multiple types.

Examples of Monitoring Types		
Monitoring Type	Description	Possible Actions
<b>Fiscal Monitoring</b>	<p>A review of a contractor’s financial operations, which may include review of internal controls for program funds in accordance with state and federal requirements, an examination of principles, laws and regulations, and a determination of whether costs are reasonable and necessary to achieve program objectives.</p> <p>This activity involves assessment of financial statements, records, and procedures. It is similar to an audit, but with lesser degree of details and</p>	<ul style="list-style-type: none"> <li>• Review the contractor’s bills to determine if appropriate units of measure are reported and that costs are correct</li> <li>• Compare bills with supporting documentation to determine that costs were allowable, necessary, and allocable.</li> <li>• Compare budget limits to actual costs to determine if the contractor’s expenditures are likely to be more or less than budgeted</li> <li>• Verify that goods or services billed were</li> </ul>

	depth, and usually a higher degree of frequency.	actually delivered according to the contract
<b>Programmatic Monitoring</b>	A review of a contractor's service delivery system to determine if it is consistent with contract requirements including outputs, outcomes, quality and effectiveness of programs. In programmatic monitoring, service-related information is reviewed for compliance with process and outcome expectations as identified in standards, rules and contracts. This activity assesses the degree to which the identified need is being met and the quality of the service being provided.	<ul style="list-style-type: none"> <li>• Review the provisions of the contract to determine desired outputs and outcomes</li> <li>• Review materials to determine if goods or services are being provided appropriately</li> <li>• Interview division personnel, contract staff, clients, or others to determine if the services are being performed according to the contract</li> </ul>
<b>Administrative Monitoring</b>	A review of a contractor's internal controls and operating processes.	<ul style="list-style-type: none"> <li>• Review personnel files/records</li> <li>• Verify required training and licensure</li> <li>• Verifying background check requirements</li> <li>• Verify contractor's insurance coverage</li> <li>• Review compliance with subcontractor requirements</li> <li>• Validate internal control processes, such as adherence to contractor's written policies/processes or application of information security protections</li> <li>• Review of complaints and resolution</li> </ul>

### 5.12.3 Monitoring Documentation and Follow-Up

Project managers must ensure that documentation of monitoring activities and results is complete, factual, thorough, and substantiates findings, such as performance deficiencies or instances of non-compliance. Monitoring documentation must be completed timely and maintained within the contract record. Project managers, in consultation with PCS, must communicate the results of monitoring with the contractor in writing, including findings (concerns, issues, or non-compliances), strengths, conclusions, and recommendations.

Monitoring documentation should include:

- Division and associated program;
- Name of person conducting monitoring;
- Date of monitoring activities;
- Fiscal year being reviewed;
- Type of monitoring activity (site visit or desk review);
- Monitoring tools and working papers;
- Conclusions and recommendations, including findings, results, any dispute and resolutions;
- Copies of supporting documentation to substantiate findings; and
- Actions taken, such as escalation, liquidated damages, corrective action plans, or service or payment hold.

An example of monitoring documentation that can be included in the contract record and shared with the contractor is the monitoring report. A monitoring report is a formal document developed by the project manager at the conclusion of the monitoring review. The report identifies documents and communicates to the contractor the facts, findings, conclusions, and recommendations resulting from the review. The monitoring report should be clear and concise. In addition, confidential employee identifying information must not appear in the report.

<b>Examples of Monitoring Follow-Up</b>		
<b>Nature of the Finding</b>	<b>Possible Action Response</b>	<b>Other Optional Steps</b>
<p><b>Minor Concern</b></p> <p>Example:</p> <p>Contractor misunderstanding of performance requirements</p>	<p>Communication with contractor to clarify problem, increase contractor awareness of possible risks, and offer information and assistance.</p>	<ul style="list-style-type: none"> <li>• Informal conversation with contractor</li> <li>• Letter to contractor</li> <li>• Follow-up monitoring to verify compliance</li> <li>• Corrective action plan</li> </ul>
<p><b>Systemic Issue</b></p> <p>Example:</p> <p>Recurring problem which requires specific action steps to correct</p>	<p>Formal correction to address and resolve the problem and prevent any future risk.</p>	<ul style="list-style-type: none"> <li>• Escalate to agency leadership</li> <li>• Formal conversation with contractor</li> <li>• Enhancing monitoring activities (increasing scope, depth, or frequency)</li> <li>• Corrective action plan</li> <li>• Letter to the contractor warning of possible sanctions if the problem is not corrected</li> <li>• Contract remedies</li> <li>• Liquidated damages as specified in the contract</li> </ul>
<p><b>Significant harm or risk of harm to agency staff or public</b></p> <p><b>Significant misuse of agency funds or resources</b></p> <p><b>Concerns of fraud, waste, or abuse</b></p> <p>Example:</p> <p>Loss or misuse of agency funds related to the contractor's lack of cooperation or carelessness</p>	<p>Contract Remedies to resolve the problem and/or eliminate negative impact.</p>	<ul style="list-style-type: none"> <li>• Escalate to agency leadership, executive staff, PCS, and general counsel</li> <li>• Impose additional reporting requirements</li> <li>• Reduce the services or dollars associated with the contract including: <ul style="list-style-type: none"> <li>○ Disallowances/collection of improper payments</li> <li>○ Suspension of referrals or services</li> <li>○ Modification of the contract provisions</li> <li>○ Suspension of payments until the problem is resolved</li> <li>○ Placing the contractor on a service hold</li> <li>○ Reduction of the contract amount</li> <li>○ Deny contract renewal</li> <li>○ Reduce the contract period or terminate prior to the contract expiration date</li> </ul> </li> <li>• Find alternate goods or services</li> <li>• Report the contractor to VPTS for unsatisfactory performance, to the appropriate licensing organization, to the OAG, or to law enforcement</li> <li>• Liquidated damages as specified in the contract</li> </ul>

## 5.13 Identifying Risks, Issues, and Controls

Internal controls are necessary to promote efficiency, reduce risk, and help ensure the reliability of financial information. A well planned and operational internal control system provides reasonable assurance that an entity can achieve goals and objectives as set in the contract terms and conditions. Internal controls cover all aspects of an entity's operations that include programmatic, financial, and overall compliance with laws and regulations.

### 5.13.1 Required Components of Internal Controls

To meet internal control expectations, project managers must follow key objectives to promote contractor's ability to meet reasonable assurance that include:

- **Financial and accounting controls:** The controls on authorizing, processing, recording, and reporting reliable and timely transactions which operate within the broader control environment of administrative controls.
- **Administrative controls:** The controls on all activities carried out by management or officials to accomplish business objectives, including safeguarding of resources.
- **Organizational controls:** The controls on how management defines authority and assigns responsibility, delegates authority, establishes a hierarchy for reporting and supports human resources policies to ensure effectiveness and efficiency throughout the system of operations.
- **Program and operational controls:** The controls on planning and accomplishing the organization's missions, objectives, performance, and goals.

Depending on the size of the entity, contractors may implement internal control components differently; and effective controls can be less formal or less structured. Effective internal controls must include the following components:

- **Control environment:** Sets the tone of an organization, and includes factors such as integrity, ethical values, management's philosophy, and operating style.
- **Risk assessment:** The identification and analysis of relevant risks to achieving objectives and determined how the risks should be managed.
- **Control activities:** The policies and procedures that help ensure management directives are adhered to.
- **Information and communication:** Pertinent information must be identified, captured and communicated in a form and timeframe that enable employees to carry out responsibilities.
- **Monitoring:** Internal control systems must be monitored to assess the quality of the system's performance over time.

## 5.13.2 Assessing Levels of Internal Controls

Project managers should use professional skepticism and reasonable assurance in their assessment of internal controls. Proper internal controls will provide assurance that the terms and conditions of the contract can be fulfilled and that the contractor is accurately and reliably reporting required information.

Professional skepticism is an attitude that includes a questioning mind, being alert to conditions which may indicate possible misstatement due to error or fraud, and a critical assessment of information that is presented. The principle of reasonable assurance is the key to understanding adequate internal controls.

To further assist with meeting reasonable assurance, contract managers should assess internal controls by using the five general accepted control activities shown below with examples:

- **Segregation of duties:** Different individuals are assigned responsibility for different elements of related activities. For example, the same individuals should not receive cash, deposit the cash, record the receipt of the cash, and also be responsible for purchasing goods and services and subsequently disbursing funds through the accounts payable system.
- **Proper authorization:** Transactions and activities should include the proper authorization that will help ensure that all company activities adhere to established guidelines unless responsible managers authorize another course of action. For example, a fixed rate sheet may serve as an official authorization of price for staff. A properly stated control should be in place for authorized deviations from this rate sheet.
- **Adequate documents and records:** Controls designed to ensure adequate recordkeeping include the creation of invoices and other documents that are easy to use and sufficiently informative; the use of pre-numbered, consecutive documents; and the timely preparation of documents.
- **Physical control over assets and records:** Helps protect the organization's assets. These control activities may include electronic or mechanical controls, such as employee ID cards, fences, a safe, cash registers, fireproof files, and locks. They may include computer-related controls dealing with access privileges or established backup and recovery procedures.
- **Independent checks:** Carried out by employees who did not do the work being checked. For example, a supervisor verifies the accuracy of an employee's petty cash drawer at the end of the day. Internal auditors may also verify that the supervisor performed the check of the cash drawer.

## 5.13.3 Assessing Risks through Contract Controls

As part of assessing risk and developing monitoring requirements, the project manager and program staff should evaluate what controls exist to reduce identified risks. Controls are activities or processes that help ensure actions are taken to reduce risks. There are many control activities that may counter risks that threaten an organization's success, which can be grouped into four categories.

- **Directive control activities** are designed to guide an organization toward its desired outcome. Most directive control activities take the form of laws, regulations, guidelines, policies, and written procedures.
- **Preventative control activities** are designed to deter the occurrence of an undesirable event. The development of these controls involves predicting potential problems before they occur and implementing ways to avoid them.
- **Detective control activities** are designed to identify undesirable events that do occur, and alert promptly.
- **Corrective control activities** are processes that keep the focus on undesirable conditions until they are corrected. They may also help in setting up procedures to prevent recurrence of the undesirable condition.

In order to identify and establish effective controls, the project manager must continually assess the risk, monitor control implementation, and modify controls as needed. Controls should be reassessed to determine if gaps exist in the control structure. Examples of contract controls include:

- User acceptance testing of technology;
- Accepting or rejecting deliverables according to formal, documented processes;
- Developing preventative action plans;
- Recommending defect repairs for processes that allow poor performance;
- Comparing actual performance with required performance;
- Recommending corrective actions;
- Scope limitations;
- Schedule requirements; and
- Policy requirements.

## 5.13.4 Recognizing Financial Controls, Risks, and Issues

Effective internal controls over financial management and reporting provides reasonable assurance that misstatements, losses, or noncompliance with applicable laws and regulations, material in relation to financial reports, would be prevented or detected.

### **Objectives of Internal Control over Financial Management and Reporting**

Reliability of financial management and reporting means that an entity can reasonably make the following assertions:

- Reported transactions actually occurred during the reporting period and all assets and liabilities exist as of the reporting date (existence and occurrence);
- Assets, liabilities, and transactions that should be reported have been included and no unauthorized transactions or balances are included (completeness);

- Assets are legally owned by the contractor and all liabilities are legal obligations of the contractor (rights and obligations);
- Assets and liabilities have been properly valued and, where applicable, all costs have been properly allocated (valuation);
- Financial reports are presented in the proper form and any required disclosures are present (presentation and disclosure);
- Transactions are in compliance with applicable laws and regulations;
- Assets have been safeguarded against fraud and abuse; and
- Documentation for internal control, transactions, and other significant events are readily available for examination.

When evaluating controls for the safeguarding of assets it is important to consider the various types of assets which include money at hand or easily accessible in the form of cash deposits, checks, loans, accounts receivable, and marketable securities (bonds, notes, shares, stocks) that an organization owns. These are important because they are more liquid in nature and as a result tend to be more vulnerable.

## 5.14 Vendor Performance Reporting

PCS is responsible for reviewing and submitting vendor performance information to the CPA Vendor Performance Tracking System (VPTS) on behalf of the THC. VPTS reporting is required at contract closeout or termination for all state agency contracts with a total value of \$25,000 or more. However, when there are critical performance issues, VPTS reporting is required for all state agency contracts, including those that are less than \$25,000.

Project managers must establish and document a process for submitting vendor performance reports to PCS within 45 days of the closeout or termination of all applicable contracts or when there are critical performance issues during the term of the contract. The process must include a description of the level of agency authority that will review and approve VPTS submissions before submittal to PCS. The VPTS report and supporting documentation must be maintained in the contract file.

VPTS reports must:

- Be based on solid, well documented contract management, and monitoring activities;
- Include associated information to substantiate the performance rating; and
- Include the following information for reports of unsatisfactory performance:
  - Terminations for cause;
  - Debarments; and
  - Final reports by the Office of Inspector General and Office of the Attorney General resulting from investigations of alleged fraud.

By statute, the CPA must track and evaluate vendor performance based on information reported by state agencies. State agencies must consider performance information and contractor ratings contained in the VPTS when determining whether or not to award a contract to a particular contractor.

The CPA can bar a contractor from participating in state contracts if the contractor has had more than two contracts terminated by the state for unsatisfactory performance during the preceding three years.

Vendors have the opportunity to protest unfavorable performance.

## 5.15 Escalation of Contract Issues

Project managers must develop an escalation process to communicate significant or serious contract related issues to PCS and program leadership, general counsel, agency executive management as appropriate and depending on the severity of the issue.

Project managers must ensure that the agency's contracting leadership, program staff, executive management staff, and other applicable staff, are notified immediately when they become aware of serious contract issue or risk. Although contractor noncompliance issues are often identified during monitoring, project managers must maintain an awareness of a contractor's performance throughout the duration of the contract. Routine contract management activities can also alert staff to noncompliance issues.

### **Examples of Significant Issues for Escalation Include:**

- Loss or misuse of agency funds related to the contractor's failure to cooperate or carelessness (depending upon amount and repetition);
- Risk that the contract will exceed budget limitations or timeframes;
- Harm or risk of serious harm to public or employees;
- Repeated non-compliance;
- Publicized or political concerns;
- Patterns of complaints or high-profile complaint;
- Appearance of impropriety or potential conflict of interest;
- Suspicion of fraud, waste, or abuse; and
- Any other serious issue or risk.

Effective escalation helps ensure that serious problems and issues are addressed quickly to prevent harm to clients, gaps in goods or service coverage, or misuse or waste of taxpayer dollars.

## 5.16 Required Reporting

The following reports and notifications related to state contracting are required by the Legislature, Legislative Budget Board (LBB), Texas Procurement and Support Services (TPASS) rules, or other statutory authority. For additional information regarding a requirement, staff should refer to the appropriate representative.

Contract Reporting Requirement Table						
Type	Required Report/Notification	Mandated by	Refer to	Responsible party*	Receiving body	Due date
<b>Information Resources Projects</b>	Major Information Resources Project Plan (over \$1 million)	Gov. Code §2054.304	PCS	PCS	TPASS; Quality Assurance Team**	Before spending 10% of allocated funds or soliciting vendors for the project.
<b>General Appropriations Act (GAA)</b>	Report: Fees, fines and penalties assessed and not collected (related to contractors)	Gen. App. Act, Art. IX, §7.08 (a) & (b)	PCS	PCS	LBB	Before Nov. 1
<b>Other</b>	Information Technology Report regarding purchases that do not use DIR contracts	Gov. Code §2157.068; DIR IT Commodity Purchasing Program Guidelines and Instructions	Pending DIR guidance	TBD	DIR	Semi-annually Mar 31 and Sept. 30
<b>Other</b>	Planned Procurement Schedule (PPS)	HB 1516; Gov. Code §2054.1015	DIR website	IT Staff	DIR	Based on a rolling 12-month reporting period
	Contract notification – construction					

<b>Construction</b>	contracts exceeding \$14,000	Gov. Code §2166.2551	LBB Contracts Database	PCS	LBB	Monthly
<b>Consulting Contracts</b>	Major consulting contracts exceeding \$15,000 – publication in TX Register before initiating contract	Gov. Code §2254.029	PCS	PCS	TX Secretary of State	Not later than 30 days prior to award
	Major consulting contracts exceeding \$15,000 – request Finding of Fact from Governor	Gov. Code §2254.028	PCS	PCS	Governor’s Budget & Planning Office; LBB	Before entering the contract
	Major consulting contracts exceeding \$15,000 – Notice of Award in TX Register	Gov. Code §2254.030, .031 & .033	PCS	PCS	TX Secretary of State	Not later than 20 days after award, renewal, or extension
	Contract notification – consultant services exceeding \$14,000	Gov. Code §2254.0301	LBB Contracts Database	PCS	LBB	Monthly
<b>Electronic State Business Daily (ESBD)</b>	Notice regarding planned procurements exceeding \$25,000	Gov. Code §2155.083	PCS	PCS	TPASS	Depending upon the posting, a minimum of 14 or 21 days
	Notice regarding awarded procurements exceeding \$25,000	Gov. Code §2155.509	PCS	PCS	TPASS	Upon award
<b>Historically Underutilized Business (HUB) Report</b>	HUB Semi-Annual & Annual Report	Gov. Code §732.111; 1 TAC §111.16 (b), (c), & (d)	PCS	PCS	TPASS	Mar. 15 & Sept. 15
<b>Information Resources</b>	Contract notification – Major Information System contracts	Gov. Code §2054.008	LBB Contracts	PCS	LBB	Monthly

<b>Projects</b>	exceeding \$100,000		Database			
<b>Major Contracts</b>	Review & delegation: major contracts of at least \$10 million	Gov. Code §2262.101	PCS	PCS	CAT Team***	Prior to solicitation
	Review & delegation: major contracts greater than \$100,000	Gov. Code §2156.121 & 34 TAC §20.41	PCS	PCS	TPASS	Prior to solicitation
	Report: Major contracts of \$1 million or more	Gov. Code §2261.254	SB 20	Under development	Internal to governing body	TBD
<b>Professional Services Contracts</b>	Contract notification – Professional exceeding \$14,000	Gov. Code §2254.006	LBB Contracts Database	PCS	LBB	Monthly
<b>General Appropriations Act (GAA)</b>	Contract notification – Contracts exceeding \$50,000	GAA, Art. IX §7.05 (a), (b), (c)	LBB Contracts Database	PCS	LBB	Monthly
<b>Other</b>	Agency Web Posting of Contracts exceeding \$100,000	Gov. Code §2054.126 (d) (4)	Agency website	PCS	THC	Monthly
	Set-Aside Report – report all items/services purchased as exemptions	Human Resource Code §122.016 & Gov. Code §2161.121 (b), .122, .124	PCS	PCS	TPASS	15 <sup>th</sup> of each monthly
	Agency Procurement Plan to CPA	Gov. Code §2155.132 (c)(d) & 1TAC §113.11 (h)	State of Texas Procurement Manual	PCS	TPASS	November 30

**\*Responsible Party:** Party responsible for submitting reports and notifications.

**\*\*Quality Assurance Team:** State Auditor, Legislative Budget Board, and Department of Information Resources.

**\*\*\*Contract Advisory Team** at TPASS as per Government Code §2262.102.

# Contract Termination, Closeout and Settlement

## 6.1 Contract Termination

Contract termination is an end to the formal relationship between THC and the contractor. Termination occurs when:

- The contract expires by its own terms;
- Both parties agree to end the contract; or
- Either party terminates the contract.

PCS must document contract termination and closeout in the contract management file.

### 6.1.1 Types of Contract Termination

- **Expiration of Contract:** Contracts that have reached the end of their term expire on their own, and there is no action required by either party to terminate the relationship; including contracts that have available renewals that the agency does not exercise. Once a contract has expired, both parties are relieved of any further performance obligations, except as provided for in the contract. Notice of termination is not required; however closeout procedures must be followed.
- **Voluntary Termination:** The parties mutually agree to end their relationship and terminate the contract, relieving the parties of any further performance obligations. To voluntarily terminate a contract, the parties must document the mutual agreement to end the relationship and closeout the contract. If the contractor wishes to terminate the relationship, the project manager must require documentation from the contractor.
- **Involuntary Termination:** Occurs when the agency no longer wishes to continue with the services of the contractor or when the agency is unable to continue the contractual relationship. All involuntary terminations should include agency review and approval in consultation with general counsel. There are two types of involuntary termination:
  - **Termination without Cause:** Many contracts provide that the agency may terminate a contract when it is in the agency's best interest even though the contractor may be performing satisfactorily. This is often referred to as "the convenience of the State." However, this is not

an automatic right and must be specifically provided for in the contract. Another reason for involuntary termination without cause occurs when funding is no longer available or has been exhausted. This is not an automatic right and must be specifically provided for in the contract. Involuntary termination without cause may occur if mandated by the legislature, for example by discontinuing a program or transferring an agency function.

- **Termination for Cause:** Termination for cause is the contractual right of the agency to terminate, in whole or in part, the contractor's right to proceed with the contract due to the contractor's failure to deliver goods or services to perform according to the terms and conditions of the contract. This type of termination requires a legitimate basis in the contract itself and involves a contract breach such as:
  - Failure to deliver goods and services within the time specified in the contract;
  - Failure to perform any significant provision of the contract;
  - Failure of progress, which could jeopardize the carrying out of the contract;
  - Failure to comply with agency rules, policies or procedures;
  - Submission of falsified documents, fraudulent billings, or making false statements;
  - Failure to obtain or maintain required licensure certification;
  - Inappropriate use or mismanagement of state or federal funds;
  - Performance that results in threats to individual health or safety; and
  - Continued instances of unacceptable performance.

## 6.1.2 Termination Decision

Before taking action to terminate a contract, the project manager, in consultation with PCS, must review the contract, agency policy, and applicable laws and regulations to ensure termination is allowed and must determine the basis for termination. The project manager must consult with the agency's management and general counsel before pursuing termination. Improper termination may subject the agency to damages and other legal liabilities. Formal executive approval for the termination must be obtained before any notification is sent to the contractor.

Termination must be coordinated with agency program staff at the earliest possible stage so alternate arrangements can be made for goods or services and to ensure a smooth transition to other contractors before the contract termination date. The project manager, in consultation with PCS, may need to negotiate a new termination date with the contractor, if possible, to enable a smooth transition to new providers.

## 6.1.3 Termination Notices

When a contract is terminated before its expiration date, a termination notice must be sent to the contractor. When practical, the agency should give the contractor at least a 30 day notice. The executive director must sign the termination notice.

PCS should send termination notices for involuntary terminations by certified mail, return receipt requested, or by courier with a signature receipt request. PCS must maintain the verification of receipt in the contract management file.

For voluntary termination, email or fax may be appropriate.

## 6.1.4 Notice without Cause

If the termination is without cause or voluntary, the notice, at a minimum, must contain:

- The effective date of the termination;
- The reason for the termination;
- Any outstanding deficiencies and required corrective actions;
- Appropriate contract citations that allow the termination;
- Record retention requirements; and
- A description of the closeout procedure.

## 6.1.5 Notice with Cause

If the contract is being terminated for cause, the letter must be approved by the agency's management and general counsel and must contain the following at a minimum:

- The effective date of the termination;
- A notice of the contractor's rights of recourse, if any;
- A statement of all contract provisions that the contractor failed to meet;
- Any related materials demonstrating contractor failures;
- Contract citations that allow the termination; and
- A description of the closeout procedure.

## 6.2 Contract Closeout

Contract closeout is the final step of the contract lifecycle and occurs once the contract is terminated. Contract closeout is a simple but detailed process. The complexity of each closeout can depend on factors such as:

- Whether the contract is competitively or noncompetitively procured;
- Whether it is a grant agreement with a contractor or subrecipient;
- Whether it is goods or services; and
- The status of the contract deliverables at the time of contract termination.

PCS should begin to close out when there is a reasonable certainty the terms and conditions of the contract have been met, and the contract will not be renewed or extended. Unless otherwise stated in the contract, the closeout process must be completed within 90 days of contract termination, unless extenuating circumstances exist.

Detailed documentation of contract closeout is critical. Many funding sources for THC contracts require complete and accurate documentation to be retained according to record retention requirements. The contract closeout process includes:

- Completion of all administrative actions;
- Settlement of all contract disputes, claims, and agreements;
- Protection of any agency confidential information;
- Settlement of financial claims;
- Auditing of any records or payments;
- Cancellation of any goods or services not yet received;
- Transferring of “working” documents;
- Transferring of equipment, hardware, software and goods;
- Transferring access to any information or reporting systems;
- Disposition of equipment;
- Vendor performance (VPTS reporting); and
- Contract document closure and retention.

## 6.3 Contract Settlement

When a contract is terminated, the project manager assesses any remaining financial transactions, including any overpayments, underpayments, or unprocessed payments.

The project manager must:

- Negotiate a fair and prompt settlement that accurately reconciles and finalizes the work and any payments;
- Protect the interests of the THC;
- Verify completion of contract terms, including any performance measurements;
- Identify and document any performance issues or deficiencies, and take appropriate corrective actions;
- Consult with THC agency management; and
- Consult and obtain approval from general counsel on reaching settlements.

Each division must have documented settlement procedures that include required documentation and approval taking into account the type and complexity of the agency’s contracts. These procedures must include, at a minimum:

- Determining approval authority for the settlement agreement;
- Required routing of the settlement agreement within the agency for approvals;
- Obtaining contractor and agency signatures on the settlement agreement; and
- Reviewing the contractor’s compliance with the settlement agreement.

**Reimbursement of allowable expenses:** When applicable, the contractor must be reimbursed for all allowable expenses incurred or services provided under the contract up to the termination date. However,

THC is only obligated to pay for goods or services that meet applicable contract standards. Under termination for cause, THC may not be liable for the contractor's costs on undelivered work and is entitled to repayment of any advance or progress payments.

**Contractor obligations:** The contractor is responsible for the prompt resolution of any claims for its subcontractors and vendors. A subcontractor may have no contractual rights against the THC on termination. Each claim must be documented by the contractor or the project manager. The contractor may submit bills, records, affidavits, audit reports, and other documents to support contract invoices within a reasonable period of time, up to 90 days after termination. Project managers should inspect a subcontractor's records if needed for the contract closeout.

### 6.3.1 Provide Contractor with Settlement

PCS sends the final settlement agreement to the contractor by certified mail with return receipt requested or by courier with a signature reception request. The letter must explain that the determination is the agency's final decision and must adequately explain each major item. In addition, if the decision constitutes a contract remedy, the letter must meet the requirements of a notice of contract remedy as stated in the contract.

If the negotiated or determined settlement offer indicates that the contractor owes payment, PCS sends a letter to the contractor requiring payment. The contractor must respond to the settlement within 30 days of receiving the agency's letter, subject to the limits on filing an appeal if applicable. The contractor's options for responding to the settlement offer including paying in the lump sum, paying in installments, or requesting an appeal. If the contractor does not respond within the required timeframe, the agency may begin involuntary collection procedures.

## 6.4 Contractor Performance Issues and Contract Remedies

The project manager should communicate with the program routinely and must maintain a reasonable level of awareness of a contractor's performance throughout the duration of the contract. Onsite monitoring and routine contract management activities should be used as appropriate to alert a contract manager to noncompliance issues.

The project manager is responsible for investigating and addressing unacceptable contractor performance as quickly as possible. The project manager is also responsible for keeping the contractor informed of noncompliance issues in writing.

Project managers and program staff should be familiar with remedy provisions in the contract and should consult with general counsel as needed to determine the correct response to a contractor's performance issues and apply the appropriate remedy.

## Procedures:

The following outlines the process for remedies if a contractor fails to perform:

### 1. The project manager must document performance issues and damages

The project manager must document performance problems as they occur, such as failure to meet a service level agreement requirement (e.g., uptime and system response times or help desk service response times) and communicate them to the contractor.

The project manager must document any potential consequences from the performance issues (e.g., damages), including:

- Financial costs;
- Disruption to services;
- Schedule changes;
- Impact on legislative mandates;
- Lost federal funding, penalties, fines, disallowances, or sanctions for the State; and
- Costs to obtain substitute goods or services.

### 2. The project manager must identify the specific contract provisions the contractor has violated

The project manager, in consultation with PCS and program staff, must determine which particular contract requirements the contractor has breached and collect the data necessary to support the agency's position.

### 3. The project manager must assess any agency responsibility in the nonperformance

The agency must determine to what extent, if any, the agency may be responsible for any contract performance failure or if other factors external to the contractor contributed to failure. If the issues are numerous and complex, the project manager and program staff must consult with general counsel. Depending upon the circumstances, legal may determine that an investigation should be conducted so as to maintain attorney-client privilege.

**Excusable non-performance:** Situations may exist when failure or delay is due to causes beyond the reasonable control of a contractor and the contractor temporarily cannot comply with the terms of the contract. This may be due to unusually severe weather, strikes, natural disasters, fire, civil disturbance, war, court order, or acts of God. In these circumstances, known as force majeure, the project manager must immediately contact PCS and/or general counsel to determine the length of the delay and whether the agency will temporarily excuse the contractor from compliance requirements.

### 4. The project manager must determine the appropriate action or remedy

A contract remedy is the action that the agency is authorized by contract, law, or policy to take in response to a contractor's noncompliance with a requirement of the contract.

The project manager, in consultation with PCS, must carefully review the contract's terms and conditions to determine what remedies are available under the contract. Some contracts provides for a progression (increase escalation) of specific, tailored remedies to address a continuing performance failure based on its severity.

The project manager consults with program staff, budget, general counsel and executive management, as necessary, to determine the appropriate action or remedy for the documented performance issue.

Possible actions include:

- A verbal conversation alerting the contractor to the problem followed by written documentation of the conversation;
- Written correspondence alerting the contractor to the problem;
- A written request for the contractor to submit a corrective action plan to correct the problem. If the contractor submits an acceptable plan, the project manager follows up on the implementation of the plan to ensure that the contractor's problems are corrected. If the plan is not implemented or the desired results are not achieved, the agency may proceed to a contract remedy.

The project manager must consult with general counsel before utilizing the following contract remedies:

- Assessment of damages;
- Withholding of payment;
- Bonds, corporate parent guarantees, or letters of credit;
- Stop work orders, contract suspension, or termination;
- Vendor hold or debarment.

##### **5. The project manager must follow the notice provisions in the contract**

Once the appropriate remedy is determined, the project manager must follow the contract's requirements for communicating performance failures to the contractor and require timely resolution of the problem. The nature of the notice may also require certain types of information to allow the contractor to know exactly how it has not performed correctly. This notice must cite to the contract sections listing the applicable requirements and detail how particular tasks or items that have not met the contractor's requirements.

Most contracts will specify who the notice must be sent to and the appropriate method for sending the notice.

Typical options for sending notice include:

- Certified mail, return receipt requested;
- First class mail;
- Electronic mail or electronic transmission (fax);
- Overnight delivery (e.g., UPS, FedEx); and

- Hand delivery (electronic or written confirmation of the receipt by the contractor should be obtained).

**6. The project manager must review and document the contractor's corrective actions**

The project manager, in consultation with program staff, must review all corrective measures requested of the contractor to ensure that the contractor performs as required.

The project manager must request regular, documented status updates from the program staff until final resolution of the performance issues, as applicable. Updates are required even when the contractor is making timely corrections and the solutions are working. The project manager must continue to request status updates until there is sufficient evidence to demonstrate that the contractor is fully implementing and maintaining corrections.

The project manager forwards all performance remedy updates to PCS to be placed in the contract management file.

**7. The project manager must take additional action if the performance issue continues**

The project manager, in consultation with PCS, executive management, and general counsel, if appropriate, must take further action if the contractor fails to resolve performance issues as required. The intent of additional actions and remedies is to enforce the contract provisions and protect the State's interests.

**8. The project manager must report fraud, waste, and abuse to the OIG**

When a project manager suspects or receives an allegation that a contractor has committed fraud, waste, or abuse, the project manager must provide details and documentation to the agency executive management, general counsel, and to the Office of Inspector General.

## Glossary

**Advertise:** To make a public announcement of the intention to purchase goods or services.

**Business days:** Any day other than a Saturday, a Sunday, or a day on which State offices are authorized or obligated by law or executive order to be closed.

**Class and item:** The classification system from the NIGP Commodity Book that identifies items and services. (State of Texas Contract Management Guide, Glossary of Purchasing Terms)

**Contract Advisory Team (CAT):** A team created to assist agencies in improving contract management practices. CAT review contracts of \$10 million or more. The team consists of six members, one from each of the following offices:

- Health and Human Services Commission;
- Comptroller of Public Accounts (CPA);
- Department of Information Resources;
- Texas Facilities Commission (TFC);
- Office of the Governor; and
- One member from a small agency per §2262.102 Government Code.<sup>xx</sup>

**Contract audit:** An independent assessment of a contractor's compliance with financial and performance contract provisions performed in accordance with applicable auditing standards.

**Contract period:** The period of time beginning with the commencement date or effective date of a contract and ending when the contract expires in accordance with its terms or when it has been terminated. The contract period includes any exercised renewal and extension periods.

**Contract record:** The complete set of information for a contract, including the contract management file, any hard-copy or electronic files, and any contract information contained in other systems. The terms contract record and contract file are used interchangeably throughout this handbook.

**Corrective action plan:** Specific steps to be taken by a contractor to resolve identified deficiencies and address concerns that the contracting agency has regarding the contractor's compliance with contract terms or applicable laws, regulations, and policies. The correction action plan may also focus on improving contractor performance (as it relates to service delivery, reporting, or financial stability).

**Cost plus incentives contract:** A contract in which the contractor is reimburse at cost, but provides incentives to fulfill contract obligations at less than the maximum amount. Although many types of incentives exist, the contract typically contains both a maximum total contract budget to perform the statement of work and a formula that specifies how cost savings will be distributed. The statement of work must be specific enough so that both parties will know when all contract goals have been met. This is another example of a performance based contract as it provides the contractor with an incentive to manage the contract effectively while achieving performance expectations at the lowest cost.

**Cost reimbursement contract:** A basis of payment in which the contractor is reimbursed for allowable incurred costs, to the extent prescribed in the contract. These contracts establish an estimate of total cost

for the purpose of obligating funds and establishing a ceiling that the contractor may not exceed without the approval of the contracting officer.

**Desk review:** A review of a contractor's service delivery or business operations that takes place away from the contractor's administrative or service delivery sites, using materials collected by or submitted by the contractor. The scope of review is at the discretion of the contracting agency.

**Extension:** The continuation of the contract period beyond the contract period specified in the procurement or contract document and processed as an amendment.

**Fee-for-service contract:** Payment is made based upon an established fee per defined unit of service.

**Fiscal monitoring:** A review a contractor's financial operations which may include a review of internal controls for program funds in accordance with state and federal requirements, an examination of principles, laws and regulations, and a determination of whether costs are reasonable and necessary to achieve program objectives. This activity is typically conducted by staff involved in program operations.

**Fiscal Year (State of Texas):** A period of 12 consecutive months, beginning September 1 each year and ending August 31 of the next year.

**Fixed price contract:** A type of payment that provides for a firm price that cannot be increased during the term of a contract or any subsequent renewal periods. Payments are not affected by contractor actual costs. A contract of this type may include an escalation clause allowing increases in the price in accordance with predetermined timeframes and conditions.

**Historically Underutilized Business (HUB):** A business in which the owner has a proportionate interest and demonstrates active participation in the control operation, and management of the business and is a member of a recognized economically disadvantaged group such as Black Americans, Hispanic Americans, women, Asian Pacific Americans, Native Americans, and veterans as defined by 38 U.S.C. Section 101(2) who have suffered at least 20 percent service-connected disability as defined by 38 U.S.C. Section 101 (6) as defined by Government Code Chapter 2161.001.

**Liquidated damages:** A specified contract provision which entitles the state to demand a set monetary amount determined to be fair and equitable repayment to the state for the loss of service due to the vendor's failure to meet the contract requirements.<sup>xxi</sup>

**Local government:** A county, municipality, school district, special district, junior college district, or other legally constituted political subdivision of the state.

**Memorandum of Agreement (MOA) or Memorandum of Understanding (MOU):** A written document that represents the agreement of the parties regarding the subject matter of the document; it does not usually involve the transfer of funds in exchange for services, but may document transfer of funds required by statute. Because the underlying agreement may or may not be legally binding and enforceable, the agreement may or may not constitute a contract. It is generally considered a less formal way of evidencing an agreement and is ordinarily used in state government only between or among state agencies or other government entities.

**Monitoring:** A systematic review of a contractor's records, business processes, deliverables, and activities to ensure compliance with the terms and conditions of the contract. Monitoring includes planned, ongoing, periodic, or unscheduled activities. The goal of the contract monitoring is to ensure delivery of quality goods and services, and protect the financial interest of the State.

**Monitoring plan:** Documents the monitoring activities required for individual contracts and tracks the status and progress of monitoring requirements.

**Onsite review:** A review of a contractor's service delivery or business operations that takes place at administrative or service delivery sites and may include observation of service delivery. The scope of the review is at the discretion of the contracting agency.

**Programmatic monitoring:** A review of a contractor's service delivery system to determine if it is consistent with contract requirements including outputs, outcomes, quality and effectiveness of programs. In programmatic monitoring, service-related information is reviewed for compliance with process and outcome expectations as identified in standards, rules and contracts. Program compliance monitoring may result in quality improvement and technical assistance activities to evaluate and improve the effectiveness of the provision of services.

**Proprietary:** Products or services manufactured or offered under exclusive rights of ownership, including rights under patent, copyright, or trade secret law. A product or services is proprietary if it has a distinctive feature or characteristic which is not shared or provided by competing or similar products or services as defined in Government Code, Section 2155.067.

**Retention period:** The period during which records must be kept before they may be disposed of, usually expressed in years or contingent upon an event, such as end of calendar year.

**Risk assessment:** The ongoing process of identifying and determining the risk that a contract poses to the State.

**Scope of work:** See statement of work.

**Statement of work:** The detailed description of what the agency is purchasing and what the contractor is required to provide in order to satisfactorily perform the work.<sup>xxii</sup>

**Subcontract:** A written agreement between the original contractor and a third party to provide all or a specified part of the work or materials required in the original contract.

**Unallowable costs:** Cost that are expressly unallowable under applicable state and federal laws and regulations under the terms and conditions of the contract, or that are unreasonable or unnecessary.

**Unit price:** The price for a good or service in accordance with the unit of measure provided in the solicitation, (e.g. price per labor hour, per foot).

- <sup>i</sup>Section 2252.901, Texas Government Code
- <sup>ii</sup>State of Texas Contract Management Guide, Payment Types
- <sup>iii</sup>Texas Government Code, Section 2262.101
- <sup>iv</sup>Texas Government Code, Section 2262.101 (d)
- <sup>v</sup>Texas Government Code, Section 2254.021
- <sup>vi</sup>Texas Government Code, Section 2254.021
- <sup>vii</sup>Texas Government Code, Section 2254.026
- <sup>viii</sup>Texas Government Code, Section 2254.027
- <sup>ix</sup>45 CFR 92.36(c)(2) and 45 CFR 75.328
- <sup>x</sup>Texas Government Code, Section 2254.021
- <sup>xi</sup>This requirement is delineated in Article IX, Section 9-7.05 of the General Appropriations Act. Instructions and forms were sent to agencies on August 23, 1999.
- <sup>xii</sup>Texas Government Code, Section 2254.036
- <sup>xiii</sup>Texas Government Code, Section 2254.028
- <sup>xiv</sup>Texas Government Code, Section 2254.029
- <sup>xv</sup>This requirement is delineated in Article IX, Section 9-7.05 of the General Appropriations Act. Instructions and forms were sent to agencies on August 23, 1999.
- <sup>xvi</sup>Texas Government Code, Section 2254.030
- <sup>xvii</sup>Texas Government Code, Section 2254.036
- <sup>xviii</sup>Texas Government Code, Section 2161
- <sup>xix</sup>Texas Government Code, Section 2161
- <sup>xx</sup>State of Texas Contract Management Guide, Definitions
- <sup>xxi</sup>State of Texas Contract Management Guide, Definitions
- <sup>xxii</sup>State of Texas Contract Management Guide, Ch. 3 – Preparing the Statement of Work